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DEPARTMENT OF EDUCATION

34 CFR Part 200

RIN 1810-AB33

[Docket ID ED-2016-OESE-0056]

Title I--Improving the Academic Achievement of the Disadvantaged--Supplement Not Supplant

AGENCY: Office of Elementary and Secondary Education, Department of Education.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Secretary proposes to establish regulations governing programs administered under title I, part A of the Elementary and Secondary Education Act of 1965 (ESEA), as amended by the Every Student Succeeds Act (ESSA). These proposed regulations are needed to implement recent changes made by the ESSA to the supplement not supplant requirement of title I, part A of the ESEA. Unless otherwise specified, references to the ESEA mean the ESEA, as amended by the ESSA.

DATES: We must receive your comments on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Submit your comments through the Federal eRulemaking Portal or via postal mail, commercial delivery,

or hand delivery. We will not accept comments submitted by fax or by email or those submitted after the comment period. To ensure that we do not receive duplicate copies, please submit your comments only once. In addition, please include the Docket ID at the top of your comments.

- Federal eRulemaking Portal: Go to www.regulations.gov to submit your comments electronically. Information on using Regulations.gov, including instructions for accessing agency documents, submitting comments, and viewing the docket, is available on the site under "How to use Regulations.gov."

- Postal Mail, Commercial Delivery, or Hand Delivery: If you mail or deliver your comments about these proposed regulations, address them to James Butler, U.S. Department of Education, 400 Maryland Avenue, SW., room 3W246, Washington, DC 20202.

Privacy Note: The Department's policy is to make all comments received from members of the public available for public viewing in their entirety on the Federal eRulemaking Portal at www.regulations.gov. Therefore, commenters should be careful to include in their comments only information that they wish to make publicly available.

FOR FURTHER INFORMATION CONTACT: James Butler, U.S. Department of Education, 400 Maryland Avenue, SW., room

3W246, Washington, DC 20202. Telephone: (202) 260-9737 or
by email: james.butler@ed.gov.

If you use a telecommunications device for the deaf
(TDD) or a text telephone (TTY), call the Federal Relay
Service (FRS), toll free, at 1-800-877-8339.

SUPPLEMENTARY INFORMATION:

Executive Summary:

Purpose of This Regulatory Action: On December 10,
2015, President Barack Obama signed the ESSA into law. The
ESSA reauthorizes the ESEA, which provides Federal funds to
improve elementary and secondary education in the Nation's
public schools. ESSA builds on the ESEA's legacy as a
civil rights law and seeks to ensure every child,
regardless of race, national origin, socioeconomic status,
background, or zip code, receives the support needed to
succeed in school.

As the statute affirms, the purpose of title I, part A
of the ESEA is to "provide all children significant
opportunity to receive a fair, equitable, and high-quality
education, and to close educational achievement gaps."¹ The
requirement that title I, part A funds supplement State and
local funds, and not supplant them, is a longstanding

¹ Section 1001 of the ESEA.

provision of ESEA intended to ensure that Federal funds provide the additional educational resources that students and teachers in high-poverty schools need to succeed. Consequently, if title I schools do not receive their fair share of State and local dollars before title I dollars are added, title I, part A funds do not serve their intended purpose of providing additional educational resources. In this situation, instead of providing the extra, supplemental funding needed to serve disadvantaged students, they simply compensate for shortfalls in the State and local funds that title I schools receive. Failure to ensure compliance with the supplement not supplant provisions in the law hurts students in title I schools, who are among those most in need of additional support. This principle is fundamental to the law and to its legacy as a civil rights law.

Data show that approximately 90 percent of local educational agencies (LEAs) provide each title I school as much per pupil as the average of non-title I schools in the LEA. However, in hundreds of LEAs across the country, title I schools are receiving, on average, hundreds of thousands of dollars less in State and local funding than the average non-Title I school. These are critical funds that could be spent on, for example, wrap-around services,

high-quality preschool, access to advanced coursework, or incentive pay for educators who choose to work in high-need schools. The general requirement that title I, part A funds supplement and do not supplant State and local funds has been part of title I, part A of the ESEA since 1970. This requirement in the law is intended to provide disadvantaged students with additional resources over and above what they receive through State and local funding streams for education. The requirement arose from the findings of a landmark report published in 1969 with support from the National Association for the Advancement of Colored People (NAACP) Legal Defense and Education Fund titled: *Title I of ESEA: Is it Helping Poor Children?*². That report revealed case after case of egregious misuses of title I funds by States and LEAs, including one example from Mississippi where a superintendent averred in Federal court that the highest per-pupil expenditure for schools serving black students in the district was about half of the lowest per-pupil expenditure in schools attended primarily by white students. Due in large measure to the findings from this report, the supplement not supplant provisions for title I, part A were added to the law during

² <http://files.eric.ed.gov/fulltext/ED036600.pdf>

the 1970 reauthorization of the ESEA. However, in the years subsequent to the inclusion of this critical safeguard, LEAs struggled with ways to demonstrate compliance with the provision in the statute and oftentimes relied on burdensome practices that worked against the intended purpose of title I funding.

The ESSA presents a significant, positive improvement in this respect, as it changed the manner in which an LEA must comply with this requirement. Prior to the passage of the ESSA, the statute lacked a clear standard for how to demonstrate compliance with the supplement not supplant requirement. Most LEAs met the requirement by demonstrating that each cost or service paid for using title I, part A funds was supplemental. This burdensome practice often limited local education officials' ability to spend title I funds in ways that would best meet the needs of low-achieving students. For example, an LEA often pulled students out of their regular classroom to provide remedial services in order to clearly demonstrate that they were supplemental, regardless of whether this was in the best interest of the students receiving those services.

The new ESSA statutory language focuses not on costs and services, but on funds. Specifically, section 1118(b) of the ESEA requires that an LEA "demonstrate that the

methodology used to allocate State and local funds to each [title I school] ensures that such school receives all of the State and local funds it would otherwise receive if it were not receiving assistance under [title I].”

Importantly, States and LEAs need not shift resources among schools in order to comply with this provision, but instead may elect to provide additional State and local educational funding to title I schools to ensure compliance with the supplement not supplant provision of the law.

This is the first time that the supplement not supplant requirement contains a statutory directive regarding how an LEA must demonstrate compliance with the requirement. For this reason, the Department proposes these regulations to provide clarity about how LEAs can demonstrate that the distribution of State and local funds satisfies the funds-based compliance test introduced in the law.

At the same time, the ESSA prohibits the Secretary from prescribing the specific methodology an LEA uses to allocate State and local funds to each school, and the proposed regulations would not establish such a specific methodology. Instead, they would clarify that an LEA must publish its methodology for allocating State and local funds and clarify how the LEA can make the demonstration

required by this section of the ESEA and ensure that funds under title I, part A are used to supplement, and not supplant, State and local funds, while also providing the flexibility needed to implement the requirement in a meaningful way. The proposed regulations reflect input provided by negotiators during negotiated rulemaking and feedback received from the public subsequent to the final negotiated rulemaking session, while also building upon the non-regulatory guidance the Department issued in 2015 on the supplement not supplant requirement as applied to schoolwide title I, part A programs, which can be accessed at:

<http://www2.ed.gov/policy/elsec/guid/eseatitleiswguidance.pdf>.

