



UNITED STATES DEPARTMENT OF EDUCATION

THE UNDER SECRETARY

March 6, 2003

Honorable Sandy Garrett
Superintendent
Oklahoma Department of Education
2500 North Lincoln Boulevard
Oklahoma City, Oklahoma 73105-4599

Dear Superintendent Garrett:

I am responding to the letter from Dr. Katie Dunlap to Cheri Yecke dated October 4, 2002, in which Dr. Dunlap requested a waiver of the maintenance of effort requirements in the Elementary and Secondary Education Act (ESEA), as amended by the No Child Left Behind Act of 2001, as they affect funds local educational agencies (LEAs) receive under Title II, Part A of the ESEA. I regret the delay in responding to this request, but I know that our staffs have had useful discussions about these matters. With Dr. Dunlap's departure from your agency, I thought it best to reply to you directly.

Maintenance of effort refers to the need of each LEA, as a condition of receiving funds under any "covered program" (identified in ESEA section 9101(13)), to have maintained in the previous fiscal year at least 90 percent of the level of State and local expenditures for K-12 education, in the aggregate or on a per-pupil basis, that the district expended in the second preceding fiscal year. (See ESEA section 9521.) If an LEA fails to maintain effort, ESEA section 9521(b) requires your agency to reduce ESEA funding to that LEA under Title II-A and other covered programs. This reduction must be in exact proportion to the percentage by which the LEA has failed to meet the 90-percent level of State and local expenditures (on a per-pupil or aggregate basis, whichever is more favorable to the LEA). In addition, section 9521(c) authorizes the Secretary to waive these requirements if the Secretary determines that doing so would be "equitable due to (1) exceptional or uncontrollable circumstances, such as a natural disaster, or (2) a precipitous decline in the financial resources of the [LEA]"

From the context of Dr. Dunlap's letter and discussions with staff of your agency, we have learned of the significant impact that State funding cuts of over 11 percent in the past two years have had on Oklahoma LEAs and the resources they have available for K-12 education. We also have learned that, in view of this severe revenue shortfall, your agency's primary interest in requesting this waiver is to enable LEAs to use their Title II A program funding to pay for positions and services that, in past years, were paid with State or local resources. Because the ability to do so concerns application of the ESEA's "supplement, not supplant requirement" as well as maintenance of effort, we will discuss both of these ESEA provisions.

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Maintenance of Effort. Because the maintenance of effort requirement in section 9521 applies to individual LEAs, we cannot grant a blanket waiver to the State. Rather we must consider the waiver requests for specific LEAs that have failed to maintain effort. Thus, before we are able to evaluate your agency's request more thoroughly, we will need to receive specific information for each Oklahoma LEA that did not meet the 90-percent threshold regarding (1) the separate amounts of State and local resources that it had available in each of the past two fiscal years, and (2) the reasons for the LEA's inability to make up for State revenue shortfalls with local resources. (In this regard, any reduction in the amount of State and local resources that an LEA expends this year for free public education, and that causes it to fail to maintain effort, would only begin to create consequences in the amount of ESEA program funding that the Department will be able to make available to Oklahoma and other States beginning July 1, 2004.) Upon receipt of these data, we will let you know if we need any further information.

Supplement, Not Supplant. The supplement, not supplant requirement prohibits the use of funds provided under Title II-A to pay for services that, in the absence of these funds, would be paid from State or local funds. It is a basic requirement of Title II-A and most other ESEA programs, and is one that ESEA section 9401(c)(4) specifically prohibits the Secretary from waiving.

However, we do want to help your agency and Oklahoma LEAs to determine when their use of Title II-A and other ESEA funds to pay the costs of salaries or other services previously paid with State or local funds would legitimately supplement, rather than supplant, State and local funds. With this in mind, we offer the following guidance

- 1. In view of the financial difficulties they are facing, we understand that many LEAs included in their consolidated local applications proposals to use a portion of ESEA program funds to pay all or part of the costs of certain personnel or services that, until now, they had paid with State or local funds. The prior use of State or local funds in this regard creates a presumption that the use of ESEA funds (in a program to which a supplement, not supplant provision applies) this year impermissibly supplants those funds. However, this presumption may be overcome by documentation confirming that, in the absence of the Federal funds, the LEA would not have maintained these personnel or services with State or local funds. Given the State's fiscal situation, many Oklahoma State and local officials appear to be facing difficult choices, but whether a particular LEA is able to document compliance with the supplement, not supplant requirement will depend upon its own unique factual circumstances.
- 2. It is important to understand the kinds of records that LEAs must maintain to confirm that these expenditures are truly permissible ones that supplement, rather than supplant State- or locally-paid services. Generally, where they would spend ESEA funds this year on personnel or services previously paid with non-Federal sources, LEAs will need to

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maintain fiscal and programmatic records to confirm that, in the absence of Title II-A and other ESEA funds, they would have eliminated these staff or other services. For example, an LEA may have hired a teacher to reduce class size whose salary previously was paid with State or local funds. Finding that this year there are no State or local funds available to pay this teacher's salary, the LEA proposes to use \$50,000 of Title II-A funds to pay for this salary in order to retain the teacher. The LEA would want to ensure that its records for the 2002-2003 school year confirm:

- a. The reduced amount or lack of State and local funds available to pay for this position, and
- b. The LEA's decision to eliminate the position in the absence of Federal funding, along with the reason(s) for that decision.

These kinds of records, for example, might explain what component(s) of its educational program the LEA would have retained with State and local resources, as well as the LEA's reasons for choosing to eliminate support for the staff position with State and local funds (and to show that it would not have paid for the position with State or local funds in the absence of Federal funds).

Your agency should instruct those LEAs unable to so document that they may not pay for these personnel or services with Title II-A or other ESEA funds under a program to which a supplement, not supplant provision applies. Of course, LEAs also would need to keep records to confirm that Title II-A and other ESEA funds are obligated for costs that are allowable under the program statutes. In this regard, Title II-A specifically permits program funds to pay the salaries of teachers hired to reduce class size. However, while an LEA may use Title II-A funds for pay supplements, salary differentials, merit pay, and similar strategies for retaining highly qualified teachers, the ESEA does not otherwise authorize an LEA to use Title II-A funds to pay salaries of these teachers or other school district staff.

- 3. Given the nature and importance of the supplement, not supplant requirement as well as the analysis of it that we offer above, we also urge your agency to inform LEAs that their authorization, if any, to pay for these salaries and other services out of ESEA funds will apply only to one school year at a time. A new decision should be made before the beginning of each school year about whether, based on the availability of State and local funds for that year's program and use of ESEA funds that is otherwise authorized as described above, the LEAs' fiscal situation compels the continued availability of ESEA funds for these personnel and services.

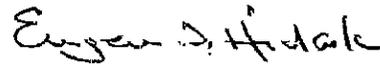
Finally, it is possible that your auditors or others may question the propriety of an LEA's use of any ESEA program funds for personnel or other services previously paid with State or local funds. For reasons explained above, an LEA's records should reasonably confirm that (1) if it had received no ESEA funding the LEA would not have paid for the

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personnel salaries or other services at issue with State or local funds, and (2) the use of these ESEA funds is otherwise authorized. Where an LEA retains these records and there are no other facts that indicate that supplanting occurred, I fully expect that this Department would support decisions made by both that LEA and your own agency

I appreciate the significant fiscal challenges that your State and its LEAs are now facing, and trust that this response will help to clarify some of the flexibility the ESEA may offer to help LEAs meet these challenges. If you have any additional questions or concerns about this response please contact Bill Wooten at (202) 260-1922.

Sincerely,



Eugene W. Hickok