

Colorado Department of Education (CDE)
 Comments on
Federal Register/Vol. 81, No. 172/Tuesday, September 6, 2016/Proposed Rules

Department of Education
 34 CFR Parts 200
 RIN 1810-AB33
[Docket ID ED-2016-OESE-0056]

The Colorado Department of Education (CDE) submits the following comments on the U.S. Department of Education (USDE), Notice of Proposed Rule-Making (NPRM), on provision of Title I – Improving the Academic Achievement of the Disadvantaged – Supplement Not Supplant (SNS), under the Elementary and Secondary Education Act (ESEA), as reauthorized as the Every Student Succeeds Act (ESSA).

Credentials of Commenters: As the agency responsible for developing the state’s plan for implementing the ESSA, in consultation with stakeholders, CDE has experience with past ESEA reauthorizations and plan development under former reauthorizations, knowledge, local context, and historical background on the Colorado educational system and students within it, and is therefore in the position to comment on the impact of the proposed rules on Colorado’s educational systems, the state’s plans and implementation of the Supplement, Not Supplant provision of the ESSA.

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General Comments Proposed Rule §200.72					
Statutory Intent	<p>Comment: The proposed rules deviate from the purpose of the SNS provision under the ESSA.</p> <p>The purpose of the SNS provision relates to the education of students. These proposed rules appear to be departing from this education of the student concept. Not all services, such as transportation, building utilities, etc. provided by a district can be equitably allocated to each school, and therefore the requirement that districtwide costs must be at least equal to or greater than it would otherwise receive if it were not a title I school is not workable or feasible. Under the proposed rule, an inefficient building and/or high transportation costs may support the school passing the supplement not supplant rule, but such costs do not equate to the direct instruction of the students at that site.</p> <p>Suggested Alternative: Additional flexibilities should be developed that compare measurable similarities between the school funding models for the education of students at each school to get to the heart of the supplement not supplant provision regarding the</p>	<p>“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 <i>for the education of students in title I schools</i>. [Emphasis added].</p> <p>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.”</p>			

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	<p>education of students in Title I schools. Furthermore, proposed rules should be revised and reduced to better align with the intent of the SNS provision under the ESSA, including a focus on sources earmarked for the education of students, rather than any State and local sources, including those that are earmarked for other needs (e.g., construction, transportation).</p>	<p><u>Proposed Regulations</u>, page 8, under “<u>Statute</u>”.</p>			
Purpose of the Proposed Rules	<p>Comment: Proposed rules do not demonstrate or align with the purpose stated in the NPRM.</p> <p>The purpose delineated in the NPRM for the proposed rules is to provide LEAs the flexibility to implement the ESSA SNS requirements in a manner that accounts for local needs and circumstances while respecting the core purpose of the statute. However, by requiring use of one of four options, the proposed rules restrict LEA flexibility, which does not account for local needs and circumstances.</p> <p>Another stated purpose is to provide “flexibility needed to implement the requirement in a meaningful way.” However, under the proposed rules, any local methods that do not comply with one of the four options would not be allowed, even if those methods might produce better results for a given local context.</p> <p>Comment: Where there was room for providing clarity, as stated in the purpose for the NPRM, clarity was not provided.</p> <p>In spite of the changes in statutory language removing the requirement to test for SNS expense by expense, the proposed rules provide no clarity or guidance on how SEAs can test for SNS overall. What are the guiding principles for determining whether the ESSA funds are truly supplemental and not supplanting State and local funds?</p> <p>It is also not clear if the schoolwide program exemptions continue to be applicable under the proposed rules.</p>	<p>“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 [emphasis added] about how LEAs can demonstrate that the distribution of State and local funds satisfies the funds-based compliance test introduced in the law.</p> <p>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 [emphasis added]. 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.”</p> <p><u>Proposed Regulations</u>, pages 3-4, under “<u>Purpose of This Regulatory Action</u>”.</p>			

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	<p>Comment: Proposed rule conflates SNS and other statutory requirements, especially Comparability.</p> <p>It appears that the proposed SNS rules attempt to also regulate Comparability. Proposed rules restrict flexibility for local decision-making and could potentially interfere with the State’s fiscal methodology for monitoring Maintenance of Efforts or Comparability.</p> <p>Suggested Alternative: Revise and reduce proposed regulations so that they are aligned with the purpose stated in the NPRM, to provide clarity and allow for meeting local needs and circumstances. If clarity is the purpose, provide non-regulatory guidance. Remove the prescribed methodologies for how LEAs can demonstrate SNS.</p>				
Costs and Benefits	<p>Comment: Proposed rules increase the burden on 100% of LEAs to demonstrate SNS using one of four options, when by USDE’s estimates, only 10% of the schools and LEAs might be out of compliance.</p> <p>Suggested Alternative: Produce the list of schools and LEAs that are not in compliance to the SEAs and allow them to work with those schools and districts directly in developing more appropriate methodologies to ensure all of the State and local funds that should be distributed to the Title I schools are distributed to those schools.</p> <p>Comment: The costs and benefits analyses in the proposed rules were based on the outcomes from the 2013-2014 Civil Rights Data Collection (CRDC). In Colorado, the “school expenditure” data for this collection is provided directly from the LEAs to the USDE and is not subject to the audit and review processes which apply to the finance December data collection, which is collected by CDE. The CRDC does not define the components of “school expenditure” for its collection. Concern exists surrounding whether a consistent application of the “current expenditures” provision under section</p>	<p>“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”</p> <p>³ These 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.”</p>			