Summary of the Major Provisions of This Regulatory

Action: For the title I, part A program, we propose new regulations governing supplement not supplant that would:

- Restate the general requirement under section 1118(b)(1) that a State educational agency (SEA) or an LEA use title I, part A funds only to supplement, and not supplant, State and local funds.
- Incorporate the requirement under section 1118(b)(2) of the ESEA that an LEA must demonstrate that the methodology used to allocate State and local funds to each

title I school ensures that such school receives all of the State and local funds it would otherwise receive if it were not a title I school.

- Clarify that an LEA may demonstrate compliance with the preceding requirement under the ESEA in a number of ways.

- Provide numerous flexibilities to ensure that an LEA can implement the requirement in a way that reflects local needs, circumstances, and decision-making.

- Clarify the implementation timeline for the proposed regulations.

Costs and Benefits: Although the Department estimates approximately 90 percent of LEAs already meet the requirements of this proposed regulation through the special rule, some LEAs would need to increase funding for some title I schools either by increasing total funding or by redirecting funding within the LEA. Given that some LEAs would need to increase funding for some title I schools, this regulation meets the test for economic significance, as explained in the Regulatory Impact Analysis section of this document, which describes costs, transfers, and benefits of the proposed regulations. We further believe that the proposed regulations would provide

a significant benefit by promoting transparency in State and local education spending, and by simplifying and clarifying the test for compliance with the supplement not supplant requirement in the ESEA, which is designed to ensure that Federal education funds provided through the title I, part A program meet their statutory purpose.

Please refer to the Regulatory Impact Analysis section of this document for a more detailed discussion of costs and benefits. Consistent with Executive Order 12866, the Office of Management and Budget has determined that this action is economically significant.

Invitation to Comment: We invite you to submit comments regarding these proposed regulations. To ensure that your comments have maximum effect in developing the final regulations, we urge you to identify clearly the specific section or sections of the proposed regulations that each of your comments addresses and to arrange your comments in the same order as the proposed regulations.

We invite you to assist us in complying with the specific requirements of Executive Orders 12866 and 13563 and their overall requirement of reducing regulatory burden that might result from these proposed regulations. Please let us know of any further ways we could reduce potential costs or increase potential benefits while preserving the

effective and efficient administration of the Department's programs and activities.

During and after the comment period, you may inspect all public comments about these proposed regulations by accessing Regulations.gov. You may also inspect the comments in person in 3W246, 400 Maryland Ave, SW., Washington, DC, between 8:30 a.m. and 4:00 p.m., Washington, DC time, Monday through Friday of each week except Federal holidays. Please contact the person listed under FOR FURTHER INFORMATION CONTACT.

Particular Issues for Comment: We request comments from the public on any issues related to these proposed regulations. However, we particularly request the public to comment on, and provide additional information regarding, the following issue. Please provide a detailed rationale for your response.

- Whether we should expand the flexibility available to an LEA that chooses to use the special rule, 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, as contemplated in §200.72(b)(1)(iii)(C) .

Assistance to Individuals with Disabilities in Reviewing the Rulemaking Record: On request we will provide an

appropriate accommodation or auxiliary aid to an individual with a disability who needs assistance to review the comments or other documents in the public rulemaking record for these proposed regulations. If you want to schedule an appointment for this type of accommodation or auxiliary aid, please contact the person listed under FOR FURTHER INFORMATION CONTACT.

Background

Public Participation

On December 22, 2015, the Department published a request for information in the Federal Register soliciting advice and recommendations from the public on the implementation of title I of the ESEA. We received 369 comments. We also held two public meetings with stakeholders--one on January 11, 2016, in Washington, D.C. and one on January 19, 2016, in Los Angeles, California--at which we heard from over 100 speakers regarding the development of regulations, guidance, and technical assistance related to the implementation of title I. In addition, Department staff have held more than 200 meetings with education stakeholders and leaders across the country to hear about areas of interest and concern regarding implementation of the new law.

Negotiated Rulemaking

Section 1601(b) of the ESEA requires the Secretary, before publishing proposed regulations for programs authorized by title I, part A of the ESEA, to obtain public involvement in the development of the proposed regulations. After obtaining advice and recommendations from individuals and representatives of groups involved in, or affected by, the proposed regulations, the Secretary must subject any proposed regulations related to standards or assessments under section 1111(b)(2) of the ESEA, as well as the requirement under section 1118(b) that funds under part A be used to supplement, and not supplant, State and local funds, to a negotiated rulemaking process.

On February 4, 2016, the Department published a notice in the Federal Register (81 FR 5969) announcing our intent to establish a negotiated rulemaking committee to develop proposed regulations to implement certain changes made to the ESEA by the ESSA. We announced our intent to establish a negotiating committee to prepare proposed regulations related to the requirement under section 1118(b) of the ESEA that title I, part A funds be used to supplement, and not supplant, non-Federal funds, specifically:

(i) Regarding the methodology an LEA uses to allocate State and local funds to each title I school to ensure compliance with the supplement not supplant requirement;

and

(ii) The timeline for compliance.

The committee met in three sessions to develop proposed regulations, which also included proposals related to assessments under section 1111(b)(2) of the ESEA: session 1, March 21-23, 2016; session 2, April 6-8, 2016; and session 3, April 18-19, 2016.

The committee included the following members:

Tony Evers and Marcus Cheeks, representing State administrators and State boards of education.

Alvin Wilbanks, Derrick Chau, and Thomas Ahart (alternate), representing local administrators and local boards of education.

Aaron Payment and Leslie Harper (alternate), representing tribal leadership.

Lisa Mack and Rita Pin-Ahrens, representing parents and students, including historically underserved students.

Audrey Jackson, Ryan Ruelas, and Mary Cathryn Ricker (alternate), representing teachers.

Lara Evangelista and Aqueelha James, representing principals.

Eric Parker and Richard Pohlman (alternate), representing other school leaders, including charter school leaders.

Lynn Goss and Regina Goings (alternate), representing paraprofessionals.

Delia Pompa, Ron Hager, Liz King (alternate), and Janel George (alternate), representing the civil rights community, including representatives of students with disabilities, English learners, and other historically underserved students.

Kerri Briggs, representing the business community.

Patrick Rooney and Ary Amerikaner (alternate), representing the U.S. Department of Education.

The committee's protocol provided that it would operate by consensus, which meant unanimous agreement; that is, without dissent by any voting member. During its meetings, the committee reviewed and discussed drafts of proposed regulations. At the final meeting in April 2016, the committee did not reach consensus on the proposed regulations relating to the requirement under section 1118(b) of the ESEA that title I, part A funds be used to supplement, and not supplant, State and local funds.

