

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 Council of Chief State School Officers (CCSSO) on the U.S. Department of Education's (ED) proposed regulations for the "supplement, not supplant" requirement under Title I of the Elementary and Secondary Education Act of 1965 as amended by the Every Student Succeeds Act (ESSA). CCSSO is the nonpartisan, nationwide, nonprofit organization of public officials who head departments of elementary and secondary education in the states, the District of Columbia, the Department of Defense Education Activity, the Bureau of Indian Education, and five U.S. extra-state jurisdictions.

We share the Department's commitment to educational equity. As state leaders in education, our goal is to ensure that all students—regardless of background—are prepared for success in college, careers, and life. We cannot accomplish this until we create equitable education opportunities for every child, no matter their race, ethnicity, income level or where they attend school. This is why CCSSO strongly supported the passage of ESSA. This reauthorization reinforced the original purpose of the Elementary and Secondary Education Act – to "bridge the gap between helplessness and hope" for the nation's children.

ESSA not only reinforces this aspiration, but it also makes it possible by giving states the flexibility they need to work with leaders at the state and local levels to create equity in education. The law strikes the appropriate balance by setting a high bar to ensure all kids receive an equitable education while making sure those closest to students have the flexibility they need to make critical decisions on how to reach this goal. For example, the law makes sure every child is tested at least once a year in reading and mathematics in grades 3-8 and once in high school, but allows state and local leaders the authority to determine the best way to conduct those assessments. The law sets clear parameters for accountability systems, but gives every state the ability to use multiple measures that best meet the needs of students in their state.

The law treats funding in the same way. Through the supplement, not supplant provision in Title I, the law seeks to ensure that Title I schools receive the state and local funding they would have received absent Title I, but it does not prescribe a specific funding formula for state and local funds (and prevents the Department from prescribing one through regulation). As state leaders in education, we know that funding is a critical part of ensuring an equitable education for every child. At the same time, we recognize states haven't always gotten this right in the past. It is a serious concern and one that state chiefs are committed to addressing. We are seeing substantial progress in our states. For example, Dr. Steve Canavero, Superintendent of

Public Instruction in the State of Nevada, noted in recent testimony during a related hearing in the U.S. House of Representatives that his state has demonstrated a strong commitment to equity, including a significant financial investment for students in poverty, English learners and underperforming schools.

As states transition to ESSA, we support strong guidance from the U.S. Department of Education that will help all states implement the supplement, not supplant requirement. We believe this guidance should be clear, consistent and practical so it can truly support the changes we know are necessary. For these reasons, CCSSO is proposing an alternative to the current proposed regulation.

### **CCSSO's Proposed Rule.**

In amending Title I's supplement not supplant provision, Congress sought to fix a longstanding problem with the way compliance has historically been tested, which has been through subjective determinations about whether individual items charged to Title I were supplemental. That compliance test needlessly limited the kinds of supports LEAs and schools provided with Title I, and led to educationally unwise practices such as purchasing instructional materials that were unaligned to a school's curriculum or pulling Title I children out of regular classroom time.

Rather than developing an entirely new supplement, not supplant test for ESSA, Congress built on language that already existed in Title I, specifically, the much more straightforward compliance test that already applied to Title I schoolwide programs. This test, which is now the test for all Title I schools, requires LEAs to show that the way they allocate state and local funds to Title I schools does not reduce their funding because they participate in the Title I program.

Looking at how LEAs allocate state and local funds to schools (referred to in the law as "the methodology") is an important equity driver that would provide stakeholders with valuable new information about how LEAs staff, serve, and fund their schools. This information, together with ESSA's per-pupil reporting requirements, would shine a bright light on funding disparities that, if caused by inequity, can and should be addressed through federal and state processes. However, the proposed regulations' complexity would lead to *less* transparency for stakeholders.

The proposed regulations to implement the revised law would lead to even larger problems than the prior supplement not supplant compliance test, as described in detail below. In practice, the rule would require all decisions that affect spending to be evaluated for compliance with the regulation's spending benchmarks rather than on what is best for students. Setting up a compliance system where every educational decision that touches spending must be vetted through a central district office is more than just a paperwork burden; it takes decision-making away from the people closest to students.



Instead, we recommend regulations (attached here following CCSSO's comments) that would require LEAs to:

- Distribute state and local funds to schools using a methodology that does not take a school's Title I participation into account,
- Publish their methodology for distributing funds,
- Demonstrate that they followed their published methodology, and
- For LEAs with Title I schools identified for comprehensive support and improvement (CSI), consider the effect of their methodology on those schools when developing support and improvement plans.

