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MEMORANDUM

TO: **Interested Parties**
FROM: **Penn Hill Group**
DATE: **September 26, 2016**
SUBJECT: **Non-Regulatory Guidance: English Learners and Title III of the Elementary and Secondary Education Act**

Overview

On September 23, the U.S. Department of Education (ED) released [guidance](#) on English Learners (ELs) and Title III of the Elementary and Secondary Education Act of 1965 (ESEA), as amended by the Every Student Succeeds Act (ESSA).

The guidance addresses how Title III funds may be used to provide services that improve the English proficiency and academic achievement of ELs, including through language instruction educational programs (LIEPs) and activities to improve the skills and knowledge of teachers who serve ELs. The purpose of this memo is to summarize the major provisions included in the guidance.

I. Fiscal Issues

General

The guidance clarifies that although several provisions in ESEA regarding ELs have moved from Title III to Title I, each State is still responsible for using Title III funds consistent with Federal law. States are still required to conduct Title III fiscal monitoring of their local educational agencies (LEAs), as required under Section 3113(b)(3)(F). Section 8201(b)(2)(I) allows consolidated State administrative funds to be used for fiscal support teams, which can provide technical assistance to LEAs. State educational agency (SEA) Title I staff should coordinate with Title III staff to best serve ELs.

Supplement, not supplant

The guidance clarifies that to the new amendments to the supplement, not supplant (SNS) requirements in Title I of ESEA (Section 1118(b)) do not apply to Title III SNS requirements. The law made no changes to Title III SNS requirements. For Title III, it is presumed that supplanting has occurred: 1) if the SEA or LEA uses Federal funds to provide services it is required to under other laws; or 2) the SEA or LEA uses Federal funds to provide services that it provided with non-Federal funds in the prior year.

All States and LEAs have a legal obligation under Title VI of the Civil Rights Act of 1964 (referred to hereafter as "Title VI") and the Equal Educational Opportunities Act (EEOA) to ensure that ELs can participate meaningfully and equally in educational programs and services. The guidance lists ways LEAs might meet these obligations (e.g., identify and assess all potential ELs, including those with a disability, in a timely, valid, and reliable manner, avoiding unnecessary segregation of ELs, or providing ELs with an educationally sound and proven

successful language assistance program taught by sufficiently well prepared and trained staff) and references a 2015 Dear Colleague Letter about EL students and Limited English Proficient parents that was jointly released by ED and the Department of Justice, and is available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-el-201501.pdf>.

A State or LEA may use its Title III funds for EL activities previously required under Title III that are now in Title I as long as:

- 1) The specific use of funds is consistent with the purpose of Title III and meets Federal guidance for “reasonable and necessary costs”;
- 2) The specific use of funds is supplemental to civil rights obligations to ELs under Title VI and the EEOA; and
- 3) The SEA or LEA can demonstrate that is it also using Title III funds for activities required under Title III.

Examples of State activities that have moved from Title III to Title I include:

- Alignment of English language proficiency(ELP) standards to State content standards (ESEA Section 1111(b)(1)(F));
- Alignment of ELP assessments to ELPELP standards (ESEA Section 1111(b)(2)(G)(ii));
- Establishment of ELP goals and indicators for accountability purposes (ESEA Sections 1111(c)(4)(A)(ii), 1111(c)(4)(B)(iv)); and,
- Identification of interventions for ELs’ academic achievement and progress in attaining ELP (ESEA Sections 1111(c)(4)(C)(iii), 1111(c)(4)(D)).

Examples of LEA activities that have moved from Title III to Title I include:

- EL parental notification regarding LIEPs and related information (ESEA Section 1112(e)(3));
- Parental participation (e.g., regular EL parent meetings) (ESEA Section 1116(f)); and,
- Reporting to the State on the number and percentage of ELs achieving ELP (ESEA Section 1111(h)(2)).

A State or LEA may also generally use Title I funds for the EL activities listed above, although an LEA must ensure that it provides Title I schools with enough non-Federal funds for required EL services before using Title I funds for those activities in the school.

Grants for State Assessments and Related Activities (Section 1201(a)(2)(C)) and Enhanced Assessments Grants (Section 1203(b)(1)) may be used to **develop, align, or improve** assessments for ELs or ELP assessments.

*Of note, Title III funds may not be used to develop ELP assessments. This would violate Title III SNS because, under Title VI and EEOA, a State must monitor EL students’ progress in achieving English proficiency. If a State uses the annual Statewide English proficiency assessments to meet this obligation, then using Title III to develop the assessment would be



supplanting. A State may use Title I or III administrative funds (either combined or separately) to align the English proficiency assessment to English proficiency standards.

