

## **Docket ID ED-2016-OESE-0056: Title I – Supplement not Supplant**

**October 28, 2016**

South Dakota Department of Education (SD DOE) appreciates the opportunity to comment on proposed rules relating to supplement not supplant regulations under the Every Student Succeeds Act (ESSA). South Dakota has reviewed the proposed regulations and asked for feedback from districts that would be most affected by these proposed rules. The proposed regulations were sent out to affected districts and each option was discussed and analyzed by stakeholders during a conference call on October 20, 2016.

SD DOE remains committed to advancing equity for all students to ensure that every child, regardless of background, is provided with an educational experience that will prepare them for college, careers, and life. SD DOE appreciates the focus of ESSA and its reauthorization to help ensure this happens in a manner that gives states the flexibility to design systems and supports needed to address equity issues at the local level. The law proposes to address funding in the same way, by seeking to ensure via the supplement not supplant provision that Title I schools receive the funding they would have otherwise received absent these federal dollars. However, as written, some of the provisions are untenable in a small rural state and would push districts to make decisions based on arbitrary fiscal compliance rather than student needs.

Throughout discussions with our school districts, the opinion was consistent. The proposed rules, as drafted, do not recognize the realities of how districts budget state and local dollars or how staffing and program decisions are made. We believe that if implemented as written, more schools and children would be negatively impacted than would be “fixed.” Further, the complexity of the regulations may lead to less transparency for stakeholders.

**As written, the regulations may make LEAs feel pressured to make decisions based on an arbitrary “test” of supplement not supplant, and not based on student needs.**

The draft regulations would require school districts to make programming changes based on a supplement not supplant compliance test rather than basing decisions on what is best for students. For example, many districts in South Dakota do not have the student population or the resources to offer specialized services full time at every building, so it is not uncommon to create one strong program and center it at one building. The district then provides opportunities for transportation or open enrollment of students from neighboring districts to ensure that students with specific needs have access to high quality, full-time staff who specialize in meeting those unique needs. These programs necessarily have very different cost bases and may have lower student to teacher ratios, creating perceptions of “per-student” resource inequities in the buildings in which these programs are based.

Under the proposed rules, LEAs may feel pressured to modify or eliminate programs such as Career and Technical Education (CTE) schools and immersion schools in an attempt to equalize funding. Centralized

programming at one building that allows districts to focus on specific student needs (such as speech, occupational, or physical therapy) may be modified, decentralized, and even watered down in an attempt to equalize funding in order to meet federal requirements. Making decisions about special programs, which are often funded using state and local level dollars, based on a supplement versus supplant test instead of decisions about how best to serve student needs may result in unnecessary shifts in resources that would diminish the services South Dakota's districts are able to provide to unique populations.

Furthermore, forcing districts to shift resources that may include staffing, based on an arbitrary funding formula, would impact students and would also impact teacher morale. In a time of nationwide teacher shortages, felt dramatically in South Dakota, where many of our rural schools are particularly struggling to recruit teachers, these rules seem contradictory to efforts to attract and retain highly qualified teachers and staff.

Additionally, the proposed regulations appear to have ramifications that would affect even non-Title I schools. Even non-Title I eligible schools need repairs or improvements from time to time. Yet, with the tests envisioned in the regulations as written, LEAs may be forced to scale back or forgo entirely capital improvements to non-Title I school buildings. Because of the strictures in place, significant capital improvements would appear to throw out of balance funding between Title I and non-Title schools. This limits the ability for LEAs to spend funding on these projects for fear of being out of compliance and greatly limits LEA choices for financing.

Indeed, the regulations as written appear to go beyond what is in ESSA. Section 1118(b) of ESSA specifies that LEAs are to be responsible for ensuring that funding is supplemental, and that it is a LEA responsibility to "determine the methodology used to allocate State and local funds" to ensure this. The statute is very clear that the decision-making authority lies with the LEA. This allows LEAs the latitude to determine how to comply with the requirement in a manner that prioritizes the local needs of students as programming decisions are being made. While the regulations as proposed certainly could be suggestions offered as part of a non-regulatory guidance package, or even a "best practices" document, the listing of three or four specific methodologies is overly prescriptive and goes beyond the intent of the law.