Our recommended regulations promote equity by:

- Ensuring LEAs do not take away state and local resources from Title I schools because they receive Title I funds,
- Enhancing transparency over how LEAs distribute state and local funds to schools, and
- Requiring LEAs to consider the effect their distribution methodology has on low-performing CSI Title I schools.

Our proposed regulations work in conjunction with, and build on, ESSA's equity tools. Specifically:

- ESSA requires LEAs to report per-pupil spending amounts, which will tell the public *how much* an LEA spends per-pupil in each school. Our recommended regulations will enhance this information by giving the public insight into *how* the LEA distributed state and local funds to schools.
- ESSA requires LEAs to identify resource inequities to be addressed through implementation of support and improvement plans for certain low-performing schools. Our recommended regulations help to make this requirement meaningful by requiring LEAs to consider whether their methodology for distributing funds to schools creates resource inequities in CSI schools.

Our proposed regulations enhance ESSA's requirement for LEAs to address resource inequities in CSI schools, and establish important guardrails to protect schools that receive Title I funds.

In addition to proposing an alternative rule, we appreciate this opportunity to communicate concerns with several provisions of the NPRM. Our specific concerns about the proposed regulations are as follows.



**The proposed regulations require LEAs to allocate “almost all” available state and local funds to schools, but does not define that term, which will cause confusion, variable enforcement, and make school spending less transparent.**

Proposed 200.72(b)(1)(B)(ii) requires LEAs to allocate to schools “almost all State and local funds available to the LEA.” It is not clear what this means.

For example, many, if not all LEAs have restricted revenue sources,<sup>1</sup> that is, money that must be used for specific purposes. These restrictions might affect whether and how LEAs can allocate the funds directly to schools. It is not clear whether restricted revenue would be considered part of what is “available to the LEA” under the proposed regulation.

In addition, LEAs must pay for costs like debt services, pension obligations, and other post-retirement benefits for retired employees. Paying for these costs centrally appears to conflict with the proposed regulation’s mandate that LEAs allocate “almost all” funds to schools, but allocating them to schools seems contrary to the proposed rule’s intent because they do not pay for school-based services.

The proposed regulations also do not address how to handle costs that are typically paid for centrally that, in theory, could be allocated to schools, but have little to do with student services. For example, employee benefit costs often vary from school-to-school for reasons that have nothing to do with staff experience or quality. For instance, a veteran teacher teaching in a non-Title I school could participate in a spouse’s health care plan at no cost to the LEA, while a novice teacher in a Title I school might have his or her whole family on the LEA’s health care plan at substantial cost to the LEA. Similarly, transportation costs might be higher in some schools than others because residential density varies from attendance zone to attendance zone. We are concerned that allocating these costs to schools could artificially distort school-to-school spending by incorporating costs that have little bearing on the amount or quality of services students receive.

We are particularly concerned about the effect that allocating costs like transportation to schools could have on an LEA’s ability to comply with desegregation orders. Transportation costs might be higher in non-Title I schools because of the extra spending needed to integrate those schools, but that kind of extra spending could put an LEA out of compliance with the proposed regulations.<sup>2</sup>

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<sup>1</sup> We use the term “restricted” here in its plain language meaning. Government accounting requirements use additional terms to describe funds that must be used for specific purposes and/or are not immediately available as described in GASB 54: <http://gasb.org/resources/ccurl/313/494/GASBS%2054.pdf>

<sup>2</sup> Proposed section 200.72(b)(1)(iii)(C) permits LEAs to exclude non-Title I schools that receive extra funding to serve a high proportion of students with disabilities, English learners, or students from low-income families, but (1) this exclusion only applies to one of the four compliance options, (2) it does not specifically address racial integration programs, (3) it is unclear what constitutes “a high proportion of students” to qualify for the exclusion, and (4) it is unclear whether higher transportation costs would be considered extra funding to qualify for the exclusion.



LEAs also spend money at the central level to support programs that are not tied to individual schools. This might include programs run in non-school buildings, such as the local library, or programs run in one school but open to students outside the school's attendance zone, such as a pre-kindergarten program. Again, it is not clear whether or how LEAs would have to allocate these costs to comply with the "almost all" requirement. Without greater clarity, LEAs might cut back on these kinds of programs to comply with the proposed rule.

The proposed regulations seem to make some allowance for certain "districtwide expenses" in section 200.72(b)(2)(iv), but the exception is vague and still requires LEAs to distribute "almost all" of their "current expenditures" to schools, which does not instruct LEAs how to differentiate between an exemptible "districtwide expense" versus a non-exemptible "current expenditure."