Because consensus was not reached, the Department may use regulatory language developed during the negotiations as the basis for the proposed regulations, or develop new regulatory language for all or a portion of the proposed regulations; and all parties who participated or were

represented in the negotiated rulemaking, as well as all members of the public, may comment freely on the proposed regulations. In addition, as required under section 1601(c)(1) of the ESEA, on August 12, 2016, the Department submitted the proposed regulations to the Committee on Health, Education, Labor, and Pensions of the Senate, and the Committee on Education and the Workforce in the House of Representatives for a 15 business-day comment period. The Department will include and seek to address comments received from Congress in the public rulemaking record for these regulations. Further information on the negotiated rulemaking process may be found at:

<http://www2.ed.gov/policy/elsec/leg/essa/index.html>.

Proposed Regulations

The Secretary proposes new regulations in 34 CFR part 200 to implement programs under title I, part A of the ESEA. We discuss substantive issues under the sections of the proposed regulations to which they pertain.

Section 200.72 Supplement not supplant.

Statute: Section 1118(b) of the ESEA requires that an SEA and LEA use the funds that each receives under part A of title I only to supplement, and not supplant, the funds made available from State and local sources for the education of students in title I schools.

According to the statutory language of the ESEA, to meet the supplement not supplant requirement an LEA must demonstrate that the methodology it selects for allocating State and local funds results in each title I school receiving all of the State and local funds that it would otherwise receive if it were not receiving title I funds. The statute also clarifies that an LEA is not required to: (1) identify that an individual cost or service supported with funds it receives under title I, part A is supplemental; or (2) provide services through a particular instructional method or in a particular instructional setting. Further, the statute specifically prohibits the Department from prescribing the specific methodology that an LEA must use to allocate State and local funds.

Section 1118(b) (5) establishes December 10, 2017, as the deadline by which an LEA must demonstrate to its SEA compliance with the supplement not supplant requirement. Before December 10, 2017, an LEA may continue to use its existing method for complying with the supplement not supplant requirement.

Current Regulations: None.

Proposed Regulations: The proposed regulations would incorporate new statutory provisions and clarify the basic responsibilities an SEA or LEA has in ensuring that the

funds received under title I, part A are used only to supplement, and not to supplant, State and local funds that are made available to support the education of students in title I schools.

Proposed §200.72(a)(1)(i) would incorporate the statutory requirement that an SEA or LEA must use title I, part A funds only to supplement State and local funds that would, in the absence of title I, part A funds, be made available for the education of students in title I schools. Proposed §200.72(a)(1)(ii) would establish that an SEA or LEA may not use title I, part A funds to supplant State and local funds.

Proposed §200.72(a)(2)(i) would make clear that an LEA is not required to identify an individual cost or service supported with funds under title I, part A as supplemental, and proposed §200.72(a)(2)(ii) would clarify that an LEA is not required to use title I, part A funds to provide services through a particular instructional method or in a particular instructional setting.

Proposed §200.72(b)(1)(i) would clarify that an LEA must demonstrate annually to its SEA that the methodology it uses to allocate State and local funds to each title I school ensures that each title I school receives all of the State and local funds that it would receive if it were a

non-title I school. Under the proposed regulations, an SEA must establish the time and form for the annual LEA demonstration. Also, an LEA would need to publish its methodology in a manner easily accessible to the public.

Proposed §200.72(b)(1)(ii) would clarify that an LEA must allocate almost all State and local education funds to all of its public schools--regardless of title I status--in a way that meets one of the following tests: (A) the actual distribution of funds is based on the characteristics of students in each school, providing more funding for students with characteristics associated with educational disadvantage including students living in poverty, English learners, students with disabilities, and other such subgroups of students chosen by the LEA; (B) the actual distribution of funds is based on a districtwide formula for allocation of personnel and non-personnel resources, provided that the total amount going to each title I school is at least equal to the sum of the amount of personnel costs expected based on the districtwide average salary for each category of school personnel and the average district-wide per pupil expenditure for non-personnel costs; or (C) the distribution of funds through any other approach that meets a funds-based compliance test established by the SEA that is as rigorous as (A) or (B)

and is approved through Federal peer review that relies on peers such as professionals with expertise in school finance, State and local education officials, and individuals who represent the interests of special populations of students. An SEA would not be required to establish such a test. Moreover, an LEA would not be required to use the SEA's test if the LEA complies with one of the other two options or the special rule discussed below.

To meet one of these tests, an LEA may create a specific funding methodology to best address its local context and need. Under any methodology, an LEA may exclude certain funding used for districtwide activities, as provided in proposed §200.72(b)(2)(iv), provided that each title I school receives a share of those activities equal to or greater than the share it would otherwise receive if it were not a title I school. For example, an LEA might exclude State or local funds used for districtwide administrative costs, to implement a districtwide summer school or preschool program, or personnel providing districtwide services such as curriculum development or data analysis.

In addition, proposed §200.72(b)(1)(iii) establishes a "special rule" that an LEA may use to meet the compliance

test, rather than using one of the three options described above. Recent school-level expenditure data from the 2013-2014 school year show that approximately 90 percent of LEAs currently would meet the special rule. However, in approximately 1,500 LEAs, 5,750 title I schools spend significantly less State and local funding than non-title I schools in the same grade span (e.g., high schools or elementary schools) in the same LEA. Each year, these title I schools receive hundreds of thousands of dollars less in State and local funding than their non-title I counterparts in the same LEA--\$440,000 per year, on average, or a median of roughly \$200,000 per year.³ These data suggest that in thousands of schools serving high-need students, title I, part A funds are being used, at least in part, to make up for underfunding at the State and local level, rather than providing truly supplemental funds.⁴

³These estimates are based on U.S. Department of Education (Department) analyses of data from the 2013-2014 Civil Rights Data Collection, and calculated in a manner consistent with the "special rule" provision of the regulations proposed in this notice. Accordingly, the 90 percent figure includes in the denominator districts to which the supplement not supplant compliance test would not apply (e.g., districts with all title I schools or no title I schools). A public-use version of the collection can be found [here](#).

⁴This practice did not *per se* result in non-compliance with the supplement not supplant requirement in section 1120A(b) of the ESEA, as amended by the No Child Left Behind Act of 2001, which did not contain statutory provisions relating to how LEAs must demonstrate compliance with the supplement not supplant requirement. In the absence of that clarity, the Department relied on a set of presumptions of supplanting for monitoring and enforcement purposes. However, these presumptions are no longer relevant because the new supplement not supplant

Under the "special rule" option, the LEA simply would demonstrate, regardless of the methodology it uses to allocate State and local funds to title I schools, that it spends an amount of State and local funds on a per-pupil basis in each title I school that is equal to or greater than the average per-pupil amount spent in non-title I schools, using data reported under section 1111(h)(1)(C)(x) of the ESEA. The proposed special rule also would allow for de minimis variations in annual expenditures, such that an LEA would be in compliance with the special rule provision if the amount it spends per pupil in each title I school is no more than 5 percent below the average amount it spends per pupil in non-title I schools. In addition, proposed §200.72(b)(1)(iii)(B) would allow an LEA using the special rule provision to exclude from the calculation of its per-pupil spending funds spent in a school that enrolls fewer than 100 students, while proposed §200.72(b)(1)(iii)(C) would allow such an LEA to comply using the special rule provision if a non-title I school serving high proportions of students with disabilities,

requirement under section 1118(b) of the ESEA for the first time clarifies that compliance relies on an LEA's methodology for allocating State and local funds and discourages the use of past and onerous practices by prohibiting LEAs from being required to demonstrate that an individual cost or service is supplemental.

