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MEMORANDUM

TO: Interested Parties
FROM: Penn Hill Group
DATE: August 31, 2016
SUBJECT: Notice of Proposed Rulemaking on the Title I Supplement, Not Supplant Requirement

Today, the U.S. Department of Education (ED) published a notice of proposed rulemaking (NPRM) on regulations for the Elementary and Secondary Education Act (ESEA) Title I “supplement, not supplant” (SNS) requirement. This notice, which should be published in the Federal Register within the next few days, is available [here](#). Public comments will be due 60 days after the NPRM is published in the Federal Register. The purpose of this memo is to summarize the proposal.

Background

Under section 1118(b) of the ESEA, as reauthorized by the Every Student Succeeds Act (ESSA), a State educational agency (SEA) or local educational agency (LEA) may use Title I funds only to supplement (and may not supplant) the funds that would, in the absence of Title I, have been available from State and local sources for the education of students participating in Title I.

Under an amendment made by ESSA, an LEA must demonstrate compliance with the SNS requirement by demonstrating that the methodology it uses to allocate State and local funds ensures that each of its schools receiving Title I funds (each “Title I school”) receives all of the State and local funds that it would otherwise receive in the absence of Title I. The new law also provides that no LEA may be required to identify any particular cost or service as supplemental, or provide Title I services through a particular instructional approach or in a particular instructional setting. Further, the statute prohibits the Secretary of Education from prescribing the specific methodology that an LEA may use to allocate State and local funds to its Title I schools and gives LEAs two years, after the date of enactment of ESSA, to come into compliance with the revised requirements of the law.

The law also requires the Secretary to submit proposed regulations on SNS to a negotiated rulemaking (neg-reg) process. Pursuant to that requirement, in March and April of this year, ED convened a neg-reg committee to consider regulations on SNS, as well as on Title I assessment regulations. This committee failed to reach consensus on regulations for SNS. Under the law, if a neg-reg committee does not reach consensus, ED may issue proposed regulations, but only after first (at least 15 days prior to publication) submitting them to the Congressional authorizing committees for comment. ED submitted its proposed SNS regulations to Congress last month and, today, released its proposal.

Content of the Proposal

Four Options

The proposed regulations would give LEAs four options for annually demonstrating compliance with the SNS requirement. For the first three options, an LEA would be required to distribute “almost all” its State and local funds to individual schools in order to be in compliance. The four options are:

- *Distributing State and local funds based on the characteristics of students* – That is, using a per-pupil funding formula under which certain categories of students (students living in poverty, English learners, students with disabilities, and other groups of students that the LEA determines are associated with educational disadvantage) generate higher per-pupil amounts, and then demonstrating that each Title I school receives all of the funds it is entitled to under the formula.
- *Distributing State and local funds based on the average costs of personnel and non-personnel resources* – Demonstrating that the State and local funding received by each Title I school is at least: (1) the average districtwide salary for each category of school personnel, multiplied by the number of school personnel in each category assigned by a districtwide formula to the school plus (2) the average districtwide expenditure for non-personnel expenditures, multiplied by the number of students in the school.
- *Distributing State and local funds based on an SEA-established compliance test* – Distributing the funds in a manner chosen by the LEA that: (1) is applied district-wide; and (2) meets an SEA-established a “funds-based compliance test” that is as rigorous as the first two approaches and has been approved through a Federal peer-review process. The proposed language provides that such an approach would be considered at least as rigorous as the first two options if it provides substantially similar amounts of State and local funding for Title I schools as the first two approaches.
- *Distributing State and local funds using another methodology that results in each Title I school receiving, per pupil, at least 95 percent of the average per-pupil funding received by non-Title I schools.* Under this option, referred to in the language as the “special rule,” an LEA may, in calculating expenditures: (1) exclude schools with fewer than 100 students; and (2) exclude non-Title I schools that receive additional funding to serve a high proportion of students with disabilities, English learners, or students from low-income families (when those funds disproportionately affect the district’s average allocation to non-Title I schools).

Flexibilities

The proposed rules would provide LEAs with several “flexibilities” in meeting one of the four tests. These flexibilities are:

- An LEA may demonstrate compliance with SNS on a district-wide or grade-span basis.
- An LEA is not required to demonstrate compliance if it has only a single school or for any grade span in which it has only a single school.
- An LEA may exclude from SNS calculations any State or local funds expended for programs that meet the intent and purposes of Title I.

- An LEA may also exclude from SNS calculations State or local funds that it spends for district-wide activities, so long as: (1) each Title I school receives a share of those activities equal to or greater than the share that it would receive if it were not a Title I school; and (2) the LEA distributes to schools almost all of the State and local funds available to it for current expenditures.

Transition Timeline

Under the proposed rules, by December 10, 2017 each LEA would either:

- Demonstrate to its SEA that has a methodology for meeting the SNS requirements that it will use no later than the 2018-2019 school year; or
- Provide to its SEA a plan for meeting the requirements no later than the 2019-2020 school year.

Prior to the 2018-2019 or 2019-2020 school year, as applicable, an LEA could demonstrate compliance with SNS using either the method it selects under the new regulations or the method it used to demonstrate compliance under the old, pre-ESSA SNS rules.

Regulatory Impact Analysis

When a regulation is proposed that is deemed “significant” (based on its anticipated impact on the economy), the issuing agency must undertake additional analyses, including an estimation of the anticipated costs. In this NPRM, ED estimates that 90 percent of LEAs are presently in compliance with the fourth option described above. Therefore, some 1,500 LEAs currently would not be able to demonstrate compliance and, as a result, would have to either redistribute a total of \$800 million in State and local funds or provide a total of \$2.2 billion in additional state and local funds to Title I schools.

Question Posed by ED

In addition to setting forth and describing the proposed regulations, the notice includes the following question on which ED is particularly seeking public comment:

“Whether we should expand the flexibility available to an LEA that chooses the special rule [the option allowing an LEA to comply with supplement, not supplant by providing each Title I school with a per-pupil allocation of State and local funding that is at least 95 percent of the average amount received by non-Title I schools], including to expand the categories of expenditures that disproportionately affect the amount of State and local funds allocated on average for non-Title I schools...”