



**THE STATE EDUCATION DEPARTMENT / THE UNIVERSITY OF THE STATE OF NEW YORK**

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November 7, 2016

Mr. James Butler  
U.S. Department of Education  
400 Maryland Avenue SW., Room 3W246  
Washington, DC 20202

Docket ID: ED-2016-OESE-0056

Dear Mr. Butler:

I am writing to provide the comments of the New York State Education Department (NYSED or “the Department”) on the United States Department of Education’s (USDE) Notice of Proposed Rulemaking (NPRM) on Title I-Improving the Academic Achievement of the Disadvantaged-Supplement Not Supplant under the Elementary and Secondary Education Act (ESEA), as amended by the Every Student Succeeds Act (ESSA).

We appreciate and share USDE’s commitment to ensuring that all students – regardless of the school they attend – have equitable access to a high-quality, well-rounded education. We share USDE’s belief that Title I funds cannot serve their intended purpose if State and local funds are not appropriately allocated. We also agree that failure to comply with Supplement Not Supplant hurts those students who are most in need of additional support.

However, the provisions of the Title I Supplement Not Supplant draft rulemaking go well beyond the law’s requirements. The law requires Local Education Agencies (LEAs) to demonstrate that Title I schools receive all of the State and local funds to which they are entitled each year. The law prevents USDE from prescribing a specific funding formula for state and local funds through regulation. The draft rulemaking – including the four “tests” of compliance – imposes conditions on states and LEAs that are confusing, duplicative, burdensome, and may lead to an inappropriate focus on compliance with allocation and expenditure methodologies instead of providing programming that is in the best interest of students.

We request that the USDE give serious consideration to addressing the issues specified below:

## I. Explicit Definitions of Key Terminology

Several sections of the draft rulemaking contain terms and phrases that do not clearly convey USDE’s expectations of the new requirements. Specifically, the following terms and phrases do not provide sufficient explanation or definition to be accurately and/or completely understood by State Education Agencies (SEAs) and/or LEAs:

Section of Proposed Rulemaking	Term or Phrase Requiring More Definition
§200.72(b)(1)(ii) §200.72(b)(2)(iv)(A)	“almost all State and local funds available”
§200.72(b)(1)(ii)(B)	“non-personnel resources”
§200.72(b)(1)(ii)(C)(1)(ii)	“funds-based compliance test”
§200.72(b)(1)(iii)(C)(1)	“high proportion”

If USDE does not clearly define these terms, NYSED is concerned that SEAs and LEAs will establish their own working definitions – leading to significant variability in implementation, even within a state. This variability could significantly compromise efforts to monitor and enforce Supplement Not Supplant provisions.

### Recommendation:

We recommend that USDE either make clear that SEAs have the flexibility to define how these terms will be applied to LEAs within a state or provide explicit definitions of key terms and phrases to ensure that SEAs and LEAs understand how these terms are to be interpreted before an LEA selects a demonstration methodology.

## II. Duplication of Title I Supplement Not Supplant and Title I Comparability Requirements

The Executive Summary of the draft rulemaking states that “The new ESSA statutory language focuses not on costs and services, but on funds.” Based on that assertion, it appears that USDE intends for new Supplement Not Supplant requirements to focus on the allocation of State and local funds to schools. However, it is unclear how USDE expects the draft Supplement Not Supplant requirements to interact with Title I Comparability requirements outlined in ESSA. While the Supplement Not Supplant provision refers to the allocation of resources, the draft rulemaking uses the terms “allocation” and “expenditure” synonymously. This conflates Title I Supplement Not Supplant with Title I Comparability in ways that are unclear, duplicative, and potentially contradictory. For example:

- The draft rulemaking allows LEAs to allocate State and local funds to schools based on a district-wide resource formula. As part of a resource formula, LEAs must use the average salaries for each category of staff instead of actual salaries

by building for each personnel type. This approach speaks to equivalence of personnel among schools in a manner that is already addressed under Comparability. Specifically, ESSA allows an LEA to meet Title I Comparability requirements by demonstrating that it has established and implemented (1) a district-wide salary schedule; (2) a policy to ensure equivalence among schools in teachers, administrators, and other staff; and (3) a policy to ensure equivalence among schools in the provision of curriculum materials and instructional supplies.