English learners, or students from low-income families has higher per-pupil expenditures due to serving those students and disproportionately affects the average amount of State and local funds spent in non-title I schools in the LEA or grade span.

Proposed §200.72(b)(2) provides flexibilities that an LEA may use in demonstrating compliance with the ESEA's supplement not supplant requirement. Specifically:

- Proposed §200.72(b)(2)(i) would establish that an LEA may comply with the supplement not supplant requirement on a districtwide or grade-span basis (e.g., high schools, elementary schools).

- Proposed §200.72(b)(2)(ii) would exempt an LEA from complying with the supplement not supplant requirement if it serves only a single school or in any grade span in which it serves only a single school.

- Proposed §200.72(b)(2)(iii) would clarify that, consistent with section 1118(d) of the ESEA, an LEA may exclude from its demonstration of compliance supplemental State and local funds expended in any school--including a non-title I school--for programs that meet the intent and purposes of title I, part A (e.g., a State-funded program providing additional services only for students most at risk of not meeting challenging State academic standards).

- Proposed §200.72(b)(2)(iv) would allow an LEA that spends State or local funds for certain districtwide activities to exclude those funds from its demonstration of compliance, provided that each title I school receives a share of those activities equal to or greater than it would otherwise receive if it were not a title I school and that the LEA distributes to schools under paragraph (b)(1) almost all of the State and local funds available to it. It would further clarify that districtwide activities may include, for example, districtwide administrative costs, districtwide programs such as summer school or preschool, and personnel providing districtwide services such as curriculum development or data analyses but may not include personnel or non-personnel resources associated with an individual school.

Proposed §200.72(b)(3)(i) would clarify the timeline for meeting the new compliance test required by the ESEA. By December 10, 2017, an LEA would be required to either (1) demonstrate to its SEA that its current methodology for allocating State and local funds meets the new supplement not supplant requirement, or (2) provide to its SEA a plan describing how it would meet that requirement no later than the 2019-2020 school year.

Proposed §200.72(b)(3)(ii) would clarify that, during

the transition to the new title I, part A supplement not supplant requirement under the ESEA, an LEA would be able to use either (1) the methodology it will use to comply with the new supplement not supplant requirement, or (2) the methodology it used for complying with the requirement as it existed prior to enactment of the ESSA.

Proposed §200.72(b)(4) would clarify that nothing in the proposed regulation shall be construed to require the forced or involuntary transfer of school personnel. It would further clarify that, consistent with section 1605 of the ESEA, the proposed regulation would not require equalized per-pupil spending for a State, LEA, or school. It would make clear that nothing in the proposed regulations would require an LEA to adopt a specific methodology to allocate State and local funds to comply with the supplement not supplant requirement. Finally, proposed §200.72(b)(4) would make clear that nothing in the proposed regulations would alter or otherwise affect the rights, remedies, and procedures afforded to school or LEA employees under Federal, State, or local laws (including applicable regulations or court orders) or under the terms of collective bargaining agreements, memoranda of understanding, or other agreements between such employers and their employees.

Reasons: We propose these regulations to implement the changes made by the ESSA to the supplement not supplant requirement of title I, part A of the ESEA. The proposed regulations would ensure that title I funds are used to fulfill their statutory purpose--that is, to "provide all children significant opportunity to receive a fair, equitable, and high-quality education, and to close educational achievement gaps"--instead of making up for inequitable allocations of State and local funding to title I schools. The proposed regulations also would provide LEAs the flexibility necessary to implement this requirement in a manner that accounts for local needs and circumstances while respecting the core purpose of the statute. Finally, the proposed regulations would clarify that previous burdensome compliance tests--related to justifying individual expenditures of title I funds--are no longer required.

While section 1118(b) of the ESEA establishes that, to comply with the supplement not supplant requirement, an LEA must demonstrate that it uses a methodology to allocate State and local funds that ensures that each title I school receives the same amount of those funds as it would if it were not receiving title I funding, the statute does not indicate how an LEA is to make this demonstration. Some

stakeholders, including some members of the negotiating committee, expressed an interest in clear requirements so that LEAs know exactly how they are expected to comply, and so that auditors are not forced to make ad hoc decisions on what constitutes an appropriate demonstration of compliance with the statute that could vary significantly from LEA to LEA and potentially have an unfair impact on students, schools, and LEAs. Some stakeholders expressed support for the Department's proposal during the negotiated rulemaking process that would have required that an LEA receiving title I funds demonstrate that each title I school spend at least as much per pupil in State and local funding as the average spent in non-title I schools in the LEA. However, other negotiators expressed strong concern that this may not be the only appropriate test of compliance with the supplement not supplant requirement. Many of those who expressed such concern also expressed support for the examples in the supplement not supplant section of the Department's 2015 non-regulatory guidance on schoolwide title I, part A programs, from which we drew in the development of this proposed rule. Some negotiators also expressed support for using a proposed rule to simply ensure transparency regarding an LEA's methodology for allocating State and local funds. Finally, some

negotiators recommended not regulating on this provision of the law at all.

The proposed regulations would require transparency in how an LEA allocates State and local funds, and would provide LEAs with three distinct options to demonstrate compliance with the requirement, including the two options outlined in the 2015 schoolwide program guidance as well as an SEA-developed funds-based compliance test that would be approved through a Federal peer review process. The first two options would allow for the demonstration of compliance through funds-based methodologies that direct resources to all public schools in an LEA on the basis of student characteristics or through the allocation of staffing and supplies. The third option was added in order to maximize flexibility for innovative approaches, consistent with the funds-based requirement established by the ESSA, that ensure LEAs are using title I funds to supplement State and local funds.

The proposed regulations would require that an LEA distribute almost all State and local funds through one of the three methodologies. This recognizes that some portion of State and local funding may not be allocated through general formulas because it is used for districtwide activities under proposed §200.72(b)(2)(iv).

The proposed regulations would also provide an LEA the choice of complying with the supplement not supplant requirement via a "special rule" instead of one of the three options described above. The special rule builds upon the Department's proposal from negotiated rulemaking. During the negotiated rulemaking process, the negotiators raised important considerations about special circumstances that would require flexibility when implementing the special rule of the proposed regulations. To address these concerns, proposed §200.72(b)(1)(iii) would:

- Provide that the special rule is met if the amount an LEA spends per pupil in each title I school is no more than 5 percent below the average amount it spends in non-title I schools, which would enable LEAs to develop and implement a methodology consistent with the supplement not supplant requirement while allowing for small and unpredictable shifts in costs from year to year;

- Allow an LEA electing to use the special rule to exclude the costs of educating students in schools that enroll fewer than 100 students. Data collected by the Department indicate that schools that educate between 1 and 49 students spend about 60 percent more per student than the national average, and schools that educate 50 to 99 students spend about 45 percent more than the national

average⁵; and

- Provide an opportunity for an LEA to comply with the special rule if the average per-pupil expenditures in non-title I schools is disproportionately impacted by a school serving a high proportion of students with disabilities, English learners, or students from low-income families. This opportunity is designed to ensure that an LEA may continue providing such additional support in a school that serves a disproportionate proportion of these high-need students and is not receiving title I funds.