South Dakota would encourage that regulations be changed to require:

- LEAs distribute state and local funds in a manner that does not take Title I participation into account;
- LEAs be required to publish their methodology for distribution;
- LEAs be able to demonstrate said methodology is followed; and
- LEAs with schools in comprehensive or targeted support be required to consider the effect of their methodology on these schools when creating their support and improvement plans.

Regulations such as the above would continue to promote equity and transparency and would work in conjunction with the equity tools and requirements set forth in ESSA. They would also provide important guardrails to protect our many Title I schools in the state. Were the draft regulations

modified as suggested, it would allow LEAs the flexibility needed to make decisions that are right for their schools and students, and ultimately to improve programming as needed in both Title I and non-Title I schools.

**The regulations are unclear in what is meant by the term “almost all”, which will cause confusion and make spending less transparent.**

Proposed 200.72(b)(1)(B)(ii) states that LEAs must allocate to schools, “almost all State and local funds available to the LEA.” Without a consistent definition of this terminology, interpretations are likely to widely vary. It is unclear whether “almost all” is to include things such as restricted dollars to be used for a specified purpose. It is also unclear whether things like bonding, pension and benefits owed to retirees, or even debt service are included in this. Should an LEA pay for these costs centrally instead of at the school level seems to conflict with the regulation’s mandate that “almost all” funds be allocated to schools, however allocating them arbitrarily to schools seems to run contrary the intent of the rule as they are not paying for school-level services, but are meeting other LEA obligations.

Additionally, in a rural state, many services are procured centrally. The regulations do not discuss how to handle costs that perhaps could theoretically be assigned at the school level, but in reality have very little to do with actual services given to students. Benefit costs are one clear example that falls into this category. Benefit costs vary significantly across schools and even across individuals. One individual may be covered by a spouse’s healthcare plan which minimizes the cost to the LEA, while another may carry their entire household on the healthcare plan which creates a significant cost for the LEA.

Similarly, transportation costs may vary greatly or be shared between buildings in smaller rural districts, and are likely to vary based on residential density differentials. Allocating costs such as benefit or transportation to schools could artificially distort school-to-school spending calculations by incorporating costs that have little bearing on the quality of a student’s educational experience. Especially in the instance of transportation services, allocating extra dollars to transport students to programs best able to meet their needs, or to more diverse educational settings, often costs more and could result in a school that is doing the right thing for its students being labeled out of compliance with the proposed regulation.

LEAs also spend money at the central level to support programs that are not tied to individual schools, to procure services they share across schools, and in small rural states, sometimes even to share across districts. This can include programming run in community buildings and programs that are open to students outside the normal school attendance zone. The regulations are unclear as to how or where LEAs should be allocating these costs to comply with the “almost all” provision of the regulations. If clarity is not given in this area, LEAs may choose to cut back on many of these supplemental programs to comply with the proposed regulations. The proposed regulations necessarily need more clarity to define what an exemptible “districtwide expense” is versus a non-exemptible “current expenditure” as seen in section 200.72(b)(2)(iv).

**The per-pupil formula option is too narrow.**

The per-pupil funding option assumes that LEAs will not be paying for school-based costs at a central level, however LEAs often pay for costs centrally that are shared across multiple schools – such as school security, nursing, transportation, or summer school. Presumably, continuing to pay for these costs centrally or participating in cooperative agreements to provide services such as special education services would not comply with the proposed regulations unless these costs can be exempted, which the rules do not make clear.

Neither do the rules provide clarity as to whether or not LEAs could use a formula that generates additional funding for students with characteristics not based on educational disadvantage such as gifted and talented, early learning, or career and technical education status.

Given these issues, it is quite possible that a LEA already using a per-pupil formula may find themselves out of compliance with the rules because of special programming or centralized services being provided. This will likely disincentivize many LEAs from using this approach.

