

GUIDANCE

for

**Title V, Part A
of the
Elementary and Secondary Education Act,
as reauthorized by the
No Child Left Behind (NCLB) Act
(State Grants for Innovative Programs)**

**U.S. DEPARTMENT OF EDUCATION
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INTRODUCTION AND PURPOSE

The No Child Left Behind Act (NCLB Act), Public Law 107-110, reauthorized former Title VI of the Elementary and Secondary Education Act of 1965 (ESEA), as Title V, Part A – State Grants for Innovative Programs (Title V-A). Title V-A provides formula grants to State and local educational agencies (SEAs and LEAs) and is designed to increase the academic achievement of, and improve the quality of education for, all students. Under Title V-A, SEAs and LEAs may use funds in a variety of ways. The driving focus, however, is to increase student academic achievement.

The statutory purposes of the program are:

- (1) To support local education reform efforts that are consistent with and support statewide education reform efforts.
- (2) To implement promising educational reform programs and school improvement programs based on scientifically based research.
- (3) To provide a continuing source of innovation and educational improvement, including support for programs to provide library services and instructional and media materials.
- (4) To meet the educational needs of all students, including at-risk youth.
- (5) To develop and implement education programs to improve school, student, and teacher performance, including professional development activities and class size reduction programs.

These purposes should serve as the starting point for SEAs and LEAs in designing and implementing programs under Title V-A.

This document is intended to answer questions and provide guidance for carrying out programs under Title V-A. This document does not impose any requirements beyond those in the Title V-A statute and other applicable Federal statutes and regulations. State and local recipients that follow the guidance in this document will be deemed in compliance with Title V-A and other applicable Federal statutes and regulations by U.S. Department of Education officials, including the Inspector General. The Department will update the Guidance as new questions are presented, if there is a change in the program statute that requires modification, or when the Department determines that more information would be helpful. Thus, the Guidance should be viewed as a living document that will be amended as needed. The Department welcomes suggestions by those who use the Guidance.

A. STATE AND LOCAL ROLES

A-1. What is the role of SEAs in implementing Title V-A?

Under Title V-A, the SEA bears the basic responsibility for the administration and supervision of Title V-A programs in the State. This includes allocating funds to the LEAs, ensuring compliance with the Title V-A statutory provisions, preparing an annual statewide summary on Title V-A programs, and carrying out State-level projects and activities.

A-2. What is the role of LEAs in implementing Title V-A?

The primary role of LEAs under Title V-A is to carry out programs under one or more of the 27 authorized innovative assistance program areas listed in the statute. Title V-A provides LEAs with flexibility in carrying out this role. LEAs have complete discretion in determining how to divide funds among one or more of the 27 innovative assistance program areas in a manner that meets both the purposes of Title V-A and the needs of the students within the LEAs [Section 5133(d)]. Moreover, LEAs and school personnel have the primary responsibility for the design and implementation of programs [Section 5101(b)].

A-3. May SEAs require LEAs to use Title V-A funds for a particular program or activity?

No. Title V-A specifically requires SEAs to refrain from exercising any influence in the decisionmaking processes of LEAs concerning their expenditures among the innovative assistance program areas [Section 5122(a)(5)]. Thus, an SEA or a State legislature may not establish -- whether through the budget approval process, legislation, or other means -- binding requirements on an LEA with respect to the division of funds among the innovative assistance program areas. However, in keeping with its administrative role, an SEA may issue rules relating to the administration and operation of Title V-A, so long as they are issued pursuant to State law, do not conflict with the provisions of Title V-A, and do not limit the discretion of LEAs regarding allocation of expenditures among the program areas. There is one exception, however. SEAs that receive State-Flex authority under the new State-Flex program may specify how LEAs use their Title V-A allocations [Sections 6141 through 6144].

B. STATE APPLICATIONS

B-1. May a State include Title V-A in a consolidated application?

Yes. An SEA wishing to receive Title V-A funds may include the Title V-A program in a consolidated application.

Sections 9301 and 9302 of the reauthorized ESEA allow SEAs to submit a consolidated State application to the Secretary for specific programs, including Title V-A. By

submitting a consolidated application, an SEA may obtain funds under many ESEA programs through a single application, rather than through separate program applications.

SEAs must meet all statutory requirements for each program included in the consolidated State application, but are not required to submit to the Department much of the information required in separate applications. Consolidation is intended to improve teaching and learning by encouraging greater cross-program coordination, planning, and service delivery, and enhancing integration of programs with educational activities carried out with State and local funds. Program coordination can strengthen the promotion of the State's educational goals for all students while effectively meeting the needs of the programs' intended beneficiaries.

B-2. May a State file a program-specific application for Title V-A?

Yes. A State may receive Title V-A funds by filing an application for assistance with the Secretary that satisfies the application requirements stipulated in section 5122(a) of the program statute. The Department will make available to SEAs instructions for the Title V-A State application, but a standard State application form is not required. The SEA may submit its Title V-A application in any format it deems appropriate, so long as it contains the information required by the statute.

The State may file a Title V-A application for a period of up to three years. If the application meets the requirements of Title V-A, the Secretary awards the State its Title V-A grant. By statute, a Title V-A program application must include the following:

- Designation of the State educational agency as the State agency responsible for the administration and supervision of Title V-A programs.
- An assurance that the SEA will submit to the Department an annual statewide summary of how assistance under Title V-A is contributing toward improving student academic achievement or improving the quality of education for students.
- Information setting forth the allocation of funds required to implement the statutory requirements for the participation of students enrolled in private schools.
- An assurance that the SEA will keep such records, and provide such information to the Secretary, as may be required for fiscal audit and program evaluation.
- An assurance that, apart from providing technical and advisory assistance and monitoring compliance with Title V-A, the SEA has not exercised, and will not exercise, any influence in the decisionmaking processes of LEAs concerning their expenditures under the program.
- An assurance that the State is in compliance with the specific requirements of Title V-A.

- An assurance that the State will provide for timely public notice and public dissemination of the information regarding the allocation of funds required for the participation of students enrolled in private schools.

The State may amend its application annually to reflect changes.

In the development of program-specific plans under Title V-A, the Department encourages SEAs to consider ways of coordinating activities across ESEA programs to promote greater flexibility and achieve optimum benefit for all students.

C. ALLOCATION OF FUNDS

C-1. How are funds distributed to LEAs?