The negotiators also identified possible complexities in LEA funding systems that merit additional flexibility. Consequently, all of the options provided in proposed §200.72(b)(1)(ii) as well as the special rule provision in proposed §200.72(b)(1)(iii) include flexibilities in §200.72(b)(2) that would:

- Allow an LEA to demonstrate compliance on a districtwide or grade-span basis, because the costs of operating a high school frequently differ from the costs of operating an elementary school;

- Exempt an LEA with a single school or a single school per grade span from the requirement;

⁵These data are based on Department analyses of data from the 2013-2014 Civil Rights Data Collection.

- Consistent with section 1118(d) of the ESEA, allow an LEA to exclude supplemental State or local funds spent for programs that are consistent with the intent and purposes of title I, part A (e.g., a State-funded program providing additional services only for students most at risk of not meeting State standards) from its demonstration of compliance with the ESEA's supplement not supplant requirement; and

- Allow an LEA to exclude funds used for districtwide activities from its demonstration of compliance, provided that the LEA ensures that each title I school receives an equal or greater share of those districtwide activities as it would receive if it were a non-title I school and the LEA distributes to schools under paragraph (b)(1) almost all of the State and local funds available to it.

The Department acknowledges that, in some LEAs, compliance with the new supplement not supplant requirement under the ESEA will require shifts in spending and budgeting practices, and that making these shifts may not be possible before December 10, 2017. Therefore, the proposed regulations would allow an LEA unable to comply by December 10, 2017, to provide and implement a plan to come into compliance by the 2019-2020 school year.

Finally, the Department includes four rules of

construction. The first would clarify that these regulations should not be construed to require the forced or involuntary transfer of any school personnel. We encourage an LEA to consider all available options to meet the supplement not supplant requirement under the ESEA, including, for example, improving working conditions in high-poverty and hard-to-staff schools to attract the best and best-paid educators, providing additional compensation or some other incentive to educators in high-poverty and hard-to-staff schools, and increasing wrap-around services or other resources in high-poverty and hard-to-staff schools, such as school counselors, school-based health providers, extended learning time, or high-quality preschool opportunities. Whichever strategies an LEA chooses, the Department encourages the LEA to comply with this requirement through increasing funding focused on high-poverty, hard-to-staff schools.

The second rule of construction would clarify that the proposed regulations do not require equalized spending per-pupil for a State, LEA, or school. The proposed regulations contemplate variations in per-pupil spending across schools--for example, an LEA taking advantage of the special rule provision would likely have (1) variation in spending among title I schools, so long as each was above

the average per pupil expenditures for non-title I schools, (2) variation in spending among non-title I schools, which would be averaged to determine the average per pupil expenditures in non-title I schools, (3) variation in spending across grade-spans, and (4) higher spending in very small schools that are exempted from the calculations altogether. Similarly, an LEA choosing to use a weighted student funding formula would have variation across schools depending on the characteristics of each school's student population. And an LEA choosing to allocate personnel and non-personnel resources is likely to have wide variation in spending depending upon the specifics of the district's formula (e.g., whether the formula allocates varied numbers of staff per student in elementary schools compared to high schools; whether the formula "counts" students with disabilities as "1.2" students or "1.4" students). The rule of construction would clarify that an LEA is not limited to formulations that would require spending identical sums of money per pupil in each school. The third rule of construction would make clear that nothing in the proposed regulations would require an LEA to adopt a specific methodology to allocate State and local funds to comply with the supplement not supplant requirement in violation of section 1118(b)(4) of the ESEA.

The fourth rule of construction would clarify that nothing in the proposed regulations would alter or otherwise affect the rights, remedies, and procedures afforded to school or LEA employees under Federal, State, or local laws (including applicable regulations or court orders) or under the terms of collective bargaining agreements, memoranda of understanding, or other agreements between such employers and their employees.

Executive Orders 12866 and 13563

Regulatory Impact Analysis

Under Executive Order 12866, the Office of Management and Budget must determine whether this regulatory action is "significant" and, therefore, subject to the requirements of the Executive order and subject to review by the Office of Management and Budget (OMB). Section 3(f) of Executive Order 12866 defines a "significant regulatory action" as an action likely to result in a rule that may--

(1) Have an annual effect on the economy of \$100 million or more, or adversely affect a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities in a material way (also referred to as an "economically significant" rule);

(2) Create serious inconsistency or otherwise

interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles stated in the Executive order.

This proposed regulatory action is an economically significant regulatory action subject to review by OMB under section 3(f)(1) of Executive Order 12866. This determination is based on the Department's estimate that LEAs currently not able to demonstrate compliance with the supplement not supplant requirements of the proposed rule may have to transfer approximately \$800 million in existing State and local education funds to demonstrate such compliance. This potential transfer is deemed an economically significant transfer under section 3(f)(1) of Executive Order 12866.

We have also reviewed these regulations under Executive Order 13563, which supplements and explicitly reaffirms the principles, structures, and definitions governing regulatory review established in Executive Order 12866. To the extent permitted by law, Executive Order

13563 requires that an agency--

(1) Propose or adopt regulations only on a reasoned determination that their benefits justify their costs (recognizing that some benefits and costs are difficult to quantify);

(2) Tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives and taking into account--among other things and to the extent practicable--the costs of cumulative regulations;

(3) In choosing among alternative regulatory approaches, select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity);

(4) To the extent feasible, specify performance objectives, rather than the behavior or manner of compliance a regulated entity must adopt; and

(5) Identify and assess available alternatives to direct regulation, including economic incentives--such as user fees or marketable permits--to encourage the desired behavior, or provide information that enables the public to make choices.

Executive Order 13563 also requires an agency "to use the best available techniques to quantify anticipated

present and future benefits and costs as accurately as possible." The Office of Information and Regulatory Affairs of OMB has emphasized that these techniques may include "identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes."

We are issuing these proposed regulations only on a reasoned determination that their benefits would justify their costs. In choosing among alternative regulatory approaches, we selected those approaches that maximize net benefits. Based on the analysis that follows, the Department believes that these proposed regulations are consistent with the principles in Executive Order 13563.

We also have determined that this regulatory action would not unduly interfere with State, local, and tribal governments in the exercise of their governmental functions.

In accordance with both Executive orders, we have assessed the potential costs and benefits, both quantitative and qualitative, of this regulatory action and have determined that the benefits would justify the costs.

The potential costs associated with the proposed regulations are those resulting from statutory requirements and those we have determined as necessary for administering

these programs effectively and efficiently. The proposed regulations would implement new statutory requirements in the ESEA related to demonstrating compliance with the longstanding supplement not supplant requirement. More specifically, under the ESEA, an LEA must "demonstrate that the methodology used to allocate State and local funds for each [title I school] ensures that such school receives all of the State and local funds it would otherwise receive if it were not receiving assistance under [title I, part A]." The proposed regulations would not require a specific methodology for allocating funds, but would require that the methodology selected and used by each LEA results in an actual distribution of funds consistent with the statutory requirement that each school participating in title I, part A receives all of the State and local funds it would otherwise receive if it were not a title I school, while also providing flexibility designed to accommodate local circumstances that might reasonably affect an LEA's ability to meet the supplement not supplant requirement.