The formula funds under Grants for State Assessments and Related Activities (Section 1201) may also be used to **administer** English proficiency assessments, but LEAs generally may not use Title III to administer these assessments.

An LEA may consolidate its Title III funds as part of a schoolwide program and the Title III SNS provision would not apply to those Title III funds. LEAs may also combine Title I and Title III funds for the same EL-related purpose.

Subgrants to LEAs

Many of the obligations for States to award Title III formula grants remain the same as under previous law. States must award formula grants in a timely manner so LEAs can spend funds in a thoughtful way and have time to engage in meaningful consultation with private school officials before making any decisions affecting the participation of eligible private school students and teachers. A State may reallocate funds originally made available to an LEA but that will not be used for the intended purpose to other LEAs and must have rules for how it will do so. An LEA may still join with other LEAs to form a consortium to receive Title III funds.

A State must reserve not more than 15 percent of Title III funds for subgrants to LEAs that have experienced a significant increase in immigrant children and youth who have enrolled in schools in the LEA for the current fiscal year compared to the average of the prior two fiscal years. The requirement to compare current fiscal year enrollment to the average of the prior two fiscal years is a change made in ESSA from prior practice (previously, an LEA would compare the preceding fiscal year to the average of the prior two fiscal years).

New maintenance of effort provisions in section 8521 also apply to Title III subgrantees.

Local Uses of Funds

LEAs must use Title III funds for: 1) professional development; 2) providing an LIEP; and 3) providing and implementing other effective activities and strategies that enhance or supplement LIEPs for ELs, which must include parent, family, and community engagement activities and may include strategies that coordinate and align related programs. An LEA may also use Title III funding for permissible activities listed in Section 3115(d), which now explicitly allows funds to be used for dual or concurrent enrollment programs or early college high schools (defined in Section 8101(15) and 8101(17), respectively).

LEAs may use Title III funds only for ELs in the dual or concurrent enrollment programs or early college high schools. LEAs may also use Title III funds to implement part of a Title I comprehensive support and improvement plan to the extent that the activities are allowable under Title III. For example, an LEA could use Title III funds in a school identified for comprehensive support and improvement based on low performance of the EL subgroup.

II. ELP Standards

Since ESSA did not make many changes to the requirement for States to adopt ELP standards (Section 1111(b)(1)(F)), States may not necessarily have to change or update their current ELP



standards, so long as they comply with the law. All LEAs that enroll ELs must implement these standards.

As under previous law, a State's English language proficiency standards must be aligned with the State's challenging academic standards (Section 1111(b)(1)(F)). ED encourages States to ensure the English proficiency standards reflect the language demands of each content area (e.g., as math assessments become increasingly language-heavy, English proficiency standards must reflect corresponding English vocabulary of mathematics). Section 1111(b)(1)(F) requires English language proficiency standards to address the different levels of ELs so ED suggests that when ELs are English proficient on the English language proficiency standards, this should correspond to the proficiency level of the content standards.

If a State develops challenging State academic standards in addition to reading/language arts, math and science, the State's ELP standards should also align with those subjects.

III. Language Instruction Educational Programs (LIEP)

A State may use State-level Title III funds to provide financial awards to LEAs that have improved the achievement and progress of ELs in meeting State English proficiency goals and the challenging State academic standards. ED encourages States to use funds to make these financial awards.

Title III requires that LIEPs be "effective." This is a change from previous law, which required that these programs be "scientifically based." ED encourages States and LEAs to establish criteria as to what "effective" means. At a minimum, effective LIEPs should result in improved ELP and academic achievement for ELs. Additionally, in developing criteria for an "effective LIEP, LEAs might consider whether the LIEP is:

- Driven by data on unique EL needs and responsive to student performance in order to drive continuous improvement;
- Aligned with local needs;
- Based on rigorous research on effective instructional approaches for increasing English proficiency and academic achievement;
- Evaluated in order to make continual improvements; and,
- Part of a systemic approach to serving ELs.

States or LEAs do not have to implement any particular type of LIEP. They may wish to incorporate methods of supporting home language development, as research shows that systematic and deliberate exposure to English, paired with supporting home language development within high quality educational settings, can result in strong outcomes for both non-native and native English speakers.

