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November 7, 2016

James Butler
U.S. Department of Education
400 Maryland Avenue, SW
Room 3W246
Washington, DC 20202

Re: Docket ID: ED—2016—OESE—0056
Title of Collection: *Title I—Improving the Academic Achievement of the Disadvantaged—Supplement Not Supplant*

Dear Mr. Butler:

We are writing on behalf of Florida School Boards Association (FSBA) to reaffirm the comments filed by the National School Boards Association (“NSBA”) in response to the U.S. Department of Education’s (“Department”) Notice of Proposed Rulemaking, *Title I—Improving the Academic Achievement of the Disadvantaged—Supplement Not Supplant*, ED—2016—OESE—0056, published by the Department on September 6, 2016.¹

The historic reauthorization of the Elementary and Secondary Education Act (“ESEA”), as amended by the Every Student Succeeds Act (“ESSA”), provides a unique and unprecedented opportunity to restore local governance and community ownership of public education. The passage of ESSA represents Congress’ clear directive to restructure and realign the federal government’s role in public education. The law restores the authority of State and local education officials, including local school board members, as the leaders best positioned to improve public education. School board members, as elected officials who govern local school districts, are accountable for ESSA compliance, including fiscal compliance at the local level.

ESSA includes clear and unambiguous provisions concerning the requirement that school districts utilize Title I funds to supplement and not supplant State and local funds. Congress expressed clear limitations on the both Federal and State authority by amending ESEA, through ESSA, to restore authority to local education leaders in demonstrating compliance with supplement not supplant requirements. For example, Congress amended ESSA to reduce administrative burdens by no longer requiring districts to identify that a specific service or cost is supplemental. Additionally, Congress clarified that school districts shall not be required to provide services through a “particular instructional method or in a particular instructional setting” to demonstrate compliance with supplement not supplant. Significantly, ESSA

¹ Elementary and Secondary Education Act of 1965, Title I—Improving the Academic Achievement of the Disadvantaged—Supplement Not Supplant, 81 Fed. Reg. 61,148 (proposed September 6, 2016) (to be codified at 34 C.F.R. pt. 200) [hereinafter “SNS NPRM”].

authorizes local school districts to individually determine the methodology it will utilize to demonstrate compliance with federal supplement not supplant requirements. These provisions were intended to equip local education leaders with the flexibility necessary to better educate and meet the needs of their students, and to better ensure equity and the academic achievement of all students.

While the Department's proposed regulation attempts to ensure the equitable distribution of state and local funds, sections of the regulation are in conflict with the statutory provisions in ESSA. Significantly, the proposed regulation will have the effect of reducing opportunities for local school districts to innovatively or effectively improve resource inequities because the proposal requires local school board members to focus exclusively on implementation of and continuing compliance with the methodologies established in the rule.

Below, we provide more details about specific areas of concern regarding the Department's proposed supplement not supplant regulation.

- **The Proposed Regulation is Inconsistent with ESSA and Limits the Authority Congress Explicitly Granted to Local School Districts**

Recommendation: Amend subsections (b)(1)(ii)(A)-(C) to directly align with the statutory provisions in ESSA. There is no statutory basis in ESSA that allows the Department to limit the methodologies available to local school districts as long as a district can demonstrate that an individual school receives all of the State and local funds it would otherwise receive if it were not receiving Title I funds. The prescription of specific methodologies runs afoul of congressional intent to restore governance to local education leaders. The failed system of rigid federal specifications must be abandoned and the regulation should be amended to focus on whether the district has achieved Title I neutrality. Furthermore, the methodology outlined in (b)(1)(iii) does not accomplish this purpose because it mandates equalized per-pupil funding in violation of ESSA.

- **The Proposed Regulation is Unnecessary and Constitutes the Type of Federal Overreach Congress' ESSA Language Specifically Prohibits**

ESSA establishes the legal test for compliance while authorizing local school districts to determine how they demonstrate compliance with the legal standard. The law establishes a "funds based" test narrowly tailored to examine the distribution of State and local funds at the individual school site level. The regulatory threshold must exclusively examine whether a Title I school is receiving all of the State and local funds it would receive if it were not receiving federal financial assistance.

However, the methodologies included in the proposed regulation significantly expand the "funds based" statutory test included in ESSA in a way that undermines local decision-making and discounts the unique nature of individual schools and the needs of students. The proposed regulation is unnecessary and represents a significant departure from the clear statutory requirements of ESSA. The regulation constitutes unwarranted federal overreach and complete disregard for Congress' clear intent. The Department's regulation must preserve the authority of the local school district and avoid the adoption of an unnecessary federal regulation that exceeds the scope of the law.

Recommendation: Amend the proposed regulation to allow school districts to use ESSA’s existing data reporting requirements to demonstrate compliance with the supplement not supplant requirement *if the data reported demonstrates that a Title I school receives all of the State and local funds it would otherwise receive if it were not receiving Title I funding.*

The proposed regulation should accurately align with ESSA’s provisions relating to supplement not supplant compliance.