The Department estimates that at least 90 percent of LEAs would comply with the proposed regulations without any

change in current allocation practices.⁶ These LEAs would be able to demonstrate compliance through the special rule option, which allows an LEA to choose any methodology that results in the LEA spending an amount of State and local funds per pupil in each title I school that is equal to or greater than the average amount of State and local funds spent per pupil in non-title I schools, using per-pupil expenditure data they will be required to collect and report under section 1111(h)(1)(C)(x) of the ESEA. In general, the Department believes that the flexibility afforded to LEAs by the proposed regulations in demonstrating compliance with the title I, part A supplement not supplant requirement would minimize the administrative costs and burdens of complying with the proposed regulations. The Department also believes that, once fully implemented, the proposed regulations would be significantly less burdensome and costly in comparison to the requirements of current law, which often involve detailed tracking and documentation of individual education expenditures.

The proposed regulations would not require the

⁶ These estimates are based on Department analyses of data from the 2013-2014 Civil Rights Data Collection, and are calculated in a manner consistent with the special rule provisions of the regulations proposed in this notice.

expenditure of additional State or local funds in title I schools; rather, an LEA could meet one of the proposed compliance tests through the reallocation of existing State and local resources. For example, the Department estimates that the approximately 1,500 LEAs currently spending, on average, more State and local funds in their non-title I schools than their title I schools would need to transfer approximately \$800 million in State and local education funds to their title I schools in order to meet the special rule in the proposed regulations. The average percentage of State and local dollars that would need to be reallocated by affected LEAs is estimated to be 1 percent. We note that the total dollars that would be required to be redistributed under the proposed regulations represent just over one-tenth of one percent of the more than \$600 billion that State and local communities spend annually on public elementary and secondary education.

Instead of transferring funds, affected LEAs and the States in which they are located may elect to increase State and local expenditures to meet the supplement not supplant requirement of the proposed regulations. If all affected LEAs do this, the total additional funding required is estimated to be approximately \$2.2 billion, or an increment of roughly one-third of one percent over

current State and local spending on public elementary and secondary schools. The Department notes that while the proposed regulations would not require the expenditure of additional State or local funds to demonstrate compliance, doing so would ensure additional support for students and teachers in title I schools consistent with the supplement not supplant requirement, while avoiding any reduction in financial support for students and teachers in non-title I schools.

The Department does not have sufficient data to support detailed estimates of the impact of using either the districtwide pupil characteristics formula test or the districtwide personnel and non-personnel resource formula test to demonstrate compliance with the proposed supplement not supplant requirement. However, the Department believes that under either approach, the total amount of existing funds that affected LEAs would have to transfer, or the additional expenditure of State or local funds that would be required, would be similar to the estimates provided for the special rule, based on estimating the differences in funding between each title I school and the districtwide average funding. Similarly, the Department cannot provide an estimate of the impact of any State-determined option for compliance, but also believes that the total amount of

existing funds that affected districts would have to transfer, or the additional expenditure of State or local funds that would be required, would be similar under this option, given that any such State-determined option must be "as rigorous" as the other options.

States and LEAs would incur certain administrative costs under the proposed regulations. For example, while it is difficult to predict the number of States that would elect to develop their own, alternative compliance tests, the Department estimates that 15 States would incur additional one-time costs of developing or adopting and submitting an alternative funds-based compliance test for Federal peer review and approval that then could be used by LEAs to demonstrate compliance with the proposed supplement not supplant requirements. The Department further estimates that these 15 States would need, on average, 48 hours to prepare and submit such an alternative funds-based compliance test for peer review. At \$40 per hour, the average cost per State would be \$1,920, resulting in a total cost across the estimated 15 States of \$28,800. We expect that States generally would use Federal education program funds they reserve for State administration under title I, part A to cover these one-time costs.

The Department also estimates that the approximately

1,500 LEAs that we estimate currently would not comply with the special rule in the proposed regulations would need, on average, 24 hours to develop or adopt an alternative funds-based compliance test consistent with one of the options in the proposed regulations. We further estimate that, assuming a \$35 hourly cost, these LEAs would spend an average of \$840 to develop or adopt a test for demonstrating compliance with the proposed supplement not supplant regulations, for a total estimated cost across 1,500 LEAs of \$1,260,000. As under the State example, we anticipate that most LEAs would use a portion of Federal program funds received under title I, part A to pay these one-time development costs.

The Department also believes that for most LEAs, adjusting allocations of State and local education resources to demonstrate compliance with the proposed regulations generally would not entail significant new administrative burden because such adjustments could be accomplished through their normal annual budget processes. However, we estimate that approximately one third of LEAs that currently would not comply with the proposed special rule would need to transfer more than 1 percent of State and local funds in order to demonstrate compliance with the proposed regulations, and that these 500 LEAs would need to

(1) develop multi-year plans for meeting their selected compliance tests and (2) integrate these plans into their annual budget processes. The Department estimates that these 500 LEAs would need, on average, 28 hours at a cost of \$35 per hour to develop and integrate these plans into their annual budget processes, for a total estimated cost of \$490,000. We note that there is likely substantial variation around the 28-hour average, with some LEAs potentially requiring significantly more time to develop and implement their compliance plans.

The estimated administrative costs of the proposed regulations, which total less than \$2 million for States and LEAs, are a small fraction of the more than \$15 billion provided by the title I, part A program. Moreover, these costs are outweighed by the fact that for the vast majority of LEAs (i.e., the more than 90 percent of LEAs that are likely to already comply through the special rule), demonstrating compliance with the proposed regulations would be significantly less complex and burdensome than the supplement not supplant requirements of current law, which typically have involved detailed tracking of education expenditures in order to demonstrate that Federal title I funds are not supplanting State or local funds. Thousands of LEAs no longer would incur the annual costs of tracking,

reporting, and auditing individual education expenditures that are the predominant practice for complying with supplement not supplant under current law. For all of these reasons, we believe the proposed regulations generally would not impose significant costs on either States or LEAs, and that for the minority of LEAs that do experience additional, mostly one-time implementation costs, such costs would be substantially offset by reduced administrative burdens once the proposed regulations are fully implemented.

Equally important, the proposed regulations would provide a significant benefit for the vast majority of LEAs by simplifying and clarifying the test for compliance with the supplement not supplant requirement in the ESEA while ensuring that Federal education funds provided through the title I, part A program meet their statutory purpose of providing students in high-poverty schools the extra resources they need to meet challenging State academic standards.

Clarity of the Regulations

Executive Order 12866 and the Presidential memorandum "Plain Language in Government Writing" require each agency to write regulations that are easy to understand.

The Secretary invites comments on how to make these

proposed regulations easier to understand, including answers to questions such as the following:

- Are the requirements in the proposed regulations clearly stated?

- Do the proposed regulations contain technical terms or other wording that interferes with their clarity?