The first responsibility of the State in administering Title V-A is to develop the formula for allocating at least 85 percent of the Title V-A funds to its LEAs. This formula must be based upon the relative enrollments in public and private nonprofit schools, adjusted to provide higher per-pupil allocations only to those LEAs with children whose education imposes a higher than average cost per child. The calculation of the relative enrollments must be based on the number of children currently enrolled in (1) public schools and (2) those private schools that participated in Title V-A programs during the preceding fiscal year. (For FY 2002 LEA allocations, the State will include in the calculation enrollment data for those private schools that participated in the former *Title VI* program during the FY 2001 fiscal year.) SEAs may therefore include only those figures for the private schools that participated in the program during the preceding fiscal year.

If a State does not have current enrollment data, either for public or private schools, it may use the preceding fiscal year's enrollment data. (Note: SEAs should be aware that the Title V-A statute does not provide for any adjustments to the calculation based on the number of private schools that actually decide to participate during the fiscal year for which funds are being distributed.)

In any fiscal year in which a State's Title V-A allocation is larger than its FY 2002 Title V-A allocation, it must distribute the entire excess amount to its LEAs, using the above formula. In such a year, the SEA must view its allocation in two "parts." The first part is the "base amount" – the amount of its FY 2002 allocation. The SEA may still retain up to 15 percent of this amount for State use. The second part is that portion of the allocation that is greater than the State's FY 2002 allocation. The SEA must distribute this entire amount to its LEAs. The result is that the maximum amount that an SEA may reserve for State use will be the same every year – 15 percent of the amount of its FY 2002 allocation (so long as the amount appropriated for the Title V-A program in subsequent years is equal to the amount appropriated in FY 2002 or greater).

LEA and SEA Uses of Funds



*Percentages are calculated against the FY 2002 “base amount.”

For small States – those receiving a minimum allocation of one-half of one percent of the amount available for allocation to the States under section 5111(a) – the rule is different. In any year in which the allocation to a small State exceeds the amount that it received in FY 2002, it must distribute at least 50 percent of the excess amount to its LEAs. The maximum amount that a small State may reserve for State use in such a year, then, is 15 percent of its FY 2002 allocation and 50 percent of the additional amount that it received in excess of its FY 2002 allocation (i.e., $15\% \times (\text{FY 2002 allocation}) + 50\%$ of the excess over the FY 2002 allocation) [Section 5112(a)(2)].

The Department must approve each State’s criteria for adjusting allocations to provide higher allocations to those districts serving children whose education imposes a higher than average cost. The statute includes three factors that an SEA may use in developing criteria for adjusting the per-pupil allocations: 1) children living in areas with high concentrations of economically disadvantaged families; 2) children from economically disadvantaged families; and 3) children living in sparsely populated areas. No other factors may be used for the adjustment. The purpose of the adjustment is to provide higher allocations only to those districts serving the greatest numbers or percentages of children falling within any of these factors. It is not intended to provide relative allocations to all districts based on poverty or sparsity. Therefore, in developing criteria for the adjustments, States must establish a “cut-off,” so that LEAs that have lower percentages or numbers of children falling within the statutory factors for adjustment do not receive any adjustments in their allocations. [Section 5112(c)(3)].

C-2. Must an LEA use the additional funds generated by children whose education creates a higher than average cost to provide Title V-A services only to those children?

No, an LEA does not have to use the additional Title V-A funds that it receives under its adjusted allocation to provide services only to the children who generated those funds. It may use the additional funds generated by these children to provide services to any children in public and private, nonprofit schools within the LEA without regard to whether those children generated the additional funds [Section 5112(d)(2)(C)]. LEAs should note that, in such a case, they may not take into account the extent to which the number of children in private, nonprofit schools have generated a portion of the adjusted allocation in providing services to private school children. Rather, as generally required under the equitable participation provisions of Title V-A, the LEA must spend equal per-pupil amounts for services to public and private school students.

However, an LEA does have the discretion to use the additional funds generated by children whose education imposes a higher cost to provide services only to children enrolled in those schools -- both public and private -- in which children who generated the additional funds are enrolled [Section 5112(d)(2)(A)]. Under this option, the LEA must use all funds received under its adjusted allocation (i.e., all of the additional funds generated by the "high-cost" children) in this manner and must use in each school the amount generated by the "high-cost" children enrolled in that school [Section 5112(d)(2)(B)].

C-3. May an LEA reallocate local funds?

From time to time, an LEA may accumulate unobligated Title V-A funds for a variety of reasons. When these funds exceed the amount that the LEA needs to provide a prudent and justifiable reserve for operating its Title V-A projects effectively during the succeeding fiscal year, the LEA should return these funds to the SEA. The SEA may then distribute these funds to all LEAs or to a particular group of LEAs. If the SEA chooses the latter option, it must have an objective basis for the selection of the LEAs, which the SEA should publicly disseminate before reallocating the Title V-A funds. Reallocated funds need to be obligated during the period of availability established when the funds were initially allocated.

C-4. How may an SEA or LEA use remaining carryover funds allocated under Title VI?

An SEA or LEA may have unobligated balances of funds that were allocated under the former Title VI program. The manner in which an SEA or LEA uses these funds depends upon whether the funds were part of its FY 2000 or FY 2001 allocation.

FY 2000 Title VI funds first became available on July 1, 2000, and, if not completely obligated by September 30, 2001, they became carryover funds as of October 1, 2001. As of that date, the Title VI statute was still in effect. SEAs and LEAs may therefore continue to use any unobligated FY 2000 funds in accordance with the provisions of the Title VI

statute and their Title VI applications. These funds will no longer be available for obligation after September 30, 2002.

FY 2001 Title VI funds first became available on July 1, 2001. If not completely obligated by September 30, 2002, they will become carryover funds as of October 1, 2002. The new Title V-A statute will be the governing program statute at that time. Therefore, beginning on October 1, 2002, SEAs and LEAs must use their unobligated balances of FY 2001 Title VI funds in accordance with the provisions of the Title V-A statute and their new Title V-A applications. SEAs and LEAs must obligate all FY 2001 Title VI funds by September 30, 2003.

D. USES OF FUNDS BY SEAs

D-1. How may an SEA use funds reserved for State use?

An SEA may retain up to 15 percent of the State's Title V-A funds (see question C-1 regarding calculating the amount available for State use), and may use the funds for one or more of the following purposes [Section 5121]:

- Administration of programs, including allocating funds to LEAs; planning, supervising, and processing SEA funds; and monitoring and evaluating programs and activities;
- Support for planning, designing, and initial implementation of charter schools (as described in Title V, Part B of the ESEA);
- Statewide education reform, school improvement programs, and technical assistance activities and direct grants to LEAs, to assist such agencies in carrying out programs and activities under the innovative assistance program areas;
- Support for the design and implementation of high-quality yearly student assessments;
- Support for implementation of challenging State and local academic achievement standards;
- Support for arrangements that provide for independent analysis to measure and report on school district achievement;
- Support for the provision of supplemental educational services by LEAs to students under Title I (as authorized under section 1116(e)(7) of the ESEA);

- Support for school renovation, IDEA, and technology activities that were authorized in section 321 of the Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act 2001 (Public Law 106-554); and
- Support for programs to assist in the implementation of the unsafe school choice policy described in section 9532 of the ESEA, which may include payment of reasonable transportation costs and tuition costs for such students.

