

**Elementary and Secondary Education Act of 1965, as amended by the Every Student Succeeds Act, Negotiated Rulemaking Committee**

**Updated for Session Two, April 6-8, 2016**

**Issue Paper: Supplement Not Supplant**

**Statutory Cite: 1118(b) of the Elementary and Secondary Education Act of 1965 (ESEA), as amended by the Every Student Succeeds Act (ESSA)**

**Regulatory Cite: Proposed draft § 200.XX**

**Background:**

The purpose of Title I of the ESSA is to “provide all children significant opportunity to receive a fair, equitable, and high-quality education, and to close educational achievement gaps.” The requirement that Title I funds supplement State and local funds, and do not supplant them, is intended to ensure that the Federal resources are spent to provide the **additional** educational resources and supports that at-risk students need to succeed, instead of being used to simply make up for unfair shortfalls in State and local funding. Title I is intended to provide the extra help low-income students need to succeed, but it cannot do that if State and local funds are not evenly distributed to start with. Nonetheless, today, in districts receiving Title I funds, two-thirds of students attend school where fewer State and local dollars are spent per pupil in Title I schools than in non-Title I schools.<sup>1</sup>

Section 1118(b) of the ESEA, as amended by the ESSA, retains the general requirement that Title I funds supplement and not supplant State and local funds. However, the test for compliance with this requirement has changed in two ways. First, Section 1118(b) includes a special rule stating that “[n]o [district] shall be required to – (A) identify that an individual cost or service supported under this part is supplemental,” which effectively prohibits a key test previously used to ensure compliance in many Title I schools. Second, the law replaces the two supplement-not-supplant tests (one for targeted assistance schools and one for schoolwide program schools) with a single compliance test that focuses on a district’s methodology for allocating State and local funds. Specifically, it requires that a district “demonstrate that the methodology used to allocate State and local funds to each [Title I school] ensures that such school receives all of the State and local funds it would otherwise receive if it were not receiving assistance under [Title I].” A district must meet this requirement not later than two years after the date of enactment of the ESSA — *i.e.*, by December 10, 2017. The ESSA prohibits the Department of Education from prescribing the specific methodology a district must use.

In addition to refocusing the supplement not supplant test on a district’s methodology for allocating State and local funds, the ESSA includes a new fiscal reporting requirement in Section

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<sup>1</sup> This sentence is updated to correct a mistake in the original version of the issue paper. No other text has been changed.

1111(h)(1)(C)(x), under which States and districts must report the per-pupil expenditures of Federal, State, and local funds, including actual personnel expenditures and actual non-personnel expenditures, for each school and district on State and local report cards.

These new statutory provisions continue the ESEA's focus on ensuring that Title I funds are supplemental to an equitable base of State and local resources for education, and provide new flexibility for school and district leaders pursuing integrated educational strategies designed to improve outcomes for the lowest-achieving students. However, it also raises questions. For example:

- What does it mean to “ensure that a Title I school receives all of the State and local funds it would otherwise receive if it were not receiving assistance under this part”?
- What does it mean to have a “methodology for allocating State and local funds” in a district that allocates resources such as staff positions instead of dollars? In a district that allocates funds through a school based budgeting system or weighted student funding system?
- Should regulations implementing this statutory provision create certain allowances for flexibility, such as when a district has particularly small schools or allow for different allocations among grade spans?
- How should the new emphasis on allocation of funds apply to State and local funds retained at the district level?
- What does it mean to meet this requirement two years after the date of enactment, when the date of enactment is in the middle of a school year? Does a district need additional time to meaningfully implement a methodology that meets the statutory requirement?
- What enforcement action must a State take if it finds that a district has not complied with the requirement? What corrective actions should the district have to take?

~~The Department is not providing draft regulatory text at this time; instead, the Department will prepare regulatory text after discussing these questions with negotiators.——~~

## **Session 2 Update**

The Department drafted the proposed regulatory language below in response to input during Session 1 from members of the Committee. The proposal would require that within a district receiving Title I funds, each Title I school – generally the highest poverty schools in the district – receives at least as much in State and local funding as the average non-Title I school in that district, so that Title I funds can provide truly supplemental support in Title I schools. The proposal would also provide flexibility for districts including (1) authority to choose its methodology for allocating State and local funds to schools; (2) time to plan – a district would not have to fully implement its methodology until school year 2019-2020; (3) flexibility to comply on a districtwide or grade-span basis; (4) exceptions for districts with a single school or a single school per grade-span; and (5) discretion to exclude from compliance calculations very

small schools and supplemental State and local funding used for programs designed to serve the same purpose as Title I.

