New SES Non-Regulatory Guidance From USED
Provides Greater Flexibility Which Could Create
Expanded Opportunities for Some TechMIS Subscribers

A Technology Monitoring and Information Service (TechMIS)
SPECIAL REPORT

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The six-months-overdue NRG on supplemental educational services (SES), issued June 13 by USED, provides greater flexibility for districts, which should create opportunities for many more firms to get their share of SES funding. In the past, we have identified several issues which many observers, including NCLB advocates, have supported, including:

- allowing schools identified for improvement for the first time to provide SES along with transportation options;

- allowing districts which have been identified for improvement to continue providing state-approved SES under certain conditions, such as demonstrated progress in increasing student performance; and

- allowing districts to reallocate unused portions of the 20 percent set-aside for SES and transportation for other allowable purposes.

To varying degrees, the new guidance addresses, at least obliquely, some of these issues.

In a new section (G-12), the Q and A guidance allows an LEA voluntarily to offer supplemental educational services during the first year in which a school is identified for improvement, if there are no schools or grade levels available to which students can be transferred. During the first year, the LEA may offer supplemental educational services which do not have to meet some of the SES requirements (e.g., serve only low-income students or contract only with state-approved providers). However, the guidance states "…because the LEA will be required to offer supplemental educational services (that meet all the statutory requirements) to students in that school the next year if the school remains in improvement status, it would help avoid confusion and administrative complexity if the LEA, in that first year, abides by the requirements of section 1116 (e) as much as possible. In addition, if the LEA uses Title I funds to provide supplemental educational services, it must meet all the requirements governing the use of those funds in schoolwide and targeted assistance programs." Under question K-13, the NRG clearly states that if an LEA provides SES to students enrolled in schools in their first year of improvement, the cost of these services count toward the 20 percent requirement under the following conditions: (a) the services meet all the requirements of section 1116 (e); and (b) the LEA is meeting the full demand for SES from students enrolled in schools in their second year of improvement or subject to corrective action or restructuring. In light of the fact that the percentage of eligible students who transfer under the parent option to another school when their school is identified for improvement for the first time has actually dropped from two percent to one percent over the last two years, the rationale for providing SES during the first year a school is identified for improvement should not be too difficult to document. In fact, some states such as Florida have been providing district-operated SES for the last year under this rationale.

Another result of this policy change is that more funds will likely be spent on SES than on parent choice transportation and will be spent one year earlier than heretofore allowed. The latter implication is that more districts are likely be able to provide such SES, particularly if they have been approved by the state as SES service providers.

In a related area under Section C-11, the guidance continues existing USED policy that, if an LEA is in need of improvement or corrective action, the LEA may not provide SES; and, if previously approved by the state, the LEA must be taken off the state's list of approved providers. As has been noted in previous TechMIS reports, the policy included in this NRG and articulated in the case where USED mandated that Chicago Public Schools discontinue providing SES once it was identified for improvement, does not have a basis in either regulations or NCLB provisions. As more urban districts are identified for improvement (e.g., the number discontinuing SES during the last two years dropped from 41 to 11 according to CEP, cited in the May TechMIS), a lawsuit questioning USED's authority could result in USED withdrawal of this policy. On the other hand and in the meantime, the new NRG formalizes a policy statement from former Secretary Paige to the President of the American Federation of Teachers that groups of teachers or a local affiliate of a national teacher group could provide SES if approved by the state. In clarifying what the definition of an "entity" is, the NRG states, "An SEA might also decide that a group of individuals that is not formally incorporated may be considered an entity. Each SEA may make this decision." The guidance also clarifies that teachers who work in a school or in an LEA in need of improvement may serve as supplemental educational service tutors and may be hired by any state-approved provider "…including an LEA provider that is not in need of improvement" to serve as a tutor in its program.

The new NRG, which represents an update of the initial August 2003 guidance, also provides a new incentive for districts to use existing afterschool programs that have been approved by the state as a supplemental service providers to expand the number of SES participants they could serve. In doing so, the amount of SES funds associated with SES participants served by the afterschool provider can count toward the 20 percent requirement. Generally speaking, for districts identified for improvement which no longer can provide SES directly, the clear options are to use teacher groups, local NEA or AFT affiliates, and/or existing afterschool providers who are all possibly more likely to be selected by parents as potential SES providers than unknown third-party groups.

Although not addressed in the new SES Non-Regulatory Guidance, there are two groups of states in which the likelihood is much greater that districts will be able to continue providing their own SES programs, in some cases even after the district has been identified for improvement. One group of such states are those which have requested, and for which USED has approved, amendments which are likely to reduce the probability a district will have been identified for improvement. These are states which, to identify a district for improvement, would require a district to fail to meet AYP targets in each of the two subject areas for each of the three grade spans for two consecutive years. When USED recently approved the requested California amendment, the number of districts which otherwise would have been identified for improvement was reduced from 378 to 150 districts. As of the end of June, we estimate that approximately 20 states have had such amendments approved. This has been corroborated by tallies compiled by Harvard University's Civil Rights Project and by Kathryn Shek, a reporter from Education Daily. These states include Alabama, Connecticut, Delaware, Georgia, Illinois, Indiana, Louisiana, Maryland, Missouri, Nebraska, New Hampshire, New Jersey, North Carolina, Oklahoma, Oregon, South Dakota, Tennessee, West Virginia, Wisconsin, and Wyoming.