D-2. Is there a limitation on the amount a State may use for administration?

Yes. For administration purposes, an SEA may now use only 15 percent of the amount that it has reserved for State use. The SEA may reserve up to 15 percent of its allocation for State use, so, in most instances, this means that an SEA may use 15 percent of the 15 percent reserved for State use for administration purposes. This is a decrease in the percentage that SEAs were previously able to use for administration under the Title VI program. Formerly, SEAs were able to use 25 percent of the 15 percent reserved for State use, for administration.

An SEA may opt to consolidate its Title V-A administrative funds with administrative funds from other ESEA programs. In doing so, the SEA may gain broader flexibility in coordinating activities across programs to carry out required tasks. Further, this consolidation removes the burden of keeping records relating to the costs of administration for individual programs. Under section 9201 of the ESEA, an SEA may consolidate administrative funds only if the SEA can demonstrate that the majority of its resources are derived from non-Federal sources.

E. USES OF FUNDS BY LEAs

E-1. How may LEAs use Title V-A funds?

In the reauthorization of the former Title VI program as Title V-A, Congress expanded the number of innovative program areas in which LEAs may use funds. Formerly, there were nine innovative program areas. There are now 27. LEAs have the flexibility to design and implement innovative projects and activities within one or more of the 27 areas to serve educational needs that they have identified. The projects and activities that LEAs implement must meet three statutory requirements. They must be (1) tied to promoting challenging academic achievement standards, (2) used to improve student academic achievement, and (3) part of an overall education reform strategy. [Section 5131].

In planning for the use of their Title V-A funds, as well as for the annual program evaluation that LEAs are now required to conduct (see section G below), it may be helpful to recognize the relationships between or among some of the 27 innovative program areas. An LEA may find that its proposed use of funds to carry out a project or activity under one program area will also address another program area. To assist LEAs in planning for the

use of their Title V-A funds and in evaluating their programs at the end of each year, we have developed the following categorization of the Title V-A innovative program areas.

Education Reform and School Improvement

- Promising education reform projects, including magnet schools [Section 5131(a)(4)].
- School improvement programs or activities under sections 1116 and 1117 of the ESEA [Section 5131(a)(9)].
- Programs to establish smaller learning communities [Section 5131(a)(19)]. (For further guidance, see the Department's guidelines on the Smaller Learning Communities (SLC) program).
- Activities that encourage and expand improvements throughout the area served by the LEA that are designed to advance student academic achievement [Section 5131(a)(20)].
- Programs and activities that expand learning opportunities through best-practice models designed to improve classroom learning and teaching [Section 5131(a)(22)].
- Programs that employ research-based cognitive and perceptual development approaches and rely on a diagnostic-prescriptive model to improve students' learning of academic content at the preschool, elementary, and secondary levels [Section 5131(a)(26)].
- Supplemental educational services, as defined in section 1116(e) of the ESEA [Section 5131(a)(27)]. (For further guidance, see the Department's forthcoming regulations for the Title I, Part A program.)

Teacher Quality, Professional Development, and Class-Size Reduction

- Programs to recruit, train, and hire highly qualified teachers to reduce class size, especially in the early grades, and professional development activities carried out in accordance with Title II of the ESEA, that give teachers, principals, and administrators the knowledge and skills to provide students with the opportunity to meet challenging State or local academic content standards and student academic achievement standards [Section 5131(a)(1)]. (For further guidance, see the Department's guidelines on the Title II, Part A program).

Parental Options

- The planning, design, and initial implementation of charter schools as described in Part B of Title V of the ESEA [Section 5131(a)(8)].
- Activities to promote, implement, or expand public school choice [Section 5131(a)(12)].

- Programs to provide same-gender schools and classrooms (consistent with applicable law and the Department’s guidelines on Single Sex Classes and Schools, attached as an appendix to this Guidance) *[Section 5131(a)(23)]*.
- School safety programs, including programs to implement the unsafe school choice policy described in section 9532 of the ESEA, and that may include payment of reasonable transportation costs and tuition costs for students who transfer to a different school under the policy *[Section 5131(a)(25)]*.

Technology and Educational Materials

- Technology activities related to the implementation of school-based reform programs, including professional development to assist teachers and other school personnel (including school library media personnel) regarding how to use technology effectively in the classrooms and the school library media centers involved *[Section 5131(a)(2)]*.
- Programs for the development or acquisition and use of instructional and educational materials, including library services and materials (including media materials), academic assessments, reference materials, computer software and hardware for instructional use, and other curricular materials that are tied to high academic standards, that will be used to improve student achievement, and that are part of an overall education reform program *[Section 5131(a)(3)]*.

Students with Special Needs

- Programs to improve the academic achievement of educationally disadvantaged elementary and secondary school students, including activities to prevent students from dropping out of school *[Section 5131(a)(5)]*.
- Programs to provide for the educational needs of gifted and talented children *[Section 5131(a)(7)]*.
- Alternative educational programs for students who have been expelled or suspended from their regular educational setting, including programs to assist students to reenter the regular educational setting upon return from treatment or alternative educational programs *[Section 5131(a)(15)]*.
- Academic intervention programs that are operated jointly with community-based organizations and that support academic enrichment, and counseling programs conducted during the school day (including during extended school day or extended school year programs), for students most at risk of not meeting challenging State academic achievement standards or not completing secondary school *[Section 5131(a)(17)]*.

Literacy, Early Childhood Education, and Adult Education

- Programs to improve the literacy skills of adults, especially the parents of children served by the LEA, including adult education and family literacy programs [Section 5131(a)(6)].
- Activities to promote consumer, economic, and personal finance education, such as disseminating information on and encouraging use of the best practices for teaching the basic principles of economics and promoting the concept of achieving financial literacy through the teaching of financial management skills (including the basic principles involved with earning, spending, saving, and investing) [Section 5131(a)(11)].
- Activities to establish or enhance prekindergarten programs for children [Section 5131(a)(16)].

Community Service and Community Involvement

- Community service programs that use qualified school personnel to train and mobilize young people to measurably strengthen their communities through nonviolence, responsibility, compassion, respect, and moral courage [Section 5131(a)(10)].
- Initiatives to generate, maintain, and strengthen parental and community involvement [Section 5131(a)(21)].
- Service learning activities [Section 5131(a)(24)].