Last, LEAs must follow generally accepted accounting principles when recording their expenditures. It is not clear whether, and to what extent, the "almost all" requirement aligns to those principles.

Without a clearer definition of what it means to allocate to schools "almost all of the State and local funds available to the LEA," it will be up to individual auditors and oversight officials to set a definition. This will lead to over-enforcement, under-enforcement, and at the very least, variable enforcement across LEAs and states. It could also prompt LEAs to change accounting practices in ways that are inadvertently less transparent.

**The per-pupil formula option is overly narrow and will put LEAs that currently use such formulas out of compliance, disincentivizing the move to such formulas in the future.**

If an LEA selects the per-pupil formula option, the proposed regulations require the LEA to distribute "almost all" of an LEA's available funds to schools through a consistent districtwide per-pupil formula where students with educational disadvantage generate additional funding for their school.<sup>3</sup> We have several concerns with these provisions.

First, few (if any) LEAs that use a per-pupil formula allocate "almost all" available funds through the formula for the reasons described above. In addition, many LEAs that use a per-pupil formula also pay for some school-based costs at the central level. For example, LEAs might pay for costs centrally that:

- Affect legal obligations, like special education services or spending required by collective bargaining agreements,
- Affect health and safety, like school nurses or security services, or
- Are shared across multiple schools, like summer school and transportation costs.

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<sup>3</sup> Proposed regulation at 200.72(b)(1)(ii)(A).

Presumably, paying for these kinds of costs centrally would not comply with the proposed regulations, unless these costs can be exempted under section 200.72(b)(2)(iv), which is unclear.

Second, it is not clear whether the proposed regulations would permit LEAs to use a formula that generates extra funding for students with characteristics that are not based on educational disadvantage such as preschool, gifted and talented programs, or career and technical education status. Many LEAs that use per-pupil formulas provide additional funding for these and other categories of students.

Finally, LEAs that move to per-pupil formulas often do so gradually over a number of years to ensure community input and to smooth transition to the new way of allocating funds. For example, an LEA might initially choose to pilot a per-pupil formula in some of its schools or to allocate a limited amount funds to schools through the new formula and increase the amount over time. A phased-in approach does not seem to comply with the requirement to use a consistent formula districtwide, or with the proposed rule's timeline.

For these reasons, it appears LEAs currently using a per-pupil formula, which is often viewed as a more equitable way to distribute funding, would not comply with the proposed rule. This could disincentivize additional LEAs to move to a weighted per-pupil approach.

**The resource formula option is vague and will undermine effective educational practices.**

If an LEA chooses the resource formula option, the proposed regulations require LEAs to distribute “almost all” of an LEA’s available funds to schools through a consistent districtwide resource formula where each Title I school receives “for its use an amount of actual State and local funds at least equivalent to the sum of:”

- The average districtwide salary for each category of school personnel multiplied by the number of personnel in each category assigned to the school, and
- The average districtwide expenditure for non-personnel resources multiplied by the number of students in the school.<sup>4</sup>

Several parts of this option are unclear, for example:

- What does it mean that each Title I school must receive an “actual amount of State and local funds for its use?”
- What is considered to be part of “salary?” Presumably this does not include benefits, but what about other types of compensation like performance pay, stipends for additional work, or recruitment and retention incentives?

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<sup>4</sup> Proposed regulation at 200.72(b)(1)(ii)(B).



- How would LEAs account for teachers and other staff who serve more than one school? What if their time in individual schools is based on need, and thus is not allocable in advance?
- What does it mean to use a consistent districtwide formula? Could LEAs use a formula that varies resource allocations based on a school's programming (for example providing extra staff in any school that offers specialized programs like International Baccalaureate, language immersion, etc.)?
- What about costs associated with long-term substitutes?
- What are non-personnel resources?

If the proposed rule does not clearly define how specific costs should be treated, then the rule will be implemented differently across the country. This was one of the problems with the previous supplement, not supplant rule. The lack of a clear definition also raises the risk of audit findings because individual auditors and oversight officials will have to interpret what the rule means and establish their own definitions which will lead to inconsistent enforcement across the country.

The rule also ignores the effect of spending on projects or purchases that take more than one year to implement. Under the proposed regulation, LEAs are required to demonstrate compliance annually, but school-to-school spending may vary from year-to-year and still equalize over a longer term. For example, an LEA might enter into an agreement to purchase technology for all its schools, but buy that technology in phases, rolling it out to a few schools each year. As a result, it might look like the LEA is spending more on some schools than others in a given year, even though all schools will eventually receive an equitable share of the technology.

