



February 24, 2019

The Honorable Betsy DeVos
Secretary
U.S. Department of Education
400 Maryland Avenue, SW
Washington, D.C. 20202

Via email only: OESE.feedback@ed.gov

RE: U.S. Department of Education January 2019 Draft Non-Regulatory Informational Document on Supplement not Supplant under Title I, Part A of the Elementary and Secondary Education Act of 1965, as Amended by the Every Student Succeeds Act

Dear Secretary DeVos:

On behalf of the NAACP Legal Defense and Educational Fund, Inc. (LDF), we write to provide comments on the U.S. Department of Education's (the Department's) January 2019 Draft Non-Regulatory Informational Document on Supplement not Supplant under Title I, Part A of the Elementary and Secondary Education Act of 1965 (ESEA), as Amended by the Every Student Succeeds Act (ESSA). We urge you to issue clear and effective guidance that encourages rigorous, transparent standards for how local educational agencies (LEAs) demonstrate their compliance with the "supplement, not supplant" (SNS) requirement of Title I, Part A, to improve the quality of educational services for all students.

Founded in 1940 by Thurgood Marshall, LDF is the nation's oldest civil rights law organization. For almost 80 years, it has relied on the Constitution and federal and state civil rights laws to pursue equality and justice for African Americans and other people of color. LDF's commitment to ensuring equity in education is demonstrated by its leadership in the seminal U.S. Supreme Court case of *Brown v. Board of Education*,¹ and its current work to advance quality educational opportunities for students of color, including through the enforcement of ESSA.²

In 1969, four years after the passage of the ESEA, LDF released a report detailing the extreme misuse of Title I funds in states across the country.³ The report found that some

¹ 347 U.S. 483 (1954).

² See, e.g., *11th Circuit Reverses District Court Decision, Preventing Gardendale Secession from Alabama School District*, <https://www.naacpldf.org/press-release/eleventh-circuit-reverses-district-court-decision-preventing-gardendale-secession-from-alabama-school-district/>; *Stout v. Jefferson Cnty. Bd. of Educ., et al.*, Case No.: 2:65-cv-00396-MHH (11th Cir. 2018), <http://media.ca11.uscourts.gov/opinions/pub/files/201712338.pdf>; 'Engaging in Education Equity' to Ensure Every Student Truly Succeeds, <https://www.naacpldf.org/press-release/engaging-education-equity-ensure-every-student-truly-succeeds/>.

³ See Washington Research Project and NAACP Legal Defense and Educational Fund, Inc., *Title I of ESEA: Is it Helping Poor Children?* (Dec. 1969), <http://files.eric.ed.gov/fulltext/ED036600.pdf>.

school districts often used Title I funds to maintain racially segregated schools. For example, in Mississippi, several school districts used federal funds almost exclusively to build and equip cafeterias and libraries, to hire teachers, and to provide instructional materials and books to Black students—resources available to schools serving white students through state and local funds.⁴ Other school districts, such as those in Alabama, used Title I funds as general aid to all students, instead of targeting students who were educationally disadvantaged, as required by ESEA.⁵

Even after Congress added the supplement not supplant provision to the ESEA in 1970, far too many states and districts still fail to provide high-poverty schools with an adequate level of state and local funds to ensure that federal funds are truly supplemental and provide the additional supports that students need to be successful.⁶ As the Department has recently stated, “approximately 5,750 Title I schools nationwide received substantially less state and local funding than their non-Title I peers *within the same district*.”⁷ Indeed, LDF has continued to litigate desegregation lawsuits in an effort to end inequities in educational systems in some of the same jurisdictions highlighted its 1969 report.⁸ It is therefore imperative that the Department provide clear and robust guidelines for LEAs to ensure that they are equitably distributing resources and providing all students with fair access to educational opportunities.

The following changes to the SNS guidance would help ensure that LEAs comply with ESSA:

- 1. Emphasize that school districts should demonstrate compliance with the SNS requirement by showing that Title I schools receive as much in state and local funds as the average of such funds received by non-Title I schools**

The proposed guidance states that a broad range of methodologies can be used to comply with the SNS requirement. This amount of leeway could allow LEAs to continue to underfund the neediest schools, which disproportionately serve students of color. The guidance should instead strongly emphasize as a main point that LEAs should demonstrate compliance by showing that each Title I school receives at least as much actual state and local funding as the average of non-Title I schools in the same district. This would help the Department ensure that Title I schools are receiving at least as much as the average non-Title I school.

⁴ *Id.* at 18.

⁵ *Id.* at 4-9.

⁶ *See*, U.S. Department of Education, Title I—Improving the Academic Achievement of the Disadvantaged—Supplement Not Supplant, 81 Fed. Reg. 61148, 61152 (Sept. 6, 2016) (Hereinafter *Proposed SNS Regulations*) (stating that in the 2013-14 school year, in about 1,500 school districts, Title I schools received hundreds of thousands less state and local funds than their non-Title I counterparts, suggesting that federal funds supplanted state and local funds).

