



November 3, 2016

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 Foundation for Excellence in Education (ExcelinEd) on the U.S. Department of Education's proposed regulations governing the supplement, not supplant requirement under the Elementary and Secondary Education Act (ESEA) as reauthorized by the Every Student Succeeds Act (ESSA). ExcelinEd is a national nonprofit organization focused on helping states build education systems that ensure each child achieves his or her full potential.

While ExcelinEd shares the Department's commitment to making ESSA a vehicle for achieving better educational outcomes for all students and for ensuring greater equity in education programs and services, we do not support the proposed supplement, not supplant regulations in their current form.

We believe that the intent of the supplement, not supplant provision is that local educational agencies (LEAs) not use ESEA Title I funds to replace the State and local funds that a school would otherwise receive, and thus that LEAs must distribute State and local funds neutrally with regard to whether or not a school is a Title I school. The proposed regulations would go well beyond that objective. If the Department ultimately decides to regulate on supplement, not supplant, we recommend the Department modify the option permitting weighted student formulas and withdraw all other options.

We call on the Department to: (1) withdraw this regulatory proposal; (2) give States the responsibility and flexibility to enforce the supplement, not supplant neutrality requirement; and (3) continue its work with States, which we have previously endorsed, on making school spending more transparent.

Our more detailed comments on the proposed regulations follow.

The proposal is inconsistent with statutory language and Congressional intent that States and LEAs have greater flexibility in achieving resource equity and demonstrating compliance with the supplement, not supplant requirement.

Under previous law, LEAs were required to comply with supplement, not supplant for schools operating Title I Targeted Assistance Programs by making subjective judgments on whether individual activities and services were supplementary. This requirement led to unwise practices (such as unnecessarily pulling Title I children out of the classroom) and needless paperwork. For schools operating Title I programs on a schoolwide basis, LEAs instead had to demonstrate that a school was receiving the State and local resources that it would have received in the absence of Title I, a much more straightforward calculation, and one on which the Department had never issued prescriptive regulations.

To simplify administration and eliminate the negative incentives created by the earlier rules, Congress, in its reauthorization of ESEA, decided that all Title I programs should be subject to the rules that previously applied only to schoolwide programs. Section 1118 of the statute specifies that, in order to be in compliance with supplement, not supplant, an LEA must ensure that its Title I schools receive all the State and local funds that they would have received in the absence of Title I. We believe that this means that an LEA must allocate its State and local funds without taking into account a school's Title I status (and thus penalizing a school for its receipt of Title I funds).¹ For example, an LEA could not provide funding supplements to its non-Title I schools but not its Title I schools, or reduce funding only to its non-Title I schools.

The Department should rely on ESSA's financial transparency requirements to promote spending equity rather than promulgating regulations on the supplement not supplant provision.

As indicated in our comment letter in response to the Department's proposed regulations on accountability and state plans (dated July 29, 2016), ExcelinEd strongly supports ESSA's requirement that districts report actual expenditures by school and encourages the Department to strengthen its proposed regulations to include all expenditures benefiting students in each school, whether allocated at the school level or not. This provision will shed a spotlight on spending inequities, without imposing excessive restrictions on LEA spending.

If the Department does issue final regulations, allowing districts to show compliance with the supplement, not supplant requirement by using a weighted student funding formula could be workable, but only with a significant change.

Proposed §200.72(b)(1)(ii)(A) would allow LEAs to demonstrate compliance with the supplement, not supplant requirement by distributing State and local funds based on the characteristics of students under districtwide per-pupil formulas that give extra weight to students living in poverty, English learners, students with disabilities, and other groups of students with educational disadvantages. ExcelinEd has long encouraged the development and implementation of weighted student formulas and, if the Department decides to move forward with a supplement, not supplant regulation that specifies methodologies for allocation of State and local funds, we believe that allowing districts to show compliance with the supplement not supplant requirement through use of a weighted student formula could be workable.

However, we recommend that the regulatory language allow districts to use funding weights that are rationally related to student need and which do not discriminate against students in Title I schools, not just those for student groups "associated with educational disadvantage." This change would allow

¹ Notably, the Senate Health, Education, Labor, & Pensions committee included language clarifying Congressional intent for the supplement, not supplant requirements in a committee report accompanying S. 1177, Every Child Achieves Act. The Senate bill language served as the basis for the final law language:

"[T]he bill removes requirements in regulation that force LEAs to identify individual costs or services as supplemental. Instead, the way in which state and local resources are allocated to a school must be examined as a whole to ensure that the methodology does not account for Title I funds the schools will receive. This language will provide more flexibility for schools to utilize Title I funds to implement comprehensive and innovative programs. LEAs will be able to demonstrate [supplement, not supplant] compliance in a much less burdensome and restrictive way, while still making clear that Federal dollars are supplemental to State and local dollars and not used to replace them."

districts to weight K-3 students, for example, to ensure adequate investment in early elementary instruction.

The three other options for demonstrating compliance with supplement, not supplant are fundamentally flawed and should be withdrawn.

Under proposed §299.72(b)(1)(ii)(B), an LEA could meet the requirement if it distributed State and local funds to its schools based on a consistent districtwide personnel and non-personnel resources formula such that each Title I school receives at least the sum of: (1) the average districtwide salary for each category of personnel multiplied by the number of personnel in each category assigned by the formula; and (2) the average district-wide expenditure for non-personnel resources, multiplied by the number of students in the school. ExcelinEd does not support this option for demonstrating compliance. Unlike a weighted student funding formula, the use of a staffing formula can result in inequity between schools due to the fact that if a student moves to another a school, the funding does not necessarily follow him or her.

Under §200.72(b)(1)(ii)(C), an LEA could use a “State-established compliance test” if doing so would provide substantially similar State and local funding to Title I schools as would be the case under two of the federally prescribed options and if such a test were approved through a Federal peer-review process. If we understand this correctly, any State wishing to create a State-established test would actually have to develop three separate methodologies, one for each of the two federally prescribed options and one for the State option, and then run simulations, on a district-by-district basis, to determine whether they produce similar results. The work products from this extensive analysis would then move to the Department’s peer reviewers, with feedback to be provided at a later time. Although we support the general notion of giving States leeway to implement supplement, not supplant in a manner sensitive to local conditions, we do not believe this option will be workable.

Under the “special rule” in §200.72(b)(1)(iii), an LEA would demonstrate compliance by providing each Title I school with at least 95 percent of the average per-pupil allocation as is received by non-Title I schools. This option is also unacceptable because, among other reasons, it could result in a school principal having to get district approval every time he or she hires a teacher, for fear of upsetting the expenditures between Title I and non-Title I schools.

I thank the Department for the opportunity to comment on its proposal. If you have any questions or need any assistance, please do not hesitate to contact me.

Sincerely,



Patricia Levesque
Chief Executive Officer
Foundation for Excellence in Education