Health Services

- Programs to hire and support school nurses [Section 5131(a)(13)].
- Expansion and improvement of school-based mental health services, including early identification of drug use and violence, assessment, and direct individual or group counseling services provided to students, parents, and school personnel by qualified school-based mental health services personnel [Section 5131(a)(14)].
- Programs for cardiopulmonary resuscitation (CPR) training in schools [Section 5131(a)(18)].

E-2. What must an LEA do to receive funds?

In order to receive Title V-A funds, an LEA must submit an application to the SEA that complies with the requirements of section 5133. The SEA sets the due date for local applications. An LEA also has the option of submitting a consolidated local application covering Title V-A and certain other ESEA programs.

E-3. What must an LEA include in a Title V-A application?

If an LEA chooses to submit a separate Title V-A application, it must include the following information:

1. A description of locally identified needs relative to the purposes of Title V-A and to the programs that the LEAs may carry out under one or more of the innovative assistance program areas (see question E-1).
2. A statement that sets forth the LEA's planned allocation of funds, based on the identified needs among the innovative assistance program areas, a description of the programs that the LEA intends to support, and a description of the reasons for the selection of these programs.
3. Information setting forth the allocation of funds required to provide equitable services to students in private, nonprofit schools under section 5142.
4. A description of how the Title V-A funds will contribute to improving student academic achievement or improving the quality of education for students.
5. An assurance that the LEA will comply with the requirements of Title V-A, including the requirements of section 5142 concerning the participation of children enrolled in private, nonprofit schools.
6. An assurance that the LEA will keep such records, and provide such information to the SEA, as may be reasonably required for fiscal audit and program evaluation (consistent with the responsibilities of the SEA under the program).
7. A provision, in the allocation of funds and in the planning, design, and implementation of innovative assistance programs, for systematic consultation with parents of children attending elementary schools and secondary schools in the area served by the LEA, with teachers and administrative personnel in such schools, and with such other groups involved in the implementation of Title V-A (such as librarians, school counselors, and other pupil services personnel) as may be considered appropriate by the LEA.
8. An assurance that the LEA will evaluate its Title V-A programs annually; that it will use the evaluation to make decisions about appropriate changes in programs for the subsequent year; that the evaluation will describe how use of Title V-A funds affected student academic achievement and will include, at a minimum, information and data on the use of funds, the types of services furnished, and the students served under this part; and that the LEA will submit the evaluation to the SEA in the time and manner requested by the SEA.
9. A description of how the LEA will comply with the Department's guidelines regarding same-gender schools and classrooms, *if* the LEA plans to carry out a program that involves providing same-gender schools and classrooms. (The guidelines are attached as an appendix to this Guidance).

These application requirements are somewhat different from the application requirements under the former Title VI program. In particular, LEAs must now identify and describe local needs relative to the purposes of authorized programs of Title V-A, must base their allocation of funds among the different innovative assistance program areas on those identified needs, and must provide an assurance that they will conduct an annual local evaluation of the programs that they implement using Title V-A funds. These are significant new requirements that highlight the NCLB Act's emphasis on accountability.

The needs identification process should result in a good baseline for LEAs, as they determine the current level of student academic achievement or quality of education, relative to the needs that they have identified. LEAs have the flexibility to determine which innovative program areas will best assist them in meeting those needs and to design good programs that are targeted toward those needs, and that will help increase student academic achievement or the quality of education. Finally, the local evaluation will provide a meaningful opportunity for LEAs to determine whether the programs helped them to move forward in raising the level of academic achievement or quality of education for their students. Even if an LEA's Title V-A programs were not as successful as they might have been, the evaluation process will prove useful to the LEA, as the LEA will use the results of the evaluation to decide how to change the program during the next year in order to achieve improvement for students.

E-4. What must an LEA include in a consolidated local application that includes the Title V-A program?

LEAs' consolidated local applications must contain the information required by the SEA. SEAs are free to determine the content of consolidated local applications; however, under section 9305(d), SEAs may require as part of a consolidated local application only descriptions, information, assurances, and other materials that are absolutely necessary for the consideration of the consolidated local application.

The flexibility that SEAs have to design the content of consolidated local applications means that they are not required to include the specific application requirements set forth in individual program statutes. Therefore, an SEA that designs a consolidated local application that covers Title V-A is not required to include any of the local application requirements found in section 5133 (outlined in question E-3 above). However, the exclusion of any of these specific Title V-A local application requirements from the consolidated local application does not change an LEA's responsibility to comply with any program requirements that are expressed through those local application requirements.

Consequently, an LEA that submits a consolidated local application that does not include any of the specific application requirements of Title V-A is still required to comply with all of the requirements contained in those application requirements, including, but not limited to, the needs identification, the allocation of funds among innovative assistance program areas based on the LEA's identified needs, and the local evaluation.

E-5. May an SEA or LEA use Title V-A funds to award grants and contracts?

Yes. An SEA or LEA may use Title V-A funds to award grants or contracts on a competitive basis to LEAs, institutions of higher education, libraries, museums, and other public and private nonprofit agencies, organizations and institutions to carry out activities authorized under Title V-A [Section 5132]. However, the SEA or LEA still must maintain overall administrative responsibility for the program under which the activity is being implemented.

An SEA or LEA may not use Title V-A funds to contract with a for-profit agency, organization, or institution to operate programs or conduct programmatic activities. However, this does not preclude an SEA or LEA from contracting with an individual or a for-profit corporation or other organization to purchase specific goods or services (e.g., equipment and materials, computer hardware and software, audit services, evaluation services, professional development services) to assist the SEA or LEA in carrying out a program.

E-6. May an SEA or LEA use funds for personnel?

SEA or LEA personnel who carry out activities under Title V-A may be paid with Title V-A funds to the extent that their duties are authorized under Title V-A. If an employee works part-time on Title V-A or splits time among Title V-A and other local, State or Federal programs, the SEA or LEA must ensure that the employee keeps time distribution records so that Title V-A funds are used to pay only for that portion of the employee's salary attributable to Title V-A. In addition, if an SEA employee splits time between Title V-A administrative and programmatic work, the employee must maintain time and effort records showing the actual time spent on each program or activity so that the employee's salary is paid either from administrative funds or programmatic funds, as appropriate.

E-7. May an LEA use funds for direct administrative costs?

An LEA may use Title V-A funds to pay only reasonable and necessary direct administrative costs associated with the operation of its Title V-A program. These costs may include the costs of "systematic consultation" with parents, teachers, and administrative personnel and the costs associated with the provision of services for private school children.