- Does the format of the proposed regulations (grouping and order of sections, use of headings, paragraphing, etc.) aid or reduce their clarity?

- Would the proposed regulations be easier to understand if we divided them into more (but shorter) sections? (A "section" is preceded by the symbol "\$" and a numbered heading; for example, §200.72 Supplement Not Supplant.)

- Could the description of the proposed regulations in the SUPPLEMENTARY INFORMATION section of this preamble be more helpful in making the proposed regulations easier to understand? If so, how?

- What else could we do to make the proposed regulations easier to understand?

To send any comments that concern how the Department could make these proposed regulations easier to understand, see the instructions in the ADDRESSES section.

Regulatory Flexibility Act Certification

The Secretary certifies that these proposed regulations would not have a significant economic impact on a substantial number of small entities. Under the U.S. Small Business Administration's Size Standards, small entities include small governmental jurisdictions such as cities, towns, or school districts (LEAs) with a population of less than 50,000. Although the majority of LEAs that receive ESEA funds qualify as small entities under this definition, the proposed regulations would not have a significant economic impact on these small LEAs because they would not require the expenditure of additional State and local education funds, only that existing State and local funding be allocated fairly to all schools, including both title I and non-title I schools. The Department believes the benefits of this proposed regulatory action would outweigh the burdens on these small LEAs of complying with the proposed regulations. In particular, the proposed regulations would clarify the supplement not supplant requirements in the ESEA while ensuring that Federal education funds meet their statutory purpose. The proposed regulations recognize the circumstances that small LEAs might face with respect to supplement not supplant requirements, allowing an LEA that uses the "special rule"

option to exclude from the calculation of its average per-pupil spending funds spent in a school that enrolls fewer than 100 students. The Secretary invites comments from small LEAs as to whether they believe the proposed regulations would have a significant economic impact on them and, if so, requests evidence to support that belief.

Paperwork Reduction Act of 1995

As part of its continuing effort to reduce paperwork and respondent burden, the Department provides the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)). This helps ensure that: the public understands the Department's collection instructions, respondents can provide the requested data in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the Department can properly assess the impact of collection requirements on respondents.

Proposed §200.72(b)(1)(i)(A) and §200.72(b)(1)(ii)(C) contains an information collection requirements. Under the PRA, the Department has submitted a copy of these sections to OMB for its review.

A Federal agency may not conduct or sponsor a

collection of information unless OMB approves the collection under the PRA and the corresponding information collection instrument displays a currently valid OMB control number. Notwithstanding any other provision of law, no person is required to comply with, or is subject to penalty for failure to comply with, a collection of information if the collection instrument does not display a currently valid OMB control number.

In the final regulations, we will display the control number assigned by OMB to any information collection requirements proposed in this NPRM and adopted in the final regulations.

Proposed §200.72(b)(1)(i)(A) would require each LEA to annually publish its methodology for allocating State and local funds in a manner easily accessible to the public. We estimate that during the three year period for which we seek information collection approval, 14,000 LEAs would devote five hours to publishing a methodology for allocating State and local funds. Therefore, we estimate for this section a total burden over three years for all respondents would be 70,000 hours, resulting in an average annual burden of 23,333 hours.

Proposed §200.72(b)(1)(ii)(C) would allow States to-- at their discretion--submit an alternate funds-based

compliance test for Federal peer review that then could be used by LEAs to demonstrate compliance with the proposed supplement not supplant requirements. We estimate over the three year period for which we seek information collection approval, 15 States would choose to submit an alternate funds-based compliance test for Federal peer review, and that each State would devote 48 hours to preparing and submitting the alternate funds-based compliance test. Therefore, we anticipate the total burden over three years for all respondents would be 720 hours, resulting in an average annual burden of 240 hours for this section. In total, we estimate a burden of 23,573 hours for this proposed regulation.

Collection of Information

<u>Regulatory section</u>	<u>Information collection</u>	<u>OMB Control Number and estimated burden</u>
§200.72 (b) (1) (i) (A)	This proposed regulatory provision would require each LEA to annually publish its methodology for allocating State and local funds.	OMB 1810-NEW. We estimate this would require 23,333 burden hours.

§200.72 (b) (1) (ii) (C)	This proposed regulatory provision would allow States to submit an alternate funds-based compliance test for Federal peer review.	OMB 1810-NEW. We estimate this would require 240 burden hours.
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If you want to comment on the proposed information collection requirements, please send your comments to the Office of Information and Regulatory Affairs, OMB, Attention: Desk Officer for U.S. Department of Education. Send these comments by email to OIRA_DOCKET@omb.eop.gov or by fax to (202) 395-6974. You may also send a copy of these comments to the Department contact named in the ADDRESSES section of this preamble.

We have prepared an Information Collection Request (ICR) for this collection. In preparing your comments you may want to review the ICR, which is available at www.reginfo.gov. Click on Information Collection Review. This proposed collection is identified as proposed collection 1810-NEW.

We consider your comments on this proposed collection of information in--

- Deciding whether the proposed collection is necessary for the proper performance of our functions, including whether the information will have practical use;

- Evaluating the accuracy of our estimate of the burden of the proposed collection, including the validity of our methodology and assumptions;

- Enhancing the quality, usefulness, and clarity of the information we collect; and

- Minimizing the burden on those who must respond. This includes exploring the use of appropriate automated, electronic, mechanical, or other technological collection techniques.

OMB is required to make a decision concerning the collection of information contained in these proposed regulations between 30 and 60 days after publication of this document in the Federal Register. Therefore, to ensure that OMB gives your comments full consideration, it is important that OMB receives your comments by [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. This does not affect the deadline for your comments to us on the proposed regulations.

Intergovernmental Review

This program is not subject to Executive Order 12372 and the regulations in 34 CFR part 79.

Federalism

Executive Order 13132 requires us to ensure meaningful and timely input by State and local elected officials in the development of regulatory policies that have federalism implications. "Federalism implications" means substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Although we do not believe the proposed regulations would have federalism implications, we encourage State and local elected officials to review and provide comments on these proposed regulations.

Accessible Format: Individuals with disabilities can obtain this document in an accessible format (e.g., braille, large print, audiotape, or compact disc) on request to the person listed under FOR FURTHER INFORMATION CONTACT.

Electronic Access to This Document: The official version of this document is the document published in the Federal Register. Free Internet access to the official edition of the Federal Register and the Code of Federal Regulations is

available via the Federal Digital System at:
www.gpo.gov/fdsys. At this site you can view this
document, as well as all other documents of this Department
published in the Federal Register, in text or Portable
Document Format (PDF). To use PDF you must have Adobe
Acrobat Reader, which is available free at the site.

You may also access documents of the Department
published in the Federal Register by using the article
search feature at: www.federalregister.gov. Specifically,
through the advanced search feature at this site, you can
limit your search to documents published by the Department.

List of Subjects in 34 CFR Part 200

Education of disadvantaged, Elementary and secondary education, Grant programs--education, Indians--education, Infants and children, Juvenile delinquency, Migrant labor, Private schools, Reporting and recordkeeping requirements.