- As part of the resource formula, LEAs must also use the district average per-pupil expenditures for non-personnel resources. However, when determining per-pupil rates, it is unclear whether an LEA is expected to use the average (1) projected per-pupil expenditures for the upcoming year; (2) actual per-pupil expenditures from the current school year; or (3) actual per-pupil expenditures from the most recently completed school year. NYSED is concerned that mandating LEAs to use current or previous year's rates may not adequately reflect changes in school demographics or student needs within a school or group of schools.
- The draft rulemaking allows LEAs to distribute State and local funds using any formula that results in Title I schools spending an amount of State and local funds per pupil that is equal to or greater than the amount of State and local funds spent per pupil in non-Title I schools. The interchangeable use of "allocation" and "expenditure" creates the following concerns for NYSED:
  - Even if an LEA allocates State and local resources in an equitable and appropriate manner, there are numerous factors that could limit an LEA's ability to ensure that actual expenses in Title I schools are equal to or greater than expenses in non-Title I schools. Factors such as long-term leaves of absence by teachers or the mid-year departure of a student requiring high-cost special education services could dramatically reduce the amount of State and local funds actually spent in a Title I school.
  - An LEA does not need to include unpredictable changes in student enrollment or personnel assignments when determining Comparability. However, an LEA would need to account for those unpredictable changes if Supplement Not Supplant requires that expenditures in Title I schools are equal to or greater than expenditures in non-Title I schools.
  - If an LEA that appropriately allocates State and local funds must also expend those funds according to this methodology, LEAs may arbitrarily expend funds in some schools and/or restrict spending in other schools, based not on student needs, but to meet expenditure obligations.
- To account for small variations from year to year, the draft rulemaking considers an LEA to be in compliance if Title I schools receive at least 95% of the average State and local funds received by non-Title I schools. However, the draft rulemaking only addresses minimum funding levels in Title I schools, but is silent on maximum State and local funding in Title I schools. However,

under Comparability, an LEA can only receive Title I funds if it demonstrates that State and local funds allocated to a Title I school are used to provide services that are “at least comparable” to services in non-Title I schools. Similarly, the statute states that if all schools within an LEA are to be served with Title I funds, the use of State and local funds must be used to provide services that are “substantially comparable” in each school. Title I and non-Title I schools have historically been considered comparable as long as each school’s per pupil expenditure or student-to-staff ratio is between 90% and 110% of the district-wide or grade-span average. Because of the discrepancy between the draft rulemaking and the statute for Comparability, a Title I school that was provided more than 110% of the average district or grade-span per pupil amount would meet Supplement Not Supplant requirements, but not Comparability, despite allocating funds to schools using the same per pupil methodology.

#### Recommendation:

We recommend that USDE clarify how the draft Supplement Not Supplant requirements are intended to interact with Title I Comparability requirements. Specifically, USDE should clarify its expectations related to the allocation of State and local funds compared to expenditure of State and local funds.

We also recommend that USDE simplify the proposed Supplement Not Supplant regulations by only requiring LEA’s to: (1) distribute State and local funds to all schools using any methodology that does not take into account the school’s Title I status; (2) publish the selected methodology in a format that parents and the public can understand; (3) demonstrate to the SEA that the methodology has been implemented with fidelity; and (4) consider, as applicable, the effect of their methodology on Comprehensive Support and Improvement and Targeted Support and Improvement schools when developing improvement plans. These adjusted requirements are consistent with both the statutory language of ESSA and the assertion that the new statutory language focuses on funds.

### **III. Distribution of State and Local Funds Based on Characteristics of Students**

The draft rulemaking allows LEAs to demonstrate compliance with Supplement Not Supplant by allotting State and local funds based on student characteristics associated with educational disadvantage, including students living in poverty, English language learners, and students with disabilities. In concept, this weighted student formula is similar to New York City Department of Education’s Fair Student Funding Formula. However, unlike New York City’s Fair Student Funding Formula, the draft rulemaking focuses only on student characteristics associated with educational disadvantage. The draft rules do not account for other factors such as instructional models.