- **Identified Methodologies in the Proposed Rule Lack Clarity**

The Department’s proposed rule outlines three “tests” for districts to utilize to demonstrate compliance with the supplement not supplant fiscal requirement, and allows for the possibility of a fourth option developed by the State educational agency.² The Florida School Boards Association opposes the prescription of specific methodologies school districts must utilize to demonstrate compliance with supplement not supplant. However, if the Department proceeds with the proposed regulatory framework, notwithstanding the objections cited above and prescribes specific methodologies school districts must utilize, the specific “tests” in the rule must be amended to clearly articulate the expectations for compliance. The proposed methodologies lack clear standards for compliance. Specific concerns with the proposed methodologies must be addressed and clarified, as detailed below. Furthermore, amending the regulation to allow school districts to determine, at the local level, specific components related to the demonstration of compliance is the most effective way to establish clear expectations in a way that supports local autonomy.

Recommendation: Amend proposed regulation (b)(1)(ii)(A) to allow local school districts to include any source of State and local funding that positively impacts students most in need. Amend proposed regulation (b)(1)(ii)(B) to clarify that local school districts have the authority, pursuant to ESSA, to: 1) determine the categories of employees that must be included in the districtwide formula; 2) determine how it will factor short and long-term substitutes into the formula; and 3) determine all issues related to the proportional inclusion of employees assigned to multiple Title I and non-Title I schools. Finally, while NSBA supports the implementation approach included in the “Special Rule” outlined in §200.72(b)(1)(iii) because it defers to the individual school district to select *any* methodology, it must be deleted from the proposed regulation because it contradicts the clearly stated Congressional intent of ESSA, at 20 U.S.C. § 6576.

- **The Proposed Regulation Contains Vague Language that Will Create Significant Compliance Challenges**

The Florida School Boards Association opposes the prescription of specific methodologies school districts must utilize to demonstrate compliance with supplement not supplant. However, if the Department proceeds with the proposed regulatory framework, notwithstanding the objections noted herein and prescribes specific methodologies school districts must utilize, the specific “tests” in the rule must be amended to clearly articulate the expectations for compliance. The Department’s proposed regulation includes vague and unclear terms that will create confusion and unnecessary challenges for districts attempting

² SNS NPRM, 81 Fed. Reg. at 61,148 (proposed rule 34 C.F.R. § 200.72(b)(1)(ii)(A)-(C) and (b)(1)(iii)).

to demonstrate compliance with the Department's regulation. Additionally, amending the regulation to clarify that local school districts have the authority, pursuant to ESSA, to define unclear and ambiguous terms included in the rule is the most effective way to ensure school districts fully utilize the flexibility provided through ESSA.

Recommendation: Amend subsections (b)(1)(ii) and (b)(1)(iii)(C)(1) of the proposed rule to clarify that local school districts have the authority, pursuant to ESSA, to define these terms related to compliance at the local level. The inclusion of vague regulatory language will result in inconsistent and ineffective implementation of the rule. Lack of a clear standard for compliance will negatively affect student populations most in need and ultimately render school districts incapable of taking effective steps to ensure equity.

The Florida School Boards Association recognizes that equity in funding is critical. Local school board members, as elected community leaders, strive to ensure and maintain equity throughout their school system. With these important goals in mind, FSBA contends that the Department's proposed regulation will not adequately further these priorities. To the contrary, the establishment of specific methodologies and federal "tests" will undermine ongoing efforts by local school board members to increase opportunities for students most in need and prevent the innovative creation of programs that further ensure equity. *The proposed regulation narrowly focuses on certain funding allocations and discounts alternative funding sources, special programs, and additional services that cannot be quantified through a districtwide formula.*

Additionally, the proposed regulation conflicts with provisions in ESSA that limit the authority of the Department and authorize local school districts to independently and individually choose a methodology for demonstrating compliance with supplement not supplant requirements. FSBA opposes the prescription of specific methodologies school districts *must* utilize to demonstrate compliance with supplement not supplant. However, if the Department implements the proposed regulatory framework, notwithstanding the objections noted herein and prescribes specific methodologies school districts must utilize, the three specific "tests" in the rule must be amended to clearly articulate the expectations for compliance. The proposed regulation should be amended to clarify that local school districts have the authority, pursuant to ESSA, to define ambiguous terms and establish compliance standards. Amending the regulation to allow school districts to locally define unclear terms in the rule is the most effective way to establish clear expectations in a way that supports local autonomy and the ability of locally elected school board members to make the best decisions for their district and their students. To this end, Federal administrative requirements that limit the flexibility or authority of local decision-makers to govern will be detrimental and significantly impede local school districts' abilities to utilize, to the fullest extent, the opportunity and flexibility authorized by ESSA.

Most importantly, the Department's proposed regulation must be amended to allow school districts to use ESSA's existing data reporting requirements to demonstrate compliance with supplement not supplant requirement. The use of existing data reporting requirements will maximize district resources, reduce administrative burdens, and allow district leaders to focus on building resources within the district. However, the standard in the proposed rule must reflect ESSA's statutory requirement: this data must demonstrate that a Title I school receives all of the State and local funds it would otherwise receive if it were not receiving Title I funding.

On behalf of the Florida School Boards Association, it is our hope that the Department will amend the proposed regulation to reflect ESSA's statutory parameters relating to supplement not supplant in a way that supports and strengthens local governance of public education. The proposed regulation must be amended to avoid federal overreach, whether it be through the regulatory, non-regulatory or peer review process. We look forward to working with the Department to further this overarching goal, and continuing to serve as a resource throughout the ESSA-implementation process.

Sincerely,



Beverly Slough
Chair, Federal Relations Subcommittee
Florida School Boards Association



Andrea Messina
Executive Director
Florida School Boards Association