Dated: August 26, 2016

John B. King, Jr.,
Secretary of Education.

For the reasons discussed in the preamble, the Secretary proposes to amend part 200 of title 34 of the Code of Federal Regulations as follows:

PART 200--TITLE I--IMPROVING THE ACADEMIC ACHIEVEMENT OF THE DISADVANTAGED

1. The authority citation for part 200 continues to read as follows:

AUTHORITY: 20 U.S.C. 6301-6576 (unless otherwise noted).

2. Section 200.72 is revised to read as follows:

§200.72 Supplement not supplant.

(a) In general. (1) An SEA or LEA--

(i) Must use title I, part A funds only to supplement 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; and

(ii) May not use title I, part A funds to supplant the funds from State and local sources.

(2) An LEA is not required under this section 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.

(b) Compliance -(1) Annual demonstration -(i) In general. To comply with paragraph (a) of this section, an LEA must annually--

(A) Publish its methodology for allocating State and local funds in a format and language, to the extent practicable, that parents and the public can understand; and

(B) Demonstrate, at such time and in such form as the SEA may reasonably require, that the methodology it uses to allocate State and local funds to each title I school ensures that the school receives all of the State and local funds it would otherwise receive if it were not a title I school.

(ii) LEA options. In order to demonstrate that an LEA meets this requirement, the LEA must distribute almost all State and local funds available to the LEA in a way that meets one of the following tests:

(A) Distribution of State and local funds based on characteristics of students. An LEA distributes State and local funds to its schools according to a consistent

districtwide per-pupil formula based on the characteristics of students in each school, such that--

(1) Students with characteristics associated with educational disadvantage, including students living in poverty, English learners, students with disabilities, and other such groups of students the LEA determines are associated with educational disadvantage, generate additional funding for their school; and

(2) Each title I school receives for its use all of the funds to which it is entitled under the formula.

(B) Distribution of State and local funds based on personnel and non-personnel resources. An LEA distributes State and local funds to its schools based on a consistent districtwide personnel and non-personnel resource formula such that each Title I school receives for its use an amount of actual State and local funds at least equivalent to the sum of--

(1) The average districtwide salary for each category of school personnel (e.g., teachers, principals, librarians, school counselors), multiplied by the number of school personnel in each category assigned by the districtwide formula to the school; and

(2) The average districtwide per-pupil expenditure for non-personnel resources, multiplied by the number of students in the school.

(C) Distribution of State and local funds based on an SEA-established compliance test. (1) An LEA distributes

State and local funds in a manner chosen by the LEA that--

(i) Is applied consistently districtwide; and

(ii) Meets a funds-based compliance test established by the SEA that is as rigorous as the approaches described in paragraph (b) (1) (ii) (A) or (B) of this section and has been approved through a Federal peer review process that relies upon peers such as professionals with expertise in school finance, State education officials, local education officials, and individuals who represent the interests of special populations of students. An SEA is not required to establish such a test; nor is an LEA required to use such a test if the LEA complies with paragraphs (b) (1) (ii) (A) or (B) or (b) (1) (iii) of this section.

(2) A funds-based compliance test that is "as rigorous as the approaches described in paragraph (b) (1) (ii) (A) or (B)" is one that results in substantially similar amounts of State and local funding for title I schools in the district as would the use of approaches

described in paragraph (b) (1) (ii) (A) or (B), as determined by a Federal peer review process.

(iii) Special Rule. Notwithstanding paragraph (b) (1) (ii) of this section, an LEA may distribute State and local funds using any methodology that results in the LEA spending an amount of State and local funds per pupil in each title I school that is equal to or greater than the average amount of State and local funds spent per pupil in non-title I schools, as reported under section 1111(h) (1) (C) (x) of the ESEA.

(A) De minimis annual variation. An LEA may be considered in compliance with the special rule in paragraph (b) (1) (iii) of this section in a specific year if the amount of State and local funds each title I school receives is no more than 5 percent less than the average amount received by non-title I schools in that year.

(B) Schools with fewer than 100 students. In demonstrating compliance with the special rule in paragraph (b) (1) (iii) of this section, an LEA may exclude from its calculations any school that enrolls fewer than 100 students.

(C) Demonstrating compliance. An LEA may demonstrate compliance with the special rule in paragraph (b) (1) (iii) of this section if it demonstrates to the SEA that--

(1) One or more non-title I schools in the LEA receive additional funding to serve a high proportion of students with disabilities, English learners, or students from low-income families and these additional expenditures disproportionately affect the amount of State and local funds allocated, on average, to non-title I schools in the LEA or in a particular grade span within the LEA; and

(2) Absent such school or schools, the LEA would be in compliance.

(2) Flexibilities. (i) An LEA may demonstrate compliance with paragraph (b)(1) of this section on a districtwide or a grade-span basis.

(ii) An LEA is not required to meet the requirements in paragraph (b)(1) of this section--

(A) If it has a single school; or

(B) In any grade span in which it has a single school.

(iii) For purposes of demonstrating compliance under paragraph (b)(1) of this section, an LEA may exclude supplemental State or local funds expended for programs that meet the intent and purposes of title I, part A.

(iv)(A) To the extent that an LEA spends State or local funds for districtwide activities, the LEA may exclude those funds from its demonstration of compliance

with paragraph (b) (1) of this section, provided that each title I school receives a share of those activities equal to or greater than the share it would otherwise receive if it were not a title I school, and the LEA distributes to schools under paragraph (b) (1) of this section almost all of the State and local funds available to it for current expenditures as defined in section 8101(12) of the ESEA.

(B) Districtwide activities--

(1) May include, for example, districtwide administrative costs, districtwide programs such as summer school or preschool, and personnel providing districtwide services such as curriculum development or data analyses; but

(2) May not include personnel or non-personnel resources associated with an individual school.

(3) Transition timeline. (i) No later than December 10, 2017, an LEA must--

(A) 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

(B) 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.

(ii) Prior to either the 2018-2019 or 2019-2020 school year, as applicable under paragraph (b) (3) (i) of this section, an LEA may use either--

(A) The method of compliance it will use to comply with paragraph (b) of this section; or

(B) The method of compliance it used for complying with the applicable title I supplement not supplant requirement in effect on December 9, 2015.

(4) Rules of construction. (i) Nothing in this section shall be construed to require the forced or involuntary transfer of any school personnel.

(ii) (A) Nothing in this section shall be construed to require equalized spending per pupil for a State, LEA, or school.

(B) Equalized spending per pupil means equal expenditures per pupil as reported under section 1111(h) (1) (C) (x) of the ESEA.

(iii) Nothing in this section requires an LEA to adopt a specific methodology to allocate State and local funds to comply with the supplement not supplant requirement.

(iv) Nothing in this section shall be construed to alter or otherwise affect the rights, remedies, and procedures afforded to school or LEA employees under Federal, State, or local laws (including applicable regulations or court orders) or under the terms of collective bargaining agreements, memoranda of understanding, or other agreements between such employers and their employees.

(AUTHORITY: 20 U.S.C. 6321(b) and (d))

[FR Doc. 2016-20989 Filed: 9/2/2016 8:45 am; Publication Date: 9/6/2016]