⁷ FACT SHEET: Supplement-not-Supplant under Title I of the Every Student Succeeds Act (archived information), Aug. 31, 2016, <https://www.ed.gov/news/press-releases/fact-sheet-supplement-not-supplant-under-title-i-every-student-succeeds-act> (emphasis in the original) (numbers based on a Department analysis of the 2013-2014 Civil Rights Data Collection. Please see Title I-Improving the Academic Achievement of the Disadvantaged-Supplement Not Supplant, 81 Fed. Reg. 61148 (proposed Sep. 6, 2016; withdrawn Jul. 17, 2018), <https://www.federalregister.gov/documents/2016/09/06/2016-20989/title-i-improving-the-academic-achievement-of-the-disadvantaged-supplement-not-supplant>).

⁸ *See supra* note 2.

The Department must also revise its answer to Frequently Asked Question #11 in the draft guidance to further clarify that LEAs can and should use actual per-pupil expenditure data to demonstrate SNS compliance. The document currently states that an LEA may not use its actual per-pupil expenditures to demonstrate compliance “since actual per-pupil expenditure data is not a methodology by which State and local funds are allocated to schools, [and] it therefore cannot be a methodology for an LEA to demonstrate compliance with supplement not supplant.” Although the law does prohibit the Department from telling LEAs that they must use a specific methodology to allocate state and local funds,⁹ it does *not* prohibit the Department from recommending or requiring a specific method by which LEAs demonstrate their compliance with SNS.

Contrary to the Department’s assertion in the draft document, the law does not link how LEAs demonstrate compliance with the methodologies they use to allocate funds. As noted in the draft guidance, LEAs could use weighted student funding, formulas for staffing and materials, or other methodologies to decide how to allocate funds to individual schools, but when reporting to the Department on compliance with SNS, LEAs can and should report whether, under whichever allocation methodology they choose, the state and local funding provided for any Title I school was at least as much as the average for non-Title I schools. Under ESSA, school districts will be able to make this showing because the law requires states to include in their annual report cards per pupil expenditures of federal, state and local funds for the preceding year, including actual personnel and non-personnel expenditures, disaggregated by source of funds, school district and school.¹⁰

2. Recommend that school districts act publicly and transparently and include stakeholders in the decision-making process regarding which methodologies they use in allocating funds and demonstrating compliance.

The Department should emphasize in its guidance document the importance of including and engaging stakeholders, including teachers, parents, students, and education advocates, in the decision-making process for how LEAs allocate state and local funding, and for how they demonstrate compliance with SNS. We urge the Department to encourage LEAs to act openly and transparently, keeping the public and engaged stakeholders informed of their actions. However, the current informational document, rather than encouraging transparency, does the opposite. Question 17 of the FAQ section states that there is no federal requirement for LEAs to post their methodology for allocating state and local funds on their websites. As the only reference to how the methodology can or should be released publicly, this inclusion sends the message that the Department does not care about public transparency. As per pupil expenditures are included in state report cards, it is reasonable for LEAs to also report the methodology they rely upon for allocating funds and ensuring SNS compliance. The document should be updated to encourage transparency and stakeholder engagement.

⁹ See Every Student Succeeds Act, 20 U.S.C § 6321(b)(4) (“Nothing in this section shall be construed to permit the Secretary to prescribe the specific methodology a local educational agency uses to allocate State and local funds to each school receiving assistance under the part.”)

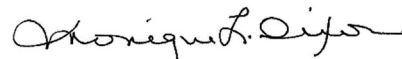
¹⁰ See Every Student Succeeds Act, 20 U.S.C. §6311(h)(1)(C)(x).

3. Provide additional suggestions for compliance with the SNS requirement by clarifying that school districts should consider pending desegregation orders and increasing funding to improve school climate.

The current SNS requirement does not acknowledge the existence of any school desegregation court orders that may require school districts to reassign school staff or take other actions to desegregate schools. Therefore, the guidance should include information regarding how school districts must comply with any pending desegregation court orders when they allocate funding in compliance with SNS. The Department should also encourage districts to comply with the SNS requirement by considering all available options, such as improving working conditions at high-poverty, hard to staff schools to attract and retain the best teachers, and increasing other resources, such as wrap-around services, school counselors and school-based health providers. We recommend that the Department provide more guidance to districts by including additional examples of effective strategies for increasing resources to high-poverty schools, such as implementing strategies to promote positive school climates. These include having additional school counselors, social workers, and access to evidence-based and promising programs like Restorative Practices, Positive Behavior Interventions & Supports¹¹ and trauma-informed care.¹² These measures get to the root of problems students are facing and proactively create more equitable environments conducive to learning for everyone in the school community.

Thank you for considering our comments. If you have any questions or concerns, please do not hesitate to contact us at (202) 682-1300.

Sincerely yours,



Monique L. Dixon
Deputy Director of Policy

Nicole Dooley
Policy Counsel

cc: Frank Brogan, Assistant Secretary, Elementary and Secondary Education

¹¹ See Jenni Owen, et al., *Instead of Suspension: Alternative Strategies for Effective School Discipline*, Duke Center for Child and Family and Policy, 2015, available at https://law.duke.edu/childedlaw/schooldiscipline/downloads/instead_of_suspension.pdf.

¹² See Katy O'Grady, *Transforming Schools with Trauma-Informed Care*, ASCA SCHOOL COUNSELOR, Jan. 2017, available at <https://www.schoolcounselor.org/asca/media/asca/ASCAU/Trauma-Crisis-Management-Specialist/TransformingSchools.pdf>.