



UNITED STATES DEPARTMENT OF EDUCATION

WASHINGTON, D.C. 20202- _____

October 2, 2008

Dear Chief State School Officer:

We are writing to draw your attention to some issues regarding State and local implementation of the Elementary and Secondary Education Act of 1965 (ESEA), as reauthorized by the No Child Left Behind Act of 2001 (NCLB). During our recent monitoring of Title III programs, the U.S. Department of Education (Department) has encountered several State and local practices that suggest the need to clarify for States some general principles of the Title III non-supplanting provision. In addition, the Department has received a number of questions from States regarding allowable expenditures of Federal funds – particularly Title I and Title III funds – on the development and administration of English language proficiency (ELP) assessments.

Attached you will find guidance to provide you with information on these topics. This guidance represents our current thinking on these issues. It does not create or confer any rights for or on any other person. Furthermore, this guidance does not impose any requirements beyond those required under applicable law and regulations.

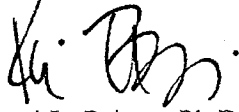
If you are interested in commenting on this guidance, please email the Department at oela@ed.gov or write to us at the following address: U.S. Department of Education, Office of English Language Acquisition, Lyndon Baines Johnson Building, 400 Maryland Avenue, SW, Room 5C-132, Washington, DC 20202-6510.

This guidance is based on our interpretation of relevant statutory provisions. Therefore, the Department strongly urges each State to ensure that both its use of Title III State Activity funds and its subgrantees' use of Title III funds at the local level are consistent with this guidance. The Department intends to include a section on supplanting in State and subgrantee programs and practices, consistent with this guidance, in its monitoring protocols for both our on-site and desk monitoring processes and in the guidance for Single Audit Act auditors, beginning with the Title III grants that will be awarded in July 2009.

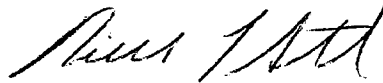
We appreciate the resources and efforts that you have expended to help ensure that all limited English proficient (LEP) students attain English language proficiency and meet the high academic standards required by No Child Left Behind. If you have any questions or concerns about the non-supplanting requirements under Title III of the ESEA, or if you

would like technical assistance to ensure that your State's policies and procedures are in compliance with Title III, please do not hesitate to contact us. We appreciate your continued support as we work together to improve the coordination and effectiveness of our services to LEP students under Federal programs.

Sincerely,



Kerri L. Briggs, Ph.D.
Assistant Secretary
Elementary and Secondary Education



Richard L. Smith
Acting Assistant Deputy Secretary
English Language Acquisition

Attachment

cc: State Title I and Title III Directors

The Office of Elementary and Secondary Education and the Office of English Language Acquisition are issuing this guidance to provide States with information on several funding issues, including “supplement not supplant” requirements, under Title III of the ESEA. This guidance represents the Department’s current thinking on these issues. It does not create or confer any rights for or on any other person. Furthermore, this guidance does not impose any requirements beyond those required under applicable law and regulations. If you are interested in commenting on this guidance, please email the Department at oela@ed.gov or write to us at the following address: U.S. Department of Education, Office of English Language Acquisition, Lyndon Baines Johnson Building, 400 Maryland Avenue, SW, Room 5C-132, Washington, DC 20202-6510.

Supplement Not Supplant Provision of Title III of the ESEA

Section 3115(g) of Title III of the ESEA (hereafter “Title III”) provides as follows:

SUPPLEMENT, NOT SUPPLANT -- Federal funds made available under this subpart shall be used so as to supplement the level of Federal, State, and local public funds that, in the absence of such availability, would have been expended for programs for limited English proficient children and immigrant children and youth and in no case to supplant such Federal, State, and local public funds.

In practice, the prohibition against supplanting under Title III means that recipients may not use those funds to pay for services that, in the absence of Title III funds, would be necessary to be provided by other Federal, or State, or local funds.¹

While the Department recognizes that, to date, some States may have interpreted the provision above as not applying to funds the State is able to retain for State-level activities under section 3111(b)(2), it is the Department’s interpretation of the law that the supplement not supplant provision of Title III applies to both funds retained for State activities – including the professional development, planning and evaluation, technical assistance, and providing recognition activities described in section 3111(b)(2) – and Title III funds expended by subgrantees.

