The Honorable Betsy DeVos
Secretary
U.S. Department of Education
400 Maryland Ave, SW
Washington, DC 20024

Re: Equitable Services Draft Guidance

March 25, 2019

Dear Secretary DeVos,

The National Association of ESEA State Program Administrators (NAESPA) appreciates the opportunity to comment on the draft equitable services guidance put forth by the U.S. Department of Education (ED) earlier this month. Some of the questions and answers contained in this document are particularly helpful – especially those regarding specifics on the mechanics and timing of consultation and participation of equitable private schools. However, NAESPA also has a number of concerns surrounding both this guidance document and the process under which the organization is commenting.

First and foremost, the timing of this comment period is particularly short. When the guidance was originally released, it allowed only 15 days for organizations to digest the document, review and discuss its implications, and compile suggested changes – though this deadline has been extended by two weeks to allow more time for comments. NAESPA acknowledges and appreciates this extension. However, this nevertheless is a shorter time period by far than the 60- or 120-day comment period typically used when items are published in the *Federal Register*. Furthermore, it comes at a time when many school districts are holding their regular spring breaks, which means fewer staff and resources are available to compile comments. While this may not be the intent, the short comment period, and its timing, could create the impression that ED is not particularly interested in hearing concerns from stakeholders on this draft guidance. We wish to note that there is a large number of stakeholders who are deeply invested in the outcome of this process, from private schools to districts, States, and parents – we hope that those voices will be actively sought, heard, and valued in this process.

Second, a number of our members are concerned that a guidance document is being used to tell us to disregard a provision of the statute. We understand the link being made between the Supreme Court decision in *Trinity Lutheran Church of Columbia, Inc. v. Comer* (2017) and the concerns about the limitations on private providers in the Elementary and Secondary Education Act (ESEA). We also understand that ED considers it part of the agency's obligation to ensure compliance with new judicial precedent. However, in this guidance ED is proposing non-binding, non-regulatory guidance that is in direct conflict with an existing statute that remains in effect and unaltered by Congress – specifically, ESEA section 1117(d)(2)(B), which states that an equitable services provider be "independent . . . of any religious organization." In doing so, ED places States and districts in a difficult situation and potentially exposes them to legal challenges from both sides. It also subjects States and districts to potential changes in policy at short notice, as guidance often changes or is rescinded from one administration to another.

We are also concerned that the nonregulatory guidance may blur the line on who is considered an acceptable provider of services to private school students, opening up that relationship to the potential for fraud and conflict of interest. Though the guidance notes that a private school is still not permitted to provide equitable services to its own students – thus preventing an LEA from providing what amounts to a cash payment – one of the school's employees could still be employed by the private school as well as by the local educational agency (LEA), essentially creating an arrangement where the LEA would subsidize the salary of religious organization employees. By stating in the amended guidance that a religious organization is an allowable provider – without defining who qualifies as a religious organization or part of one – ED creates the potential for confusion and misallocation of funds. The restrictions here should be tightened to ensure that the intent of the law remains in place.

In addition, we disagree with ED's contention that the statute limits the ability of an LEA to carryover funds set aside for equitable services. Though ESEA notes that the funds "must be obligated in the fiscal year for which the funds are received by the LEA," that language does not explicitly prohibit the use of carryover in the event the funds are not obligated in that year. ED says that such carryover would only be permitted in the event of an emergency or natural disaster, or where the amount is de minimis. To create these additional requirements, as ED suggests, would be to place a burden on funds allocated for equitable services that is different from the expectation for funds provided to public schools.

We appreciate your attention to this matter. Should you have any questions related to these comments, please contact Bob Harmon at bob.harmon@eseanetwork.org.

Sincerely,

Sonya G. Morris

Sonya G. Morris, President
National Association of ESEA State Program Administrators (NAESPA)