While it is clear that LEAs will have the discretion to identify other groups of students associated with educational disadvantage (e.g. students in temporary housing, foster care students, migrant students, neglected students), it is unclear whether LEAs

will have the discretion to consider other factors when allocating State and local funds on a weighted basis. For example, it is not clear whether an LEA could utilize a weighted funding formula to support students attending a school with a specialized instructional model or a prekindergarten program since those factors are not directly associated with educational disadvantage. It is also not clear if an LEA could differentiate funding to schools within a common grade span group. The answers to those questions have implications for numerous LEAs across New York State that operate specialized program schools such as New York State Pathways in Technology (NYS P-TECH)/early college high schools, Career and Technical Education (CTE) high schools, and Transfer high schools.

The answers to those questions also have implications for how LEAs use State and local funds to support Comprehensive and/or Targeted Support and Improvement Schools. Without some flexibility to consider a school's accountability status, the proposed regulations may discourage districts from allocating State and local funds to support school improvement efforts in the lowest-performing schools. The lack of an incentive to invest State and local funds in those schools may significantly hinder the implementation and/or long-term sustainability of critical improvement efforts.

#### Recommendation:

We recommend that USDE allow LEAs the discretion to select factors beyond student characteristics associated with educational disadvantage to be used in a weighted student funding formula methodology. Specifically, LEAs should be given the flexibility to use a weighted funding model to allocate State and local funds to schools based on factors such as, but not limited to, variations in instructional models within a common grade span grouping and school accountability status.

#### **IV. District-Level Expenditures**

The draft rulemaking allows an LEA to exclude State and local funds spent on district-wide activities from each of the compliance tests. Notwithstanding the need for clarification of the phrase "almost all," it is unclear how specific cost categories should be allocated by an LEA. The lack of clarity about what must or may be considered a district-level cost raises concerns because it may incentivize LEAs to:

- Reflect building-level costs at the central level in order to comply with these requirements. This could result in arbitrary decisions about whether to attribute resources such as shared instructional coaches or professional development vendors to a particular school or identify them as a district-level expense.
- Reflect district-wide costs at the building level in order to comply with these requirements. This could result in arbitrary decisions about assigning expenses such as employee benefits, transportation, and shared summer programming to schools instead of classifying them as district-level expenses.

Such practices will diminish transparency and contribute to inefficient and ineffective monitoring of Supplement Not Supplant requirements.

Recommendation:

We recommend that USDE specify acceptable thresholds for the allocation of “almost all” State and local funds. We also recommend that USDE identify allowable categories of both district-wide and school-level activities and provide guidance on how expenses should be allocated to each of those categories.

**V. Limiting Principal Control Over School Personnel Decisions**

The draft rulemaking clearly intends to create greater transparency in how an LEA allocates State and local funds to its schools. However, in seeking to provide greater transparency, the compliance tests provided by USDE may inadvertently undermine effective educational practice by limiting or removing a building principal’s capacity to allocate resources – particularly the hiring and assigning of school personnel – based on identified student needs. Even though the draft rulemaking contains language stating that the forced or involuntary transfer of any school personnel will not be required, NYSED is concerned that the compliance tests proposed by USDE may discourage districts from giving building principals discretion over school staffing decisions in favor of controlling school-level personnel decisions at the district-level to comply with the new Supplement Not Supplant requirements.

Recommendation:

We recommend that USDE specify that school personnel decisions should be made primarily in response to identified needs of the students served in each school building.

If I can be of any further assistance, please do not hesitate to contact me at (518) 474-5844 or [commissioner@nysed.gov](mailto:commissioner@nysed.gov).

Sincerely,



MaryEllen Elia  
Commissioner

c: Beth Berlin  
Jhone Ebert  
Angelica Infante  
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