**The resource formula option is unclear and has the potential to undermine best practices.**

In addition to the above, the details provided in the proposed regulations leave many ambiguities that LEAs must wrestle with. For example, it is unclear what items are included in salary. Even if benefits are excluded, items such as stipends for additional work, recruitment incentives, or performance pay are not clearly to be included or excluded. In smaller, rural states it is not uncommon for teachers or staff to be shared across schools, and some staff such as administrators, counselors, and nurses often split their time based on need, which may mean that their salaries cannot be allocated to a building level in advance. It also remains unclear where costs such as long-term substitute teachers and non-personnel resources fit into this option.

This option also lacks clarity in what it means to have a consistent districtwide formula. For example, would it be allowable for a LEA to vary allocations based on a school's programming, such as an autism specialist program or a language immersion program? The rule also ignores the impact of phased implementation of projects. Often, projects and purchases take multiple years to implement, causing school-to-school spending to vary from year-to-year. Over some longer period of time, spending may equalize, but the presence of a large building improvement project or new intervention program may drive costs for one school up in any given year. As discussed above, these increased costs would appear to make an LEA out of compliance.

As written, this rule may also incentivize hiring practices that are focused on meeting spending thresholds instead of hiring the teacher best suited to meet student needs. As written, the regulations limit a LEA's ability to work through collective bargaining agreements and may result in decisions being made that would require renegotiation of existing agreements. Those teachers who have been in the field longer typically are more expensive teachers, and there is a hidden assumption in the regulations as written that this will automatically make them "better" teachers. However, a younger teacher with more specialized training, who is "less expensive" may be better suited to meet the educational needs of students in a given program. Principals should have the ability to make this hiring determination based on student need without the pressure to hire simply to meet spending thresholds. If a LEA

chooses to hire a lower cost teacher in order to meet the supplement not supplant test, the action could also put the LEA in a position of conflict with laws that do not allow age discrimination in hiring practices.

Many LEAs do not operate Title I programs at every school and, as written, this rule could also hurt these schools. Although schools with at least 35% of their students living in poverty are eligible for Title I funds, in a minimally funded state, many LEAs may find that the Title I dollars available are not enough to serve all eligible schools effectively. In practice, this means that eligible schools could lose state and local resources should LEAs have to increase spending in Title I schools to comply with proposed regulations. The proposals in 200.72(b)(1)(ii)(B) make no exceptions for non-Title I schools that are Title I eligible.

**The State-established compliance option is complicated and vague.**

The flexibility afforded to states to create their own options is appreciated, but is unclear and overly complex as written. Per the proposal, States can develop a “funds-based compliance test” for meeting supplement not supplant only if the test provides substantially similar amounts of funding at the State and local levels for Title I schools. This would be the case under the first two federally defined options and only if such a test is approved through the Federal peer-review process. No definitions for “funds-based compliance test” or “substantially similar” have been given, and it appears that an SEA wanting to create its own test would need to run LEA-by-LEA simulations for each of the federally recognized options as well as the State option to establish similarity in advance of the peer review process.

This greatly and unnecessarily increases the burden on the State, especially in light of new accountability and oversight responsibilities required of SEAs under ESSA.

**The “special rule” is ambiguous and appears to be overly narrow, not accounting for a wide range of factors that impact school spending.**

This “special rule” allows LEAs to use any methodology that results in spending at least as much in Title I schools as the LEA spends on average in non-Title I schools (200.72(b)(iii)). The exceptions in this option are appreciated, but may not do enough to protect students. For example, certain non-Title I schools are able to be excluded if the school is receiving additional funding to serve “a high proportion of students with disabilities, English learners or students from low-income families,” but has no similar provisions for other educationally disadvantaged students that might generate extra supports such as homeless students or students in foster care.

The regulation also does not define “high proportion”, so it is unclear which schools would be eligible for exclusion. For example, LEAs that choose to house special education programs for students with severe disabilities in a non-Title I school to allow students needing self-contained classrooms the opportunity to engage with students in a general education setting throughout the day may have a much higher spending level at the school because of the presence of the program. Furthermore, this exception ignores that non-Title I schools housing even one or two students with the most severe disabilities, could drive much higher spending at the school.