ESEA, as amended by ESSA, now requires that each State both monitor LEAs in implementing Title III and further assist them if the strategies funded are not effective, such as by providing technical assistance and modifying such strategies (Section 3113(b)(8)). States should establish uniform, clear statewide guidelines or benchmarks for demonstrating effectiveness. For example, a State may choose to use the progress ELs are making in achieving ELP (the State accountability system indicator in Section 1111(c)(4)(B)(iv)) and the progress current and former ELs are making in achieving proficiency on the academic content assessments to determine whether or not an LEA's LIEP is effective. States should work with LEAs to revise LIEPs if multi-

year student performance data show ELs are not making sufficient progress in achieving English proficiency.

An LEA must provide for the equitable participation of eligible private school students, their teachers, and other educational personnel in private schools located in areas served by the LEA. This requirement applies to both EL and immigrant youth subgroups.

IV. Educators of English Learners

ESEA, as amended by ESSA, requires that preparation and professional development programs supported by Title III funds must be “effective” (formerly, they had to be “high-quality”). Section 3115(c)(2) provides a fuller description of the professional development that must be “effective” when supported with Title III funds.

States may also now use Title III to provide professional development to improve teaching skills to meet the diverse needs of ELs, including on how to implement effective programs and curricula to teach ELs (Section 3111(b)(2)(B)). Title III funds used for professional development do not need to be limited to teachers who exclusively teach ELs – *all* teachers who have ELs in their classrooms can benefit from these funds.

ESEA, as amended by ESSA, does not dictate qualifications for teachers of ELs. ED recommends that these teachers be trained both on supporting language development and on mastery of academic content knowledge. Preparation and professional development for teachers of ELs and school leaders should improve instruction, increase teachers’ and school leaders’ ability to implement effective curricula for ELs, increase students’ ELP, improve students’ academic achievement, be based on the highest available level of evidence, and be continually measured to determine their effectiveness. ED encourages States and LEAs to use State and local funds for activities that lead to relevant State or local certification and licensing requirements for educators of ELs. A State or LEA should establish criteria to ensure preparation and professional development programs meet ESEA requirements under Section 3115(c)(2) and demonstrate effectiveness with regards to language development and academic outcomes.

Title III funds may be used to provide supplemental staff to support ELs, so long as a State or LEA has already met its Title VI and EEOA obligations. For example, Title III funds could be used to hire a specialist on EL students with interrupted formal education or ELs with a disability to provide supplemental support to that population. An LEA could assign an EL teacher to spend 50% of his/her time providing language instructional services to ELs, with 50% of his/her salary funded from State and local funds, and 50% of his/her time providing supplemental EL services, funded from Title III.

V. Parent, Family, and Community Engagement

The ESEA requirements for parent, family, and community engagement with to regard to ELs are as follows:

- Each LEA that receives a Title I subgrant must implement an effective means of outreach to parents of ELs. The outreach must include holding, and sending notice of opportunities for, regular meetings in order to gather and respond to recommendations from parents (ESEA Section 1112(e)(3)(C)).



- An LEA receiving a Title III formula subgrant must conduct parent, family, and community engagement, in addition to the required uses of funds for supplementing LIEPs for ELs and providing professional development to teachers and school leaders (ESEA Section 3115(c)(3)).
- ESSA expanded allowable uses of Title III State-level activity funds to include providing technical assistance to LEAs to strengthen and increase parent, community, **and family** engagement in programs that serve ELs (ESEA Section 3111(b)(2)(D)(iv)).
- A State must ensure that its Title III State plan, or a consolidated State plan that includes Title III funds, has been developed in consultation with parents of ELs, in addition to LEAs, teachers, administrators of Title III programs and other relevant stakeholders. (ESEA Section 3113(b)(3)(G)).

The term “family” is not defined in ESEA (although “parent” is defined in Section 8101(38)). Families may include relatives involved in the social, emotional, and academic support of the student and expand beyond parents and guardians to include siblings, grandparents, aunts, uncles, cousins and others. For an EL or immigrant student, extended family members, such as grandparents, may have a significant role in the student’s life. Foster youth, unaccompanied children, and others may have a “family” network that extends beyond biological relatives. SEAs, LEAs, and schools should be responsive to diverse family structures.

The term “community” is not defined in ESEA. A community may include the local and extended network of organizations (private, non-profit, for-profit, or faith-based organizations) that exist to support the student and his or her family. A school and LEA should make an effort to familiarize themselves with the various community organizations that support the students and families in their area (e.g., churches, synagogues, mosques or other faith-based communities, cultural centers, heritage language schools, and mutual assistance associations in the local community).