Another group of states are those which have been granted Ed-Flex status as a state. In general, many states requested, several years ago, the right to receive waivers from certain regulations in return for imposing greater accountability measures tied to student performance. Another group of states applied for and received waivers for Local Ed-Flex. In the case of Florida, ten districts have the right to request and receive certain regulatory relief by implementing greater accountability measures. In the June 30 issue of Title I Online, USED official Elaine Quesinberry, stated USED policy as follows: "…a state may use its Ed-Flex authority to allow a district in improvement to serve as an SES provider..." The article also states, "The provisions prohibiting districts from running their own SES programs if they are in improvement, however, is regulatory, not statutory. Hence, said Quesinberry, ED decided it is waivable."

This policy statement would certainly allow a state which has Ed-Flex status to automatically provide a waiver to all districts which have been identified for improvement who wish to continue operating their own state-approved SES programs. These states include: Alabama, Colorado, Delaware, Illinois, Indiana, Kansas, Massachusetts, Maryland, North Carolina, Oregon, Pennsylvania, Texas, and Vermont.

One might reasonably assume that the policy would also apply to districts who are part of a Local Ed-Flex state. Indeed, for the last year, Hillsborough County, Florida, which is one of the ten Florida districts which received local Ed Flex status approval, has been operating a district-approved SES program which has more participants than any other externally-operated SES program.

Firms who may wish to partner with districts in order to receive some portion of SES funds, should target these states, informing specific districts regarding their options under this newly-stated USED policy, if they are not already aware of these policies.

The new NRG explains in greater detail the one area in which a district identified for improvement may itself provide SES – i.e., for students with disabilities and English language learners, who are eligible SES participants, but whom no external state-approved service provider will serve. In order to provide such services, the LEA does not have to be approved the state. Given the fact that, in most instances, external service providers do not wish to serve special education and limited-English-proficient students, this may provide a stable opportunity for firms with effective products in this area to partner with districts to provide SES for these students, particularly in light of the fact that additional IDEA funding may be available to cover the increased cost of providing such services.

High-level USED officials have stated -- off the record -- their willingness to reconsider, if not change, the Department's existing policy regarding districts identified for improvement no longer being allowed to continue providing Title I-funded SES. However, on more than one occasion, as reported in recent TechMIS issues, Chairman John Boehner, one of the four primary Congressional authors of NCLB, has been adamant in continuing existing USED policy in this area.

Another question which has been raised in several quarters is what funds that are allocated for SES, beyond the districts' initial Title I allocation, can be counted toward meeting the 20 percent requirement in districts with large numbers of schools identified for improvement for two or more consecutive years. Following a recommendation by Dr. Phyllis McClure in her recent report to the Center for American Progress (see TechMIS Washington Update April 2005), the new NRG states that the state four-percent school improvement set-aside allocations to schools identified for improvement can be used for SES. This updated NRG also notes that the recently authorized IDEA allows an SEA to reserve IDEA funds for supplemental educational services which are one of eleven permissive activities for which state set-aside funds can be used. Hence, an SEA can allocate such IDEA funds to schools identified for improvement based solely on disaggregated scores of subgroups of students with disabilities to pay for supplemental educational services. In this case, these funds may count "toward its obligation to spend an amount equal to 20 percent of its Title I, Part A allocation on supplemental educational services and choice-related transportation." However, the same statement is not made for using allocations of the four percent state set-aside under Title I for school improvement. This does not follow any rhyme, reason, or logic.

Another issue which we have raised in previous TechMIS reports is: when an LEA reallocates the unspent portion of 20 percent earmark for SES and parent choice transportation options, what can such unspent funds be used to purchase? And a related question is: how should an LEA reserve Title I funds to help pay for the cost of SES and transportation? On the last point, the NRG states that the LEA may reserve such needed Title I funds for earmarks "off the top prior to making allocations to schools," or may also "adjust allocations to schools to make available the required funds." Most large urban districts will do a combination of the two or, at the least, reserve Title I funds taken off the top in the central office "reserve" prior to making allocations to schools, if it is felt that some earmarked funds will remain unspent.

In order for an LEA to earmark less than 20 percent for choice-related transportation and SES and/or to reduce the 20 percent to a lesser amount mid-year, it must estimate the lesser amount needed to "meet demand" by documenting that it has:

- appropriately notified all eligible parents of the availability of services;
- adequately publicized options to parents in understandable formats; and

- offered parents a reasonable time to investigate their options and submit their request.

If a district can provide such documentation, the LEA "may allocate any unused funds to other allowable activities." If, on the other hand, an LEA spends less than the 20 percent but continues to have an excess demand for services, an LEA must spend such unspent funds by reopening enrollment for SES such as summer schools (which several SES providers, such as Catapult, have been suggesting in advertisements where unused earmarks exist). On the other hand, if an LEA carries over the unspent earmark to the next year, it must continue to earmark those funds for choice-related transportation and SES in the next year. The bottom line is that districts that have clearly demonstrated and documented that the demand for SES and choice-related transportation options is less than the 20 percent during the current school year, may reallocate the unspent earmark to purchase other allowable goods and services. In most states, the end of the year for obligating such funds is as early as June 30, but can be as late as September 30, the end of the Federal fiscal year (see May 16 Special Funding Alert).