Similar variations in spending could happen as a result of capital improvements, which are typically scheduled through a long-term capital improvement plan, or maintenance projects, which might be carried out through a schedule or on as-needed basis. It is not clear whether this kind of spending would be treated as "non-personnel resources," or whether these costs would have to be allocated to schools to meet the "almost all" standard described above. If these types of costs must be allocated to schools, an LEA could be out of compliance if its non-Title I schools have higher maintenance costs in a given year or if the LEA builds a scheduled addition for a non-Title I school under its capital improvement plan.

We are also concerned the proposed rule would incentivize bad educational practices, which was a significant problem under the previous rule.

For example, some LEAs are giving principals significantly more discretion over teacher hiring, and wish to move away from the "forced placement" of teachers. This is a deliberate strategy to let principals select the teachers that will best meet their students' needs. The proposed regulations would undermine this type of initiative because LEAs might have to override principal selections to meet the required spending thresholds.

The rule could also hurt high-poverty schools that do not participate in Title I, but are Title I eligible. Although schools with at least 35% poverty are typically eligible for Title I funds, LEAs might not receive enough Title I money to serve all eligible schools effectively. For example, an LEA might determine it only has enough Title I funds to serve schools with 75% poverty or more. In practice this means many high-poverty schools that are Title I eligible are *not* Title I schools, and these schools could lose state and local resources if LEAs have to increase spending in Title I schools to comply with the proposed regulations. Proposed 200.72(b)(1)(ii)(B) provides no exceptions for non-Title I schools that are Title I eligible.

### **The option of using a State-established compliance test is complicated and unclear.**

While we appreciate the option for states to develop their own methodologies for meeting supplement, not supplant, the proposed option is both complicated and unclear. Under the proposed rule, states could develop a “funds-based compliance test” for meeting supplement not supplant only if the test provides substantially similar amounts of State and local funding for Title I schools as would be the case under the first two federally required options and only if such a test were approved through a Federal peer-review process.<sup>5</sup>

The Department has not defined the term “funds-based compliance test” or defined what “substantially similar” amount means. In addition, to comply with the “substantially similar” requirement it appears an SEA wishing to create a State-established test would have to run simulations on a LEA-by-LEA basis for each of the two federally prescribed options, and then for the State option, to ensure similarity of result. These results would likely have to be submitted to the Department’s peer reviewers, with feedback to be provided at some point in the future.

In practice, this is a significant burden on SEA capacity, especially in light of the new accountability and other oversight responsibilities SEAs have under ESEA.

### **The “special rule” is unclear and does not take into account the wide range of factors that affect school-to-school spending.**

The “special rule” permits 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.<sup>6</sup> We appreciate that the Department has added several exceptions to this option, but we remain concerned the exceptions still do not do enough to protect students.

For example, it appears LEAs are now permitted to exclude certain non-Title I schools from their calculations if the school receives additional funding to serve “a high proportion of students with disabilities, English learners, or students from low-income families.” There are two problems with this exclusion.

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<sup>5</sup> Proposed regulation at 200.72(b)(1)(ii)(C).

<sup>6</sup> Proposed regulation at 200.72(b)(iii)



First, it does not reflect other educationally disadvantaged students that might generate extra supports for a school, such as students in foster care or homeless students.

Second, the proposed regulation does not define the term “high proportion,” so it is unclear which schools would be eligible for exclusion. For example, an LEA might house a special education center for students with severe disabilities in a non-Title I school to give students whose IEPs call for self-contained classrooms the opportunity to interact with other students in a general education setting at points throughout the day. This center might only represent 10% of the school’s overall population, but drive much higher spending for the school. Furthermore, this exception ignores that non-Title I schools with even one or two students with severe disabilities could drive much higher spending in the school.

In addition, the rule does not take into account that costs may vary based on programming decisions that promote equity. For example, certain career and technical education programs are disproportionately expensive (like welding or automotive technology), so an LEA might establish one program in one school and allow students from other schools to attend that program. If the program is set up in a non-Title I school, it could skew per-pupil spending, even if the program is open to students from Title I schools. There are similar concerns with preschool programs, magnet schools, schools for the gifted and talented, etc. that serve students from both Title I and non-Title I schools. There is no exception for these types of programs in the proposed rule.

We are also concerned the proposed regulation could disincentivize any initiative where the costs cannot be controlled centrally – like course choice or performance pay initiatives.