Beyond the *requirements* for parent, family, and community engagement with regard to ELs listed above, Title III lists specific State and LEA *allowable* uses of funds for parent and family engagement activities for ELs and immigrant children and youth. Some include States or LEAs providing family literacy services and programs, coordinating and aligning EL-related programs, or offering comprehensive community services to families of immigrant children and youth.

Title I requires that every LEA that uses funds under either Title I or Title III for services to ELs must provide a parent with notification (within a specified timeline) that outlines their child’s identification as an EL and placement in an LIEP. These requirements are in Section 1112(e)(3).

A parent of an EL child may decline to enroll the child in an LIEP or remove him/her from the LIEP. However, under Title VI and EEOA, the LEA still must take “affirmative steps” and “appropriate action” to provide the student with access to its educational program and to meet the ELs language and academic needs (even if they are not in an LIEP). Additionally, an LEA must still assess all ELs on the ELP assessment even if they are not in an LIEP. State or local assessment opt-out policies do not override the LEAs obligation to assess all ELs on the ELP assessment.

ED provides resources to support parent, family, and community engagement, including:

- The Dual Capacity Building Framework;



- Chapter 10 of the EL Tool Kit;
- The Resource Guide: Supporting Undocumented Youth;
- The White House Task Force for New Americans Webinar Series; and,
- The Newcomer Tool Kit

VI. Early Learning

Title III funds may still be used to serve ELs as young as age 3. The law also includes new provisions that allow Title III funds to support preschool teachers (Section 3102), includes early childhood education programs as part of the stated purposes of LEA subgrants and in the authorized uses of funds (Section 3115), and includes a new assurance pertaining to early learning programs, if applicable, in Local Title III plans (Section 3116).

LEAs may include preschool teachers in pre-service and in-service professional development activities using Title III funds. ED encourages this practice. LEAs may use a portion of Title III funds to provide effective preschool LIEPs that are coordinated with other relevant programs and services by providing supplemental language instruction for ELs in public preschool programs. In doing so, an LEA may braid Title III funds with other funding streams available to provide effective preschool language instruction for ELs.

Examples of how an LEA may use Title III in preschool programs:

- District A operates a preschool program for four-year-olds that is currently funded with State and local funds, and half the students are ELs. The LEA plans to start implementing, in this existing program, a new, optional dual-language preschool model. It wishes to use Title III funds for EL-related professional development for the preschool teachers and to purchase bilingual learning materials. Assuming that the professional development and the bilingual materials have not previously been provided from different funding sources, and that all of the teachers interact with all of the students, the LEA may use Title III funds for these purposes; however, those funds may be used for only half the per-pupil cost of the learning materials, because half the students are not ELs.
- District B operates a preschool program for four-year-olds that is currently funded with State and local funds, and one-third of the students are ELs. Two of the teachers have received training in teaching ELs, and the district wishes to use Title III funds to pay the salaries of those trained preschool teachers, and also to start conducting weekly family learning nights for the entire preschool population. The LEA may not use Title III funds for the teacher salaries; that would raise a rebuttable presumption of supplanting because those salaries were previously paid from State and local funds. The LEA could use Title III funds for one-third of the total cost of the family nights, because one-third of the students are ELs.

An LEA that uses Title III subgrant funds to support preschool-aged ELs should ensure that its language instruction and other services are developmentally appropriate for young ELs, culturally responsive, research-based, and supportive of all ELs' needs. These LIEPs must be effective, as required in Section 3115(a).

Section 3116 requires that an LEA that receives Title III funds must coordinate activities and share data with early childhood programs, as part of its local plan. This should help lead to



improved alignment across the early educational years and improved outcomes for ELs, including better coordination between Head Start, other early childhood programs and schools served by the LEA. For example, LEAs may include Head Start teachers in professional development opportunities.

ED encourages LEAs to consult with and solicit feedback from early learning programs in the community to determine which data would be most appropriate to share with early learning programs, including Head Start agencies. Examination of what shared data would be most beneficial is important. For example, collecting and analyzing kindergarten entry assessment data, data from the annual ELP assessment given in kindergarten or first grade, and elementary school academic achievement data could help to identify strengths of early learning programs in preparing ELs for academic success, as well as areas for improvement. LEAs must comply with the Family Educational Rights and Privacy Act (FERPA) when sharing any data.