OMB Circular A-133, which offers general guidance on the application of supplement not supplant provisions, explains that, generally, a supplanting violation is presumed when an institution uses Federal funds to provide services that it is required to make available under

¹ Title I, Part A of the ESEA (hereafter “Title I”) also includes a similar “supplement not supplant” provision in section 1120A(b). The “supplement not supplant” provision in Title I prohibits the supplanting of non-Federal funds. A significant distinction between the “supplement not supplant” provision in Title III and the “supplement not supplant” provision in Title I is that the Title III provision prohibits supplanting of Federal, as well as State and local, funds, whereas the Title I provision prohibits only the supplanting of State and local funds.

other Federal, State, or local laws. See the 2008 Circular A-133 Compliance Supplement which, in accordance with 73 Fed. Reg. 32059 (June 5, 2008), is available at the following Internet address:

http://www.whitehouse.gov/omb/circulars/a133_compliance/08/ed.doc

Supplanting and Provision of Language Instruction Educational Programs

States, districts, and schools are required to provide core language instruction educational programs and services for limited English proficient (LEP) students. This requirement is established based on Title VI of the Civil Rights Act of 1964, and its implementing regulations, as interpreted by the Supreme Court of the United States (including the Supreme Court's ruling in Lau v. Nichols), and based on other significant case law (including Castaneda v. Pickard), the Equal Educational Opportunities Act of 1974, and other Federal, State, and local laws. Therefore, the use of State or subgrantee Title III funds to provide core language instruction educational programs, including providing for the salaries of teachers who provide those core services for LEP students, would violate the supplement not supplant provision in section 3115(g) of the Act, as such services are required to be provided by States and districts regardless of the availability of Federal Title III funds.²

Reducing State and Local Funding on the Basis of the Amount of Title III Funds A Local Educational Agency (LEA) is Eligible to Receive

The Department has encountered situations in which a State proposed to implement a law to reduce the amount of State aid available to local educational agencies (LEAs) for implementing language instruction educational programs for LEP students based on the amount of Title III funds its LEAs receive. Such statutes and policies violate Federal law. Section 9522 of the ESEA specifically prohibits a State from taking into consideration

² State and local education agencies (SEAs and LEAs) have raised a few questions regarding supplanting issues under consolidated funding arrangements or within Title I schoolwide programs. Under section 1114 of the ESEA, an LEA that fully consolidates Title III funds with other State, local, and Federal funds as part of a schoolwide program does not, in expending Title III funds, have to meet most of the statutory requirements of that program, including the non-supplanting requirement set out in section 3115(g) of the ESEA. Each school, however, must identify the specific programs being consolidated, and the amount each program contributes to the consolidation, and maintain records that demonstrate that the schoolwide program addresses the intent and purposes of each of the Federal programs whose funds are being consolidated to support the schoolwide program. In addition, while section 3115(g) would not apply to a schoolwide program that consolidates Title III funds with other Federal funds, section 1114(a)(2)(B) establishes a specific non-supplanting requirement for schoolwide programs. Under that provision, each school operating a schoolwide program must receive all the State and local funds it would otherwise receive to operate its educational program in the absence of Title I, Part A or other Federal education funds, "including funds needed to provide services that are required by law for...children with limited English proficiency." The Department has recently issued non-regulatory guidance on Title I fiscal issues, including on the consolidation of funds in Title I schoolwide programs. This guidance, which updates and modifies prior guidance on schoolwide programs issued by the Department, can be found on the Internet at the following address: <http://www.ed.gov/programs/titleiparta/fiscalguid.doc>.

payments under any ESEA program (with the exception of Impact Aid) in determining the amount of State aid an LEA receives for the free public education of its children. Furthermore, any reduction in the amount of State funds an LEA receives to implement language instruction educational programs based on the receipt of Federal funds for its LEP population under Title III violates the non-supplanting provision of Title III.

Likewise, any efforts by an LEA or school to reduce State and local funds expended to implement language instruction educational programs serving LEP students based on the receipt of Federal Title III grant funds also violates the non-supplanting provision of Title III. In the absence of these Federal funds, LEAs would still be required to provide language instruction educational services and would need to expend funds to serve LEP students. For example, the Department has encountered numerous Title III subgrantees that, for budgetary reasons, use Title III funds to pay the salaries of their English as a Second Language (ESL) teachers. Typically, ESL teachers provide the core language instruction educational program services and their salaries are the responsibility of States and LEAs, not the Federal Government.

As a general rule, the use of Title III funds to pay for services to LEP students that were paid for in prior years with State, local, or other Federal funds also raises a presumption of a violation of the Title III non-supplanting requirement. An LEA may be able to rebut this presumption, however, if it can demonstrate, through contemporaneous documentation, that it would not have continued to provide those services for LEP students with State, local, or other Federal funds because, for example, of budgetary constraints or competing educational priorities.

Use of Title III Funds to Develop ELP Assessments

A number of States have asked the Department to provide more specific information on the allowable uses of Title III funds to pay for the costs of developing ELP assessments, which are required under both section 1111(b)(7) of Title I and section 3113(b)(2) of Title III of the ESEA. This section of this letter addresses this particular issue.

Generally, a State or an LEA that is a Title III subgrantee cannot – without violating the non-supplanting requirement set out in section 3115(g) – use Title III funds to pay for the costs of developing annual ELP assessments. This is because section 1111(b)(7) requires States and LEAs to:

provide for an annual assessment of English proficiency (measuring students' oral language, reading, and writing skills in English) of all students with limited English proficiency in the schools served by the State educational agency.