F. PARTICIPATION OF CHILDREN ENROLLED IN PRIVATE, NONPROFIT SCHOOLS

F-1. How may private school children receive services under Title V-A?

An LEA must provide Title V-A services to children enrolled in a private, nonprofit school within the LEA if, after consultation with private school officials, the officials of the private school indicate that they wish the children in that school to participate. The LEA

must contact the private schools within the LEA annually to determine which schools wish their children to participate. The LEA must consult with the officials of interested private schools in a timely and meaningful manner to determine the needs of the children, the types of Title V-A services that will be provided, and how those services will be provided. The LEA provides those services on an equitable basis to those children whether or not the services are the same Title V-A services the LEA provides to the public school children. The expenditures for such services, however, shall be equal (consistent with the number of children served) to Title V-A services provided to public school children. LEAs pay the cost of administering Title V-A services for public and private school students “off the top” of their allocations, before calculating how much of the Title V-A funds are to be made available for services for public and private school students. [Section 5142(a) and (b)].

F-2. What administrative requirements apply regarding the provision of services to private school children?

The services, materials, and equipment that an LEA provides for the benefit of participating private school students must be secular, neutral, and nonideological. The control of Title V-A funds and the title to any equipment and materials purchased with those funds must remain in a public agency (usually the LEA). No Title V-A funds may be paid to any private school, and the title to equipment and materials may not be transferred to any private school. Title V-A services must be provided by a public agency either directly or through a contractor. Any contractor must be a person or an association, agency, or corporation who or that, in the provision of the Title V-A services, is independent of the private school and any religious organization. A public agency must supervise and have ultimate control over any contractor hired to provide Title V-A services. Finally, Title V-A services for private school students must supplement, and in no case supplant, the level of services that would be available to participating students and educational personnel in the private schools in the absence of the Title V-A funds [Sections 5142(a)(1)(A) and (c)].

F-3. How may an LEA ensure that Title V-A services are provided in a proper manner for the benefit of private school students and personnel?

LEAs should implement safeguards and procedures to ensure that Title V-A funds are used properly for private school children.

First, private school officials should be fully informed of and agree to the limitations on the use of any equipment and materials located in the private school. LEAs should obtain from the appropriate private school official a written assurance that any equipment and materials placed in the private school will be used only for secular, neutral, and nonideological purposes; that private school personnel will be informed as to these limitations; and that the equipment and materials will supplement, and in no case supplant, the equipment and materials that, in the absence of the Title V-A program, would have been made available for the participating students.

Second, the LEA is responsible for ensuring that any equipment and materials placed in the private school are used only for proper purposes. The LEA should determine that any Title

V-A materials, such as library books and computer software, are secular, neutral, and nonideological. A good benchmark for this review is that the equipment and materials would be appropriate for use in public schools. The LEA should mark all equipment and materials purchased with Title V-A funds so that they are clearly identifiable as Title V-A property of the LEA. The LEA also should maintain an up-to-date inventory of all Title V-A equipment and materials provided for the benefit of private school students. It is also a helpful practice for private schools to maintain logs to document the use of Title V-A equipment and materials located in their schools. The LEA also should perform periodic on-site monitoring of the use of the equipment and materials. The monitoring could include on-the-spot checks of the use of the equipment and materials, discussions with private school officials, and a review of any logs maintained.

Third, the LEA should designate one public school official to oversee Title V-A services for private school students and ensure that services, materials and equipment provided for these students are secular, neutral, and nonideological. The designated official also should be responsible for receiving and handling any complaints or allegations that Title V-A funds are being used for improper activities for private school students.

Finally, LEAs need to ensure that if any violations occur, they are corrected at once. An LEA must remove materials and equipment from a private school immediately if removal is needed to avoid an unauthorized use.

F-4. May private school children and personnel receive services under any Title V-A innovative program area?

If Title V-A funds are used to provide services for children enrolled in private, nonprofit schools, these services must primarily benefit the children, not the private schools. This means that the funds must be used to meet specific needs of students enrolled in the private schools, rather than the needs of the private schools themselves or the general needs of the students enrolled in the private schools. (See section 76.658 of the Education Department General Administrative Regulations (EDGAR)).

In working with private schools to decide what Title V-A programs and activities will be carried out for children and personnel in those schools, LEAs must ensure that the programs and activities are supplemental in nature and will meet the specific needs of the children enrolled in the schools. For example, LEAs may not use funds for class-size reduction purposes in a private school [*Section 5131(a)(1)*]. This use of funds, which would involve hiring teachers for private school classrooms, would meet the needs of the private schools themselves, as well as the general needs of the students enrolled in the schools, rather than the specific needs of those students. However, LEAs may use funds to provide professional development activities for teachers in private schools [*Section 5131(a)(2)*].

There are several innovative assistance programs that, by their nature, cannot be carried out in a private school. These include (1) the planning, design, and initial implementation of charter schools [*Section 5131(a)(8)*]; (2) activities to promote, implement, or expand public

school choice [Section 5131(a)(12)]; and (3) programs to implement the unsafe school choice policy in section 9532 [Section 5131(a)(25)].

For all other innovative assistance programs, particularly those involving education reform or school improvement activities, LEAs must evaluate closely whether the activities proposed to be carried out in a private school will primarily benefit the children enrolled in the school or the school itself. If the latter, then the LEA may not permit that activity or program to be implemented in the private school. In some instances, a program or activity that primarily benefits the private school's students (because it addresses specific, rather than general, needs of the students) will also incidentally benefit the school. The LEA may permit a program or activity of this type to be carried out in the private school. Again, under the regulations in EDGAR, the key in determining if particular services may be provided to students in a private school is whether those services will meet specific needs of students enrolled in the school, rather than their general needs or the needs of the school itself. This does not preclude an incidental benefit to the private school. However, LEAs must be careful in this determination and may not authorize any services whose purpose is to benefit the general needs of the private school or its students.

F-5. How does an SEA calculate the amount of funds to be distributed to the LEAs?

The funds allocated to LEAs are based on the relative enrollments of the total of the number of children enrolled in public schools and the number of children enrolled in private, non-profit schools that participated in the program for the fiscal year preceding the fiscal year for which the determination is made. (See question C-1.)

F-6. What are the obligations of LEAs to private schools that did not participate in Title V-A programs in the preceding year?

The LEA has the obligation to contact, on an annual basis, appropriate officials from private, nonprofit schools within the LEA to determine whether such schools desire that their students participate in Title V-A programs. This must be done for schools that did and did not participate in the program during the previous year. Once a school agrees on behalf of its students to participate, the enrollment of those students is considered in the calculation of relative enrollment for the LEA for the following year. The method for calculating funds does not diminish the responsibilities of the LEA under section 5142.