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	8101 (12) of the ESEA is being used by all LEAs and their schools statewide when submitting the CRDC data.	<u>Proposed Regulations</u> , page 9, last paragraph and footnote 3.			
Comments on Specific Paragraphs of Proposed Rule §200.72					
Annual Demonstration	<p>Comment: Additional language in proposed rules is an overreach of the USDE’s authority and increases burden on the LEAs and SEAs.</p> <p>Adding the words “annually publish their methodology” increases the burden on LEAs unnecessarily and creates work that is not likely to improve implementation of complicated methodologies nor ensure that they meet the intent of the SNS provision – to ensure that Title I school receive a fair share of the State and local funds and that Federal funds are not used to compensate for shortfalls in State and local funding of those schools. Publication of complex methodologies will not necessarily translate to increased transparency.</p> <p>Further, an annual demonstration increases the administrative burden on LEAs and SEAs. The ESSA does not delineate a requirement that demonstration must be submitted annually, therefore this decision should be left to the SEAs and LEAs.</p> <p>Suggested Alternative: Remove the terms “Annually publish” from the proposed rule.</p>		61158	1	(b)(1)(A) & (B)
LEA Options	<p>Comment: LEA options provided in proposed rules restrict the flexibility intended by the ESSA and are better suited for non-regulatory guidance rather than regulations. Proposed methodologies rely on a funds-driven approach, which restricts the flexibility to consider the quality and type of resources available at schools.</p> <p>Further, the ESSA restricts USDE from prescribing a specific methodology. By providing vague options that may only be</p>		61158	1	(b)(1)(ii)

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	<p>implemented correctly through further instruction and parameters provided by USDE, USDE has used the proposed regulations to accomplish what they are prohibited from doing. This action is a manipulation of the regulations and does not comport with the intent of the ESSA.</p> <p>Suggested Alternative: Move LEA options to non-regulatory guidance.</p>				
LEA Options	<p>Comment: Addition of the words “distribute almost all State and local funds” changes the requirement and intent of the SNS provision in the ESSA.</p> <p>By adding the words “distribute almost all State and local funds” in the proposed rules, the proposed rules would force an LEA to distribute a specific amount of funds, which is not the intent behind this provision. The intent is to ensure that schools that receive funds under the ESSA would receive all of the State and local funds they would otherwise receive if they were not receiving assistance under this part, not a set amount of the State and local funds. This provision is intended to ensure that funds allocated under the ESSA are distributed to Title I schools as truly supplemental funds and not used to replace any of State and local funds, regardless of how much of the State and local funds get distributed to the school level.</p> <p>While the reasons section of the proposed regulations states that “[t]his recognizes that some portion of State and local funding may not be allocated through general formulas because it is used for districtwide activities,” this explanation is not inherently apparent in the proposed regulation. The proposed regulation should be explicit in stating the meaning, whereas, these words, “almost all,” will be subject to auditor interpretation and judgment and will lead to confusion on the part of SEAs and LEAs.</p>	The ESSA §1118(b)(2) Compliance – “To demonstrate compliance with paragraph (1), a local educational agency shall demonstrate that the methodology used to allocate State and local funds to each school receiving assistance under this part ensures that such school receives all of the State and local funds it would otherwise receive if it were not receiving assistance under this part.”	61158	1	(b)(1)(ii)

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	<p>Further, the addition of the words “almost all” is another example of USDE using unclear and vague definitions within the proposed regulations to accomplish what they are explicitly prohibited from doing in the ESSA. In order to effectively implement this provision, USDE must provide more clarity and definition surrounding the term “almost all.” By doing this, USDE is prescribing the methodology that the LEAs must implement. This circular-style regulation does not comport with the intent of the ESSA.</p> <p>Suggested alternative: Remove the words “almost all” and move LEA options to non-regulatory guidance.</p>				
Flexibilities	<p>Comment: The addition of the words “distribute almost all State and local funds” changes the requirement and intent of the SNS provision in the ESSA.</p> <p>Suggested Alternative: Take out the words “distribute almost all State and local funds” and replace them with “distribute State and local funds it would otherwise receive if it were not receiving assistance under this part.”</p>		61158	3	(b)(2)(iv)
Transition Timeline	<p>Comment: The addition of the extended timeline reflects the complicated nature of the proposed options provided for LEAs.</p> <p>Under the ESSA, LEAs are required to demonstrate their compliance with SNS no later than December 2017. The proposed rules include an option for LEAs that are unable to meet this deadline by allowing them to submit a plan to comply in December 2017 with implementation to begin no later than the 2019-2020 school year. This extension is not provided in statute. Where the ESSA intended to relieve the complicated nature of SNS, the proposed rules bring back a complicated, funds-driven methodology that clouds transparency instead of providing clarity. While the addition of the extension may be perceived as providing additional flexibility, it is a false flexibility cloaking a more</p>	<p>“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.”</p>	61154	1	

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	<p>complicated requirement and does not align with the intent of the statute.</p> <p>Suggested Alternative: Revise and reduce proposed regulations so that they are aligned with the purpose stated in the NPRM, to provide clarity and allow for meeting local needs and circumstances. Remove the prescribed methodologies for how LEAs can demonstrate SNS.</p>				
Comments in Response to Invitation to Comment					
	<p>NPRM Question: Should USDE 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 averaged for non-Title I schools, as contemplated in 200.72(b)(1)(iii)(C)?</p> <p>Comment: Using regulations to increase flexibility is counterproductive.</p> <p>Suggested Alternative: Use non-regulatory guidance to expand the categories of expenditures.</p>		61158	1	(1)