### **The proposed regulations are silent as to the consequences under federal law for non-compliance**

SEAs are responsible for monitoring and enforcing LEA supplement not supplant compliance under both the proposed regulations and the Uniform Grant Guidance. But the proposed regulations do not address the consequences under federal law for noncompliance.

For instance, the proposed rule appears to require the use of current year data when determining compliance. Typically, the Department’s regulations on fiscal rules specify which year to examine, and for those rules that are based on actual spending, compliance is almost always based on a prior year for which spending data is final. See, for example:

- Current 34 CFR § 299.5, which clarifies the ESEA MOE test for LEAs compares spending for the “preceding fiscal year” to spending in the “second preceding year,” and defines those terms.
- 34 CFR § 300.203, which carefully clarifies each of the relevant measuring years for IDEA’s various LEA MOE tests, all of which are prior years.



- Appendix A to 34 CFR part 300, which sets the measuring year for excess cost compliance as spending in the “preceding school year.”

Using prior year data makes sense for fiscal rules based on actual spending levels, because actual spending cannot be determined until spending data is final.

Because the rule appears to measure compliance based on current year financial data, it is unclear what would happen to an LEA that is in compliance with the rules based on its planned allocations but falls out of compliance based on changes in needs during the school year such as changes in enrollment, teacher departures, unplanned maintenance, or other unplanned costs that commonly occur during the fiscal year. Likewise, if compliance is to be measured on prior year (final data), these unplanned scenarios, which are common and have little link to equitable funding, should be excepted.

In addition, the rule does not state the consequences of non-compliance. For example, does an LEA need to prove SNS compliance to be eligible for Title I, like the IDEA MOE eligibility test, or should non-compliance be addressed by requiring repayment of state and local funds? The expectations of the proposed rule are unclear on this.

**The data on which the Department relies in the NPRM has not been validated.**

Last, we note the per-pupil spending amounts in the Civil Rights Data Collection (CRDC), which the Department relies on heavily in the NPRM, have not been validated. It is unclear whether the CRDC data accurately captures all spending that benefits a school, such as school-based personnel or services that are currently accounted for centrally. For these reasons, we are very concerned about making major policy decisions relying entirely on the CRDC data.

We anticipate more accurate spending data will soon be produced through ESSA’s new requirement to report per-pupil spending, which will help to inform policy decisions going forward.

I thank the Department for the opportunity to comment on this proposal. Please call on the Council if you have any questions or need any assistance.

Sincerely,



Chris Minnich  
Executive Director



§200.72 Supplement not supplant.

- a) *In general.* An SEA or LEA must use title I, part A funds only to supplement, and not to supplant, 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.
- b) *Compliance.* (1) *In general.* An LEA must demonstrate that the methodology used to allocate State and local funds to each school receiving title I, part A assistance ensures that such school receives all of the State and local funds it would otherwise receive if it were not receiving title I, part A assistance.
  - (2) *Annual demonstration.* To comply with paragraph (b)(1), an LEA must annually:
    - i. Distribute State and local funds to schools using a methodology that does not reduce such funds to schools because they participate in the title I, part A program,
    - ii. Publish its methodology for distributing State and local funds to schools in a format and language, to the extent practical, that parents and the public can understand, and
    - iii. Demonstrate, at such time and in such form as the SEA may reasonable require, that it followed its published methodology and did not reduce State and local funds to schools that participate in the title I, part A program because they receive title I, part A funds.
      - A. *Exception.* When following its published methodology, an LEA will not be out of compliance if it is unable to fill a position allotted through the methodology, or other similar circumstance.
  - (3) *Not required.* An LEA is not required 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.
- c) *Schools identified for comprehensive support and improvement that participate in title I, part A.* When developing the plan required by section 1111(d)(1)(B) in a comprehensive support and improvement school that participates in title I, part A, the LEA must consider the effect of its methodology on resource inequities consistent with section 1111(d)(1)(B)(iv).
- d) *Transition timeline.* (1) No later than December 10, 2017, an LEA must—
  - i. Demonstrate to the SEA that it has a methodology for allocating State and local funds to schools that meets the requirements in paragraph (b) of this section that the LEA will use no later than the 2018-2019 school year; or



- ii. Submit a plan to the SEA 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.
- (2) Prior to either the 2018–2019 or 2019–2020 school year, as applicable under paragraph (d)(1) of this section, an LEA may use either—
- i. The method of compliance it will use to comply with paragraph (b) of this section; or
  - ii. The method of compliance it used for complying with the applicable title I supplement not supplant requirement in effect on December 9, 2015.