F-7. What happens if an LEA chooses not to participate in the Title V-A program?

If no program is carried out in the LEA, the SEA shall make arrangements, such as through contracts with nonprofit agencies or organizations, under which children in private schools in the LEA are provided with services and materials to the same extent as would have occurred if the LEA had received funds.

F-8. Would it be beneficial for SEAs and LEAs, in working with private school officials in implementing Title V-A, to create Non-Public School Working Groups?

Some SEAs and LEAs have created *Non-Public School Working Groups*, made up of representatives from the full spectrum of private schools, and have found that such groups facilitate consultation between public and private school officials and the effective implementation of programs and services for private school students and teachers. Such groups meet on a regular basis, and smooth the progress of Federal education program implementation for private school students and teachers.

G. REPORTING REQUIREMENTS

G-1. What reporting responsibilities do LEAs have under Title V-A?

The LEA is required to evaluate its Title V-A programs annually. This is a new requirement that will result in greater accountability under the program. The evaluation must describe how Title V-A programs within the LEA affected student academic achievement. At a minimum, the evaluation must include information and data on the use of funds, the types of services furnished, and the students served by the programs. However, the evaluation should contain sufficient information for the LEA to make a connection between the services that were provided and the effect on academic achievement. To aid this process, the Department encourages LEAs to use the needs identification that they are now required to conduct to provide them with a baseline measure of the level of academic achievement or quality of education in the areas in which they want to target Title V-A funds. When the LEAs conduct their annual evaluations, they can use the baseline as a reference to see whether there has been any progress as a result of the Title V-A programs. LEAs must use the information gleaned from the evaluation to make decisions about appropriate changes in programs for the subsequent year. Finally, LEAs must submit their evaluations to the SEA at the time and in the manner requested by the SEA.

G-2. What reporting responsibilities do SEAs have under Title V-A?

The SEA is required to prepare, and submit to the Secretary, an annual statewide summary of how assistance under Title V-A is contributing toward improving student achievement or improving the quality of education for students. The summary is to be based on the evaluation information that each LEA submits to the SEA. Each SEA must decide on the format and content of its statewide summary and may include statistical measures in the summary. As with the local evaluation, however, the summary must include information about the effect of Title V-A programs implemented within the State on student academic achievement or the quality of education. The Department intends to work with Title V-A State coordinators to develop a statewide summary format that will be available to SEAs that wish to use it. Because SEAs have the authority to develop the content and format of their own summaries, however, no SEA will be required to use any format that the Department develops.

H. FISCAL REQUIREMENTS

H-1. Is there a non-supplanting requirement under Title V-A?

Yes. Section 5144 provides that Title V-A funds shall be used to supplement, and not supplant, any other Federal, State, or local education funds.

H-2. May Title V-A funds be used for State-mandated activities?

The ability of an SEA or LEA to use Title V-A funds to carry out activities required by a State-mandated program depends upon whether non-Federal funds are already available to carry out activities under the State-mandated plan. Presumably, in the absence of Title V-A funds, the SEA or LEA would use State or local funds to carry out a State-mandated plan. To use Title V-A funds in connection with that plan would therefore violate the supplement, not supplant requirement. However, in certain instances, an SEA or LEA may overcome the presumption that supplanting will result if Title V-A funds are used in connection with a State-mandated program or activity. In those instances, the SEA or LEA should be able to demonstrate through written documentation (e.g., State or local legislative action, budget information, or other materials) that it does not have the funds necessary to implement the program or activity and that the program or activity would not be carried out in the absence of the Title V-A funds.

H-3. What should an SEA or LEA consider to ensure that its use of Title V-A funds does not result in supplanting?

In general, an SEA or LEA should determine what educational activities it would support if no Title V-A funds were available. If the result of this determination is that no State or local funds remain available to fund certain activities that are supplemental in nature, then the SEA or LEA may be able to use Title V-A funds for those activities. In no event, however, may an SEA or LEA decrease State or local funds for particular activities because Title V-A funds are available.

H-4. Does a maintenance-of-effort requirement apply to the Title V-A program?

Yes, but only at the SEA level. SEAs are required to maintain effort in order to receive their full allocation of Title V-A funds for any fiscal year. The SEA maintains effort when either the combined fiscal effort per student or the aggregate expenditures within the State with respect to the provision of free public education for the preceding fiscal year was not less than 90 percent of the combined fiscal effort or aggregate expenditures for the second preceding fiscal year [Section 5141(a)].

The Department interprets "preceding fiscal year" to mean either the Federal fiscal year or the twelve-month fiscal period most commonly used in a State for official reporting purposes prior to the beginning of the Federal fiscal year in which funds are available.

Both State and local expenditures for free public education within the State are to be considered in determining whether a State has maintained effort under Title V-A. The Department interprets “aggregate expenditures for free public education” to include expenditures such as those for administration, instruction, attendance, health services, pupil transportation, plant operation and maintenance, fixed charges, and net expenditures to cover deficits for food service and student body activities. States may include in the maintenance-of-effort calculation expenditures of Federal funds for which no accountability to the Federal government is required. (Impact Aid funds are an example of such funds; however, there is a requirement of accountability for certain Impact Aid funds, such as those received for children with disabilities. Therefore, Impact Aid funds may be included in a State's maintenance of effort calculation under Title V-A, but only to the extent that there is no accountability for their expenditure.)

States must be consistent in the manner in which they calculate maintenance of effort from year to year in order to ensure that the annual comparisons are on the same basis (i.e., calculations must consistently, from year to year, either include or exclude expenditures of Federal funds for which accountability to the Federal government is not required). Moreover, States that choose to include expenditures of Federal funds for which accountability to the Federal government is not required, must do so with the understanding that future years' maintenance-of-effort calculations may be affected by fluctuating Federal appropriations over which neither the Department, nor a State, has any control.

Finally, it is the Department's position that expenditures not to be considered in determining maintenance of effort under Title V-A are expenditures for community services, capital outlay, debt service, or any expenditures of Federal funds for which accountability to the Federal government is required.

I. OTHER APPLICABLE STATUTES AND REGULATIONS

I-1. What general statutory and regulatory provisions apply to Title V-A?

Title IX of the ESEA contains general provisions that apply to Title V-A, as well as to other ESEA programs. Part A of Title IX contains definitions of many terms used in the ESEA. SEAs and LEAs should consult these definitions for meanings of terms found in Title V-A. (In addition, for the specific purposes of Title V-A, section 5145 also contains definitions of four terms – “LEA,” “public school,” “school-age population,” and “State.”) Part B of Title IX contains provisions regarding the consolidation of administrative funds. Part C contains provisions regarding consolidated State and local plans and applications. Part D contains provisions regarding waivers of statutory and regulatory requirements. Finally, Part E contains certain uniform provisions. SEAs and LEAs should note that the maintenance-of-effort provision in Part E of Title IX does not apply to Title V-A.