More specifically:

Paragraph (a) of the proposal restates section 1118(b)(1) and (3) of the ESSA. Paragraph (b) implements the statutory compliance requirement to ensure that Title I funds are used to provide truly supplemental support in high-poverty schools. Paragraph (b)(1)(ii) states that each district may determine the methodology it will use to allocate State and local funds to its schools, provided that (1) the methodology results in each Title I school spending an amount of State and local funds that is equal to or greater (per pupil) than the average spent in non-Title I schools in the district (using the data required under Section 1111(h)(1)(C)); and (2) the methodology allocates sufficient State and local funding to each Title I school to provide a basic educational program (as defined under State or local law) and services required by law for students with disabilities and English learners.

Paragraph (b)(2) addresses those costs or services paid for at the district level instead of at the school level. The proposed regulation would require that a district ensure that each Title I school receives a share of those services that is equal to or greater than the share it would otherwise receive if it were not a Title I school.

Paragraph (b)(3) explicitly exempts districts with only a single school from the school-based provisions of the regulation described above, except for the requirement that the Title I school have sufficient State and local funding to provide a basic educational program and services required by law for students with disabilities and English learners. It further provides districts with the flexibility to exclude schools with fewer than 100 students from demonstrating that its methodology meets the requirements described above, and to exclude supplemental State and local funds expended in any school (including non-Title I schools) for programs that meet the intent and purpose of title I, part A.

Finally, paragraph (b)(4) provides clarity around the transition timeline, explaining that a district may either (1) demonstrate to the State by December 10, 2017 (two years after the date of enactment of the statute) that its current methodology for allocating State and local funds meets the requirement, or (2) submit a plan to the State by December 10, 2017 for how it will fully implement a methodology that meets the requirement no later than the 2019-2020 school year.

**Draft Regulatory Language**

**§200.XX. Supplement not supplant.**

**(a) In general.**

(1) An SEA or LEA--

(i) Must use Title I, Part A funds only to supplement the funds that would, in the absence of the Title I, Part A funds, be made available from State and local sources for the education of students participating in Title I programs; and

(ii) May not use Title I, Part A funds to supplant the funds from State and local sources.

(2) An LEA is not required under this section to--

(i) Identify that an individual cost or service supported with Title I, Part A funds is supplemental; or

(ii) Provide services with Title I, Part A funds through a particular instructional method or in a particular instructional setting.

**(b) Compliance.**

(1) School costs or services.

(i) To comply with paragraph (a) of this section, an LEA must annually demonstrate, at such time and in such manner as the SEA may reasonably require, that the methodology it uses to allocate State and local funds to each Title I school ensures that the school receives all of the State and local funds it would otherwise receive if it were not a Title I school.

(ii) An LEA may determine the methodology it will use to allocate State and local funds to its schools, provided that the methodology--

(A) Results in the LEA spending an amount of State and local funds per pupil in each Title I school that is equal to or greater than the average amount spent per pupil in non-Title I schools, as reported under Section 1111(h)(1)(C)(x) of the Act; and

(B) Allocates an amount of State and local funds that is sufficient to enable each Title I school to provide-

(I) The basic educational program as defined under State or local law; and

(II) In conjunction with funds provided under the Individuals with Disabilities Education Act, services required by law for students with disabilities; and services required by law for English learners.

(2) Districtwide costs or services. To comply with paragraph (a) of this section in allocating State and local funds for districtwide costs or services, an LEA must ensure that each Title I school receives a share of those costs or services equal to or greater than the share it would otherwise receive if it were not a Title I school.

(3) Exceptions.

(i) An LEA may demonstrate compliance with paragraph (b)(1)(ii)(A) of this section districtwide or on a grade-span basis.

(ii) An LEA with only a single school or only a single school per grade-span does not have to meet the compliance requirements in paragraph (b) of this section, except paragraph (b)(1)(ii)(B).

(iii) For purposes of demonstrating compliance with paragraph (b)(1)(ii)(A) of this section, an LEA may exclude--

(A) A school that enrolls fewer than 100 students; and

(B) Supplemental State or local funds expended in any school for programs that meet the intent and purposes of title I, part A.

(4) Transition Timeline.

(i) An LEA must--

(A) Demonstrate to the SEA no later than December 10, 2017 that its current methodology, which the LEA will continue to use in school year 2018-2019, meets the requirements in paragraph (b) of this section; or

(B) Submit a plan to the SEA no later than December 10, 2017 for how it will fully implement a methodology that meets the requirements in paragraph (b) of this section beginning no later than the 2019-2020 school year.

(ii) Prior to either the 2018–2019 or 2019–2020 school year, as applicable under paragraph (4)(i) of this section, an LEA may use either--

(A) The methodology it will use to comply with paragraph (b) of this section; or

(B) The methodology it used for complying with the applicable Title I supplement not supplant requirement in effect on December 9, 2015.