Neither does the rule explain what methodology should be used in a district where all schools are participating in Title I programs.

This rule also does not take into account the fact that costs vary based on programming decisions that are already being made to promote educational equity. Certain programs, including specific CTE programs such as diesel mechanic or welding programs, are inherently more expensive than others, so an LEA may choose to establish a program at one school and allow students from other schools to participate in the program. If the program is set up in a non-Title I school, it can skew the per-pupil spending ratio even if the programming is open to students from all schools. This is a common case in South Dakota where very flexible open enrollment policies and laws are used to allow students to have access to well-rounded educational opportunities not otherwise possible in our small districts.

It is also concerning that the proposed regulations have the potential to disincentivize initiatives whose costs cannot be controlled centrally such as course choice, dual-credit, or performance pay initiatives that LEAs may otherwise choose to explore.

**The consequences for non-compliance are unclear.**

The regulations make it clear that SEAs are responsible for monitoring and enforcing LEA compliance with supplement not supplant rules, but the proposed regulations do not address the consequences for non-compliance.

The proposed rule appears to indicate that the current year data is to be used for compliance purposes, but this would not be final spending data. Using prior year data would make more sense for rules based on actual spending levels, because actual spending cannot be determined unless spending is final. Since these rules appear to specify current year data, it is unclear what would, or should, happen to an LEA whose planned allocations were in compliance but whose actual allocations fall out of compliance because of changes in needs, enrollment, or staffing during the fiscal year. Likewise, if compliance is to be measured on prior year data, unplanned events need to be accounted for.

**The foundational data used in the draft regulation is not validated data.**

The per-pupil spending amounts relied heavily on in the draft regulation comes from the Civil Rights Data Collection (CRDC), which is unvalidated. There is little evidence to show whether the CRDC data actually captures all spending that benefits a school including centrally procured services, especially given that many LEAs are using a centrally based, as opposed to a site-based accounting model. It is disconcerting that major policy decisions and regulations would be made relying solely on the CRDC data.

**As written, the regulations greatly increase administrative burden at the LEA and SEA levels.**

All of the methodologies proposed would create additional administrative burden, especially in small, rural states in which services are often centralized at the district level. Simply choosing a methodology will increase administrative costs for LEAs.

Demonstrating compliance would require districts to run multiple calculations to determine which methodology is best for the district and then reassign staff and reallocate expenditures accordingly. While a few of South Dakota's school districts practice site-based accounting, it was agreed by all affected by the proposed rules that they would need to hire an additional administrative position to address the increased requirements. Finding funding to hire additional staff would have a direct, negative impact on students, as districts would have to cut from somewhere else. Again, this negates the ability of the district to make decisions based on the needs of students. This also is contrary to the claims that ESSA is meant to simplify and reduce administrative burden.

Without clearer definitions of "almost all" and exemptible "districtwide expenses", it is impossible to know whether or how well the "almost all" requirement aligns to generally accepted accounting principles. This leaves it up to individual auditors and oversight officials to create definitions, leading to enforcement challenges, and variable enforcement across LEAs and states, and increases the burden on an LEA to demonstrate compliance. It may also result in different standards and tests for Title I part A, and other federal programs not covered by these regulations.

As written, the regulation places great additional burdens on the state as they will increase the State oversight burden by requiring additional State's technical assistance to LEAs and require additional State compliance monitoring to ensure the LEAs are in compliance with this complex regulation.

In conclusion, the rules as proposed do not adequately take into account the needs of a rural state that utilizes many centralized services, is facing widespread concerns about teacher shortages, and relies on cooperative agreements between schools to ensure that students have access to needed resources. South Dakota, along with many rural states, looks very different from large urban centers that have the ability to offer more services and programs at multiple schools. A simple, possible solution would be to adjust the special rule provision to exclude schools that enroll fewer than 600 students or LEAs that enroll fewer than 8000 students.

Should these rules move forward, states and LEAs must be afforded additional administrative dollars and additional guidance if they are to ensure that the requirements can be effectively enforced.