The General Education Provisions Act (GEPA), 20 U.S.C. 1221-1234i, is another source of general statutory requirements applicable to Title V-A. GEPA's provisions apply to most programs administered by the Department. GEPA contains the so-called "Tydings amendment," the additional year for the obligation of funds under certain programs, including Title V-A. GEPA also includes provisions addressing such matters as forward funding, protection of students' and parents' privacy rights (FERPA), and appeal procedures.

There are no program-specific regulations for the Title V-A program. However, the following parts of the Education Department General Administrative Regulations (EDGAR) apply to Title V-A: 34 C.F.R. Parts 76, 77, 80, 81, 82, 85, 97, 98, and 99.

SEAs and LEAs are particularly encouraged to be familiar with Parts 76 and 80, as they address a range of matters important to the everyday administration of the Title V-A program.

J. FLEXIBILITY

J-1. How do the principal flexibility provisions of the NCLB Act affect the Title V-A program?

In general, the principal flexibility provisions, which are described in greater detail on the Department's website at <http://www.ed.gov/offices/OESE/esea/index.html>, affect the Title V-A program as follows:

- **State-Flex (ESEA Sections 6141 through 6144)**

An SEA with State-Flex authority may consolidate Title V-A funds that are available for State-level activities and State administration with certain other State-level funds, and use those funds for any ESEA purpose in order to make adequate yearly progress and advance the educational priorities of the State and the LEAs with which the State enters into performance agreements. The SEA must allocate Title V-A funds to its LEAs in accordance with the formula in section 5112(a) (i.e., based on relative enrollments); however, the SEA has the authority to specify how the LEAs may use the funds.

An LEA that enters into a performance agreement with its SEA in a State-Flex State may consolidate Title V-A funds with certain other Federal funds, and use those funds for any ESEA purpose consistent with the SEA's State-Flex plan in order to meet the State's definition of adequate yearly progress, improve student academic achievement, and narrow achievement gaps.

The SEA, and the LEA with which the SEA enters into performance agreements, will provide for the equitable participation of students and professional staff in private schools consistent with section 9501, and sections 9502, 9503, and 9504 shall apply to all services and assistance provided with such funds in the same manner as such sections apply to services and assistance provided in accordance with section 9501. (See section 6141(c)(1)(K)).

- **Local-Flex (ESEA Sections 6151 through 6156)**

An LEA that enters into a Local-Flex agreement with the Secretary may consolidate Title V-A funds with certain other Federal funds and, consistent with the purposes of the Local-Flex program, use those funds for any ESEA purpose in order to meet the State's definition of adequate yearly progress, improve student academic achievement, and narrow achievement gaps.

The local flexibility demonstration agreement shall contain an assurance that the LEA agrees that in consolidating and using funds under the agreement, the LEA will provide for the equitable participation of students and professional staff in private schools consistent with section 9501, and that sections 9502, 9503, and 9504 shall apply to all services and assistance provided with such funds in the same manner as such sections apply to services and assistance provided in accordance with section 9501. (See section 6151(c) (8)).

- **Transferability (ESEA Sections 6121 through 6123)**

Under this flexibility authority, an SEA may transfer up to 50 percent of the non-administrative funds that it receives under certain Federal programs to other specified programs that address more effectively its unique needs or to its allocation under Part A of Title I. This authority allows a portion of an SEA's State-level non-administrative funds to be transferred into or out of the Title V-A program.

Likewise, an LEA (except an LEA identified for improvement or subject to corrective action under section 1116(c)(9)) may transfer up to 50 percent of the funds allocated to it by formula under certain programs to its Title V-A allocation (or to other specified allocations) or to its allocation under Part A of Title I. An LEA may also transfer up to 50 percent of its Title V-A funds to certain other programs. (There are special transferability rules governing LEAs identified for improvement or corrective action.)

Each SEA or LEA that transfers funds under this section shall conduct consultations in accordance with section 9501, if such transfer transfers funds from a program that provides for the participation of students, teachers, or other educational personnel, from private schools. (See section 6123(e)(2)).

- **Rural Education Initiatives (ESEA Sections 6201 through 6234)**

Under the Title VI Rural Education Achievement Alternative Uses of Funds Authority, an eligible LEA may combine its Title V-A funds with certain other Federal funds and use the applicable funding to carry out local activities under one or more specified Federal programs.

An eligible LEA may use its “applicable funding” under the Small, Rural School Achievement Program to carry out activities under a number of Federal programs, including Title V-A.

- **Ed-Flex (as revised by Section 1073 of the NCLB Act)**

Consistent with the provisions of the Ed-Flex legislation, an Ed-Flex State may waive requirements of the Title V-A program that, in particular circumstances, may impede the ability of LEAs or schools to carry out educational reforms and raise the achievement levels of all students. There are certain requirements that an Ed-Flex State may not waive. For example, an Ed-Flex State may not grant any waiver that would undermine the underlying purposes of the Title V-A program.

- **Consolidation of State and local administrative funds (ESEA Sections 9201 and 9203)**

An SEA may consolidate funds made available to it for State administration under the Title V-A program and other ESEA programs, as well as other programs that the Secretary may designate, if the SEA can demonstrate that the majority of its resources are derived from non-Federal sources. The consolidated administrative funds may be used to administer the programs included in the consolidation and for administrative activities designed to enhance the effective and coordinated use of funds under those programs.

Similarly, with approval of its SEA, an LEA may consolidate Title V-A funds available for administration, as well as other local administrative funds, to administer the programs included in the consolidation and for uses, at the district and school levels, designed to enhance the effective and coordinated use of funds under those programs.

- **Consolidated applications (ESEA Sections 9301 through 9306)**

An SEA may seek Title V-A funding as part of its consolidated State application. Similarly, an LEA may seek Title V-A funding as part of its consolidated local application.

- **Schoolwide programs (ESEA Section 1114)**

Consistent with the requirements of section 1114 of the ESEA, an LEA may consolidate and use funds under Part A of Title I and other programs that the Secretary may designate to implement a schoolwide program in a school in which at least 40 percent of the children are from low-income families.

APPENDIX A

4000-01-U

DEPARTMENT OF EDUCATION

Office for Civil Rights; Single-Sex Classes and Schools:
Guidelines on Title IX Requirements

AGENCY: Department of Education.

ACTION: Guidelines on current title IX requirements related to single-sex classes and schools.