VII. Immigrant Subgrant and Serving Immigrant Students

A State must reserve at least enough funds to make one or more subgrants to an eligible LEA that has experienced a significant increase in the percentage or number of immigrant children and youth, as compared to the two preceding fiscal years (Section 3114(d)). ED encourages States to consider both increases in the percentage and in the number of immigrant children and youth. A State may define what “significant increase” means by considering the State’s *current* fiscal year data as compared to the average of the two preceding fiscal years (in prior law, the State’s *preceding* fiscal year data was compared to the average of the two preceding fiscal years).

LEAs must use the immigrant subgrant to provide enhanced instructional opportunities for immigrant children and youth (Section 3115(e)). Such section also lists several allowable uses of funds that are quite similar to prior law.

ED provides resources to help LEAs and schools support immigrant children and youth, including the Newcomer Tool Kit.

VIII. Reporting and Data Collection

Title III includes additional reporting requirements for ELs beyond Title I requirements. LEAs must report to their States on:

- Title III programs and activities;
- Number and percentage of ELs making progress toward ELP;
- Number and percentage of ELs who attain proficiency and exit LIEPs;
- Number and percentage of former ELs who meet academic content standards (for 4 years);
- Number and percentage of ELs who have not exited LIEPs after 5 years as an EL; and,
- Any other information required by the SEA.

Under Section 3121, an LEA must disaggregate by ELs with disabilities in reporting the number and percentage of ELs making progress toward ELP, and in reporting the number and percentage of former ELs meeting State academic standards for each of the four years after they no longer receive Title III services. ED encourages LEAs to disaggregate all of the reporting requirements by ELs with disabilities, long-term ELs, recently arrived ELs, and EL students with interrupted formal education (as defined by the State).

IX. Long-term English Learners

ESEA does not define “long-term English learner.” ED recommends using the reporting requirement in Section 3121(a)(6) as a guide for how to define this population. This provision requires LEAs receiving Title III subgrants to biannually report the number and percentage of ELs who have not yet attained ELP within five years of initial classification as an EL and first enrollment in the LEA. Thus, “long-term ELs” may be ELs who have not attained English proficiency after 5 years.

In reporting the requirement under Section 3121(a)(6), if an EL moves into another LEA, the “new” LEA should include that student in reporting on this measure if he or she has not attained English proficiency within 5 years of initial classification in the original LEA. ED encourages prompt data sharing between LEAs so students do not fall through the cracks.

SEAs and LEAs might provide unique supports to long-term ELs, including using data on academic performance and English proficiency attainment to tailor LIEPs, target services, and provide social and emotional supports.

X. Former English Learners

An LEA must report to the State on the academic achievement of an EL for each year of the four years after such student has achieved ELP and no longer receives EL services (Section 3121(a)(5)). The students included in this reporting must include *all* former ELs served by the LEA who have achieved ELP and therefore no longer receive any EL services. These data must be disaggregated by ELs with disabilities.

A student who exits EL status by achieving ELP is a former EL, and must be considered as such for Title III reporting, Title I accountability (if a State chooses to include former ELs), and State civil rights obligations.

SEAs and LEAs might use data on former ELs to inform program improvement. Data could be examined to see if achievement gaps remain for these students once they reach English proficiency as compared to non-EL students. These data could be used to see if students should be re-assessed for EL services or if additional academic supports are needed to meet challenging State academic standards.

XI. English Learners with Disabilities

The new Title III reporting requirement requires that States and LEAs report the number and percentage of ELs in the programs and activities who are making progress toward achieving ELP both in the aggregate and disaggregated, at a minimum, by English learners with disabilities; it also requires that the data on former ELs be disaggregated by English learners with disabilities (ESEA Section 3121(a)(2), (a)(5)). States and LEAs are encouraged to consider further disaggregating all reporting requirements by ELs with a disability.

The Individuals with Disabilities Education Act (IDEA) does not have this same reporting requirement. Section 618 of the IDEA requires States to report data each year to ED and the public on the number and percentage of children with disabilities by race, ethnicity, gender, limited English proficiency status, and disability category in specified areas dictated by statute. States must continue reporting these items.

Instruction for ELs with disabilities should take into account their specific special education and related services needs, as well as their language needs. Under IDEA, States and LEAs must establish and maintain qualifications to ensure that personnel necessary to carry out the purposes of Part B of the IDEA are appropriately and adequately prepared and trained, and that those personnel have the content knowledge and skills to serve children with disabilities. These requirements apply to personnel serving ELs with disabilities.

Federal resources to support States in serving ELs with disabilities are available through ED-funded technical assistance centers such as the National Center for Educational Outcomes and the Center for Parent Information and Resources.