Because Title I requires States to administer annual ELP assessments, in general it would be a violation of Title III supplement not supplant requirements to use Title III funds to

develop such assessments. This is because, in the absence of Title III funds, States would still be required to develop and administer an annual ELP assessment under Title I.

Note that the supplement not supplant provision applies to all funds made available under subpart A of Title III, including funds the State retains for State-level activities under section 3111(b)(2). The Department recognizes that some States may have, to date, interpreted the supplement not supplant provision of Title III as not applying to State-level activities, as section 3111(b)(2)(C)(iii) allows States to reserve funds to help subgrantees with such activities as “identifying or developing, and implementing measures of English proficiency.” However, because of the Title III prohibition against supplanting other Federal funds, there are only limited circumstances under which Title III funds reserved under section 3111(b)(2) may be used for costs related to ELP assessments.

Under Title III, State educational agencies (SEAs) are required under section 3113(b)(2) to develop ELP standards. The ELP assessments administered to determine whether Title III subgrantees are meeting Annual Measurable Achievement Objectives (AMAOs) under Title III must be aligned with the State’s ELP standards. Because the alignment of the ELP assessment with ELP standards is not a requirement that an ELP assessment would otherwise have to meet under Title I, a State may use Title III State Activity funds it receives under section 3111(b)(2) to either:

- (1) pay for the costs of developing an ELP assessment, separate from the ELP assessment required under Title I, that is aligned to the State’s ELP standards, or
- (2) pay for the costs of enhancing an existing ELP assessment required under Title I in order to align it with the State’s ELP standards required under Title III.

If, as is typically the case, a single ELP assessment is used in a State to meet both the requirements of Title I and Title III, only the costs that were incurred specifically to meet Title III requirements not otherwise required under Title I may be paid for with Title III funds.

Use of Title III Funds to Administer ELP Assessments

Several States and LEAs have requested information from the Department about whether Title III State Activity funds and/or LEA subgrant funds may pay for the costs associated with administration of a State’s annual ELP assessment. Specifically, States and LEAs have asked whether Title III funds may be used to pay for substitute teachers during test administration, for the scoring or reporting of ELP assessment results, for training incentives related to administering the ELP assessment, or for materials or equipment related to the administration of annual ELP assessments.

In general, the cost of administering such assessments may not be paid with Title III funds, including funds reserved by the State for State-level activities, because Title I already requires States to administer an annual ELP assessment to all LEP students.

In the case where a separate ELP assessment is administered for the purposes of Title III only, the costs associated with administering such an assessment may be paid with Title III funds, but only to the extent that those costs are over and above what would be required to administer the ELP assessment required to be administered to all LEP students in the State under Title I.

Therefore, in general, Title III State and subgrantee funds may not be used to pay for substitute teachers or materials or for the cost of scoring State ELP assessments administered to LEP students, as these activities are all related to the administration of a State's annual ELP assessment required under Title I.

However, in cases in which a State has a separate or particular assessment for Title III purposes only, or prepares separate reports of student, school or LEA performance for Title III purposes only, Title III funds may be used for activities over and above what would have been in place absent the Title III requirements.

Use of Title I and other Federal Funds for State ELP Assessments

There are funds available from Title I and other Federal programs to help States develop and administer their ELP assessments.

For example, there is specific statutory authority for an SEA to use Title I State administrative funds, either alone or consolidated with other ESEA administrative funds, to develop State ELP assessments. This authority is found in section 9201(f) of the ESEA, which states: "In order to develop challenging State academic standards and assessments, a State educational agency may consolidate the amounts described in subsection (a) [consolidation of State administrative funds under any ESEA program or other program designated by the Secretary] for those purposes under Title I." Because section 1111(b)(7) of Title I requires annual ELP assessments, the Department believes that section 9201(f) authorizes the use of State administrative funds for this purpose.

In addition, section 6111 of the ESEA, which provides additional funds to States for assessments and related activities, specifically permits a State to use those funds "to pay the costs of the development of the additional State assessments...required by section 1111(b)," which includes annual ELP assessments. Further, section 6111(2) specifically permits the use of 6111 funds to administer the assessments required by section 1111(b), but only after development of the assessments is complete.

Finally, the Department has awarded competitive enhanced assessment grant funds under section 6112 to consortia of States to develop ELP assessments in compliance with Title III.

Screening and Placement Assessments for LEP Students

While most of the discussion above focuses on the annual ELP assessments States are required to develop and administer to track the progress of LEP students' attainment of

English language skills, it should also be noted that States and LEAs are responsible for identifying LEP students who may need language education services, regardless of their receipt of Federal funds. Many States and LEAs have developed language assessments used for the purposes of screening students for language proficiency and placing students into core language instruction educational programs. The development and administration of such screening or placement assessments may not be paid for out of Title III or Title I Federal funds. This is because States and LEAs would be required to identify and make placement decisions for LEP students even without Federal funding. Thus, it would violate both the Title I and Title III “supplement not supplant” provisions to use such Federal funds for the development or administration of LEP screening or placement assessments.