SUMMARY: On January 8, 2002, the President signed into law the No Child Left Behind Act of 2001, which reauthorized the Elementary and Secondary Act of 1965. Section 5131(a)(23) of the Elementary and Secondary Education Act allows local educational agencies (LEAs) to use Innovative Programs funds to support same-gender schools and classrooms consistent with applicable law. It also requires the Department, within 120 days of enactment, to issue guidelines for LEAs regarding the applicable law on single-sex classes and schools. This notice fully implements Congress's mandate by describing and explaining the current statutory and regulatory requirements relating to single-sex classes and schools.

FOR FURTHER INFORMATION CONTACT: Jeanette J. Lim, Office for Civil Rights, U.S. Department of Education, 400 Maryland Avenue, S.W., room 5036, Mary E. Switzer Building, Washington, DC 20202-2899. Telephone: (202) 205-8635 or 1-800-421-3481.

If you use a telecommunications device for the deaf (TDD), you may call 1-877-521-2172. For additional copies of this document, you may call OCR's Customer Service Team at (202) 205-5413 or 1-800-421-3481. These Guidelines will also be available at OCR's site on the Internet at:

www.ed.gov/ocr

Individuals with disabilities may obtain this document in an alternative format (e.g., Braille, large print, audiotape, or computer diskette) on request to the contact person listed under FOR FURTHER INFORMATION CONTACT.

SUPPLEMENTARY INFORMATION: This notice implements Congress's mandate in the No Child Left Behind Act of 2001 (NCLB Act) to

provide guidelines to LEAs regarding the applicable law on single-sex classes and schools. See Pub. L. 107-110, Sec. 5131(a)(23), 5131(c).

Elsewhere in this issue of the Federal Register is a notice of intent to regulate (NOIR), which invites comment on our intention to amend the current regulations implementing Title IX of the Education Amendments of 1972 (Title IX) related to elementary and secondary single-sex classes and schools to provide more flexibility to educators. The purpose of these amendments would be to support efforts of school districts to improve educational outcomes for children and to provide public school parents with a diverse array of educational options that respond to the educational needs of their children, while at the same time ensuring appropriate safeguards against discrimination. The NOIR is intended to begin this process and ensure adequate public input on these important and sensitive issues.

GUIDELINES ON CURRENT TITLE IX REQUIREMENTS:

Single-sex classes: The Title IX statute generally prohibits sex-based discrimination in education programs or activities receiving Federal financial assistance. Specifically, it states that no person in the United States, on the basis of sex, can be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. 20 U.S.C. 1681.

Section 1681(a) of Title IX contains two limited exceptions relating to classes or activities within primary and secondary schools that otherwise are coeducational. Subsection 1681(a)(7)(B) of Title IX exempts any program or activity of any secondary school or educational institution specifically intended for the promotion of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference or for the selection of students to attend such a conference. Subsection 1681(a)(8) of Title IX states that the law does not preclude father-son or mother-daughter activities at an educational institution. However, if those activities are provided for students of one sex, opportunities for reasonably comparable activities must be provided for students of the other sex. Accordingly, these activities are permitted on a single-sex basis if the requirements of the statute are met. [\[1\]](#)

Our current Title IX regulations generally prohibit single-sex classes or activities. The regulations in 34 CFR 106.34 state --

A recipient shall not provide any course or otherwise carry out any of its education program or activity separately on the basis of sex, or require or refuse participation therein by any of its students on such basis, including health, physical education,

industrial, business, vocational, technical, home economics, music, and adult education courses.

Our regulations contain two categorical exceptions for specific types of classes or portions of classes that may be segregated by sex. Those exceptions are: (1) physical education classes during participation in sports "the purpose or major activity of which involves bodily contact" (34 CFR 106.34(c)); and (2) "[p]ortions of classes in elementary and secondary schools which deal exclusively with human sexuality." (34 CFR 106.34(e)). In addition separation of students by sex is permitted if it constitutes remedial or affirmative action. 34 CFR 106.3[2]

Single-sex schools: The Title IX statute exempts from its coverage the admissions practices of non-vocational elementary and secondary schools.[3] Accordingly, the regulations do not prohibit recipients from adopting single-sex admissions policies in non-vocational elementary and secondary schools. See 34 CFR 106.15(d). However, the regulations specifically provide that an LEA may "exclude any person from admission" to a non-vocational elementary or secondary school "on the basis of sex" only if "such recipient otherwise makes available to such person, pursuant to the same policies and criteria of admission, courses, services, and facilities comparable to each course, service, and facility offered in or through such schools." (34 CFR 106.35(b))[4] In other words, under the current regulations, an LEA cannot use a single-sex admissions policy -- which is not itself subject to Title IX's prohibition -- as the predicate for otherwise causing students, on the basis of sex, to be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. For example, school districts may not establish a single-sex school for one sex that provides the district's only performing arts curriculum. Students of the other sex also must have access to a comparable school with that curriculum. It has been our longstanding interpretation, policy, and practice to require that the "comparable school" must also be single-sex.

An LEA may offer a single single-sex school if such an action constitutes remedial or affirmative action. (34 CFR 106.3) In addition, while the statutory exemption precludes the Department from examining an LEA's justification for a single-sex school, LEAs also should be aware of constitutional requirements in this

area.^[5] LEAs may be challenged in court litigation on constitutional grounds.

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www.access.gpo.gov/nara/index.html

AUTHORITY: 20 U.S.C. 1681, 1682.

Dated: May 3, 2002

Rod Paige,
Secretary of Education.

^[1] The statute also exempts activities of educational institutions controlled by religious organizations to the extent that the application of Title IX would be inconsistent with the religious tenets of the organization. 20 U.S.C. 1681(a)(3).

^[2] The current regulations also permit recipients to group students in physical education classes and activities by ability as assessed by objective standards of individual performance developed and applied without regard to sex (34 CFR 106.34(b)) and to "make requirements based on vocal range or quality which may result in a chorus or choruses of one or predominantly one sex." (34 CFR 106.34(f))

^[3] Section 1681(a)(1) of Title IX states that in regard to admissions to educational institutions, the law applies only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of

undergraduate higher education. As such, non-vocational elementary and secondary schools are exempt.

[4] These provisions on single-sex schools do not apply to private elementary and secondary schools.

[5] The Supreme Court has decided two significant constitutional cases specifically regarding single-sex education. United States v. Virginia, 518 U.S. 515 (1996) (State-sponsored, male-only military college violated Equal Protection Clause); Mississippi University for Women v. Hogan, 458 US 718 (1982) (State-sponsored, female-only nursing school violated the Equal Protection Clause.)