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The No Child Left Behind Act of 2001

OVERVIEW OF SUPPLEMENT NOT SUPPLANT REQUIREMENTS

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Introduction

This issue brief addresses the meaning and likely application of the “supplement not supplant” (SNS) provisions contained in the No Child Left Behind Act of 2001 (NCLB). In particular, this document provides guidance on how to ensure that state or local funding decisions do not conflict with SNS requirements and thereby risk the loss of parallel federal funds.¹ This is particularly important in light of current state and local budget shortfalls, which may force cuts in state or local funding for certain education programs.

In general, SNS provisions in the NCLB require that NCLB recipients use federal funds to supplement (or increase) the amount of funds that would otherwise be made available for the given program from nonfederal sources. Certain actions, most notably reductions in state or local funds for the given program from the prior year, are presumed to constitute supplanting, but the recipient can rebut that presumption by showing that the amount spent from nonfederal funds is not less than the amount that would have spent in the absence of federal funds.

Analysis

There is no single definition of SNS in the NCLB. Rather, the Act contains more than thirty SNS provisions in all ten titles (making it important to examine the specific SNS provision that may be applicable to each specific program). Broadly representative of the SNS provisions (and of substantial importance) is the SNS requirement applicable to federal funding under Title I, Part A of the NCLB, which states:

A State educational agency or local educational agency shall use Federal funds received under this part only to supplement the funds that would, in the absence of such Federal

¹ This issue brief has been prepared for the Council of Chief State School Officers by Scott R. Palmer and Arthur L. Coleman of Nixon Peabody LLP. It is intended as an information source and should not be construed as specific legal advice; readers should not act upon information in this publication without professional counsel. This document is not intended to provide an exhaustive analysis of SNS requirements under federal law. Indeed, the exact parameters of SNS requirements under the NCLB and other federal laws are not as settled as one might expect, and specific cases may raise unique issues of application. Nonetheless, an examination of federal statutes, regulations, guidance, letters, and case law provides some important and useful information.

funds, be made available from non-Federal sources for the education of pupils participating in programs assisted under this part, and not to supplant such funds.²

Pursuant to guidance from the U.S. Office of Management and Budget (OMB),³ U.S. Department of Education (USED) auditors charged with evaluating NCLB compliance are to presume that supplanting has occurred in three cases:

The SEA or LEA used Federal funds... to provide services that the SEA or LEA was required to make available under other Federal, State or local laws.

The SEA or LEA used Federal funds to provide services that the SEA or LEA provided with non-Federal funds in the prior year.

The SEA or LEA used Title I, Part A... funds to provide services for participating children that the SEA or LEA provided with non-Federal funds for nonparticipating children.

However, according to the OMB guidance, "These presumptions are rebuttable if the SEA or LEA can demonstrate that it would not have provided the services in question with non-Federal funds had the Federal funds not been available." These principles were recently confirmed by USED in the NCLB context in a letter to the State of Oklahoma.⁴

This SNS standard indicates that state and local education funding decisions under NCLB programs must be made *regardless* of, not *because* of, the availability of federal funds. Most notably, state and local budget cuts that target NCLB programs because of increased federal funds risk violating SNS requirements, and losing federal funds. However, state and local budget cuts that are made regardless of federal funds on the basis of, for example, across the board funding decreases or specific educational justifications may not violate SNS requirements. These decisions should be made one year at a time.

Furthermore, where state or local funding actions may implicate SNS requirements under NCLB, it is important that the recipient develop and maintain documentation that can be used to rebut the SNS presumption. For example, with regard to state or local budget cuts that may implicate NCLB SNS requirements, the recipient should maintain documentation such as:

- Records confirming the decision(s) to eliminate the services (or relevant positions) in the absence of federal funding, along with the reasons for those decisions.
- Fiscal and programmatic records confirming the reduced or lack of state and local funds to pay for the services (or relevant staff positions), including that other funds were not available for those purposes.
- Records explaining what related programs were to be maintained with state and local funding, and distinguishing budget and programmatic decisions with respect to those programs from the services at issue.

² 20 U.S.C. §6321, 115 STAT. 1511.

³ *Compliance Supplement to OMB Circular No. A-133, Audits of States, Local Governments, and Non-Profit Organizations*, Office of Management and Budget (March 2003).

⁴ Letter from Under Secretary Hickok to Honorable Sandy Garrett, Superintendent, Oklahoma Department of Education, March 6, 2003.

Finally, several additional provisions related to SNS under NCLB should be kept in mind:

- **Schoolwide Programs:** For NCLB recipients that are operating schoolwide programs under Title I, Part A, SNS requirements apply at the school level.⁵ In other words, recipients do not have to demonstrate that they used federal funds to supplement and not supplant nonfederal funds tied to specific NCLB *programs* in the school. Rather, such recipients have to show that nonfederal funds spent on the school *as a whole* were the same as those which would have been spent in the absence of federal funds.
- **Exclusion of Funds Used for Intent and Purpose of Title I:** With regard to the SNS provision contained in Title I, Part A, a reduction in nonfederal funds from a given program is not considered supplanting where those nonfederal funds are spent on other programs that “meet the intent and purposes” of Title I, Part A.⁶
- **Maintenance of Effort:** Separate but related to SNS, the NCLB establishes maintenance of effort (MOE) requirements for LEAs, stating:

A local educational agency may receive funds under a covered program for any fiscal year only if the State educational agency finds that either the combined fiscal effort per student or the aggregate expenditures of the agency and the State with respect to the provision of free public education by the agency for the preceding fiscal year was not less than 90 percent of the combined fiscal effort or aggregate expenditure for the second preceding fiscal year.⁷

The Secretary may waive this MOE requirement where it would be equitable due to “exceptional or uncontrollable circumstances, such as a natural disaster,” or “a precipitous decline in the financial resources of the local educational agency.”⁸

⁵ 20 U.S.C. §6314, 115 STAT. 1471.

⁶ 20 U.S.C. §6321, 115 STAT. 1511.

⁷ 20 U.S.C. §7901, 115 STAT. 1980.

⁸ *Id.*