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MEMORANDUM

O: December 17, 2002

TechMIS Subscribers

FROM: Charles Blaschke

SUBJECT: Title I Final Regulations and Implications

During the last week in November, USED released final Title I regulations which appeared in the Federal Register on December 2. The final version included USED's responses to questions and comments submitted in October relating to the August 6 proposed regulations. Rather than attempt to summarize all of the rules, in this Special Report we identify only major opportunities and potential problems created for many TechMIS subscribers. Also, you should be aware that on December 4 and on December 12, USED issued nonregulatory guidance (NRG) on Parent Choice Options and Supplemental Services, respectively, which you will note in the enclosed Special Report are in conflict with each other on certain issues. When differences have existed between final regulations and nonregulatory guidance regarding ESEA over the last 35 years, the regulations always took precedence in terms of the Title I legal framework. How this Administration will resolve such differences, would they attempt to do so, is not clear as Congressional oversight over USED thus far has been extremely weak. If you have any questions as to how any specific

regulations could affect you, please feel free to give me a call.

I have also included an e-mail from MCH who has asked us to help them and FETC to conduct a half-day symposium on February 3 (the Monday before the FETC conference officially begins), which will provide an update on: (a) Title I and important regulations and the Federal education budgets for FY 2002 (which could be impacted midyear by a rescission); (b) the FY 2003 budget (which is under a Continuing Resolution through January); and (c) the Administration's proposed FY 2004 budget (which will be submitted shortly after the symposium). The intended audience is exhibitors primarily, as well as selected technology coordinators from Florida districts. If you or some of your junior staff are going to be in Orlando on that Monday, I hope you can join us for one or more sessions.

Again, if you have any questions please contact me directly.

USED Publishes Final Title I Regulations Which Suggest Some Immediate Opportunities For Many TechMIS Subscribers As Well As Several Concerns And Problems

A Technology Monitoring and Information Service (TechMIS)
SPECIAL REPORT

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December 17, 2002

On December 2, the final Title I regulations were published in the Federal Register and, as we suggested in several reports on the August 6 proposed regulations and various non-regulatory guidance publications, there are indeed some new opportunities for TechMIS subscribers who have relevant products and services. However, buried in the 350+ page set of regulations are a number of rulings which could present problems or concerns for certain software and related publishers. Rather than attempting to summarize all of the final regulations, we have attempted to identify those rules and regs which create specific opportunities as well as those creating problems for specific types of firms. While USED has identified this set of regs as being "final," there are a number of instances where uncertainties continue and for which USED plans to submit additional proposed regulations in the future. Such revisions in regulations and continuing publication of nonregulatory guidance in specific areas (e.g., School Choice published on December 4, Supplemental Services on December 12) continue to foster confusion and uncertainty among many districts. This will have a dampening effect on purchases of products and services; publishers will have to live with this over the next year. We have omitted comments on regulations in important areas which do not have direct immediate impact on publishers, such as definitions and compliance rules imposed upon states and districts related to adequate yearly progress (AYP).

Without question, the final regulations will expand market demand in the area of professional development and staff training immediately and over the next several years (through 2006) when all teachers must be "highly qualified."

1. Alternative Certification Route

Not unexpectedly, the final regulations further bolster the emerging "alternative certification routes for teacher certification" which Secretary Paige (to the chagrin of the NEA, AFT, and other groups) has touted as an alternative to traditional four-year teacher college routes. The regulations add new language that requires teachers in alternative route programs to: "(1) receive high-quality professional development that is sustained, intensive, and classroom-focused in order to have a positive and lasting impact on classroom instruction before and while teaching; (2) participate in a program of intensive supervision that consists of structured guidance and regular ongoing support for teachers or a teacher-mentoring program; (3) assume functions as a teacher only for a specified period of time not to exceed three years before receiving full state certification; and (4) demonstrate satisfactory progress toward full certification prescribed by the state."

In responding to several comments suggesting that "alternative route" teachers would not meet the new "high qualifications" in the law, the Department says, "We do not believe that Congress intended that teachers in alternative route programs should be unable to teach until they have obtained full state certification. Beyond this we believe that LEAs can and should be able to continue to effectively use alternative routes to certification as a mechanism for increasing the number of teachers who are capable to providing effective instruction." Without question, these changes create a demand for online or other technology-based training for individuals participating in alternative route processes established by states. Indeed, as noted in the last Washington Update, proportionately more "educators" are participating in distance learning programs as of 2000, suggesting that many were existing teachers taking additional credit courses or individuals preparing to become teachers. In the December 4 Education Week, knowledgeable observers of traditional college-based teacher training suggested that these institutions are not likely to expand alternative routes for teacher training and certification or as David Imig, CEO of the Association of Colleges for Teachers' Education (which represents more than 700 teacher preparation colleges), was reported to say, "They (colleges) don't see the incentives. The structures of university finances are such that it is almost impossible to do this kind of work." Rather he noted that colleges make their money by charging students per credit hour rather than offering bulk rates for training packages.

The National Center for Education Information (NCEI), a highly respected organization -- which,

since 1983, has been surveying states regarding alternative routes for certifying teachers -- reported that, in 2002, there are 45 states (plus the District of Columbia) with one or more types of alternative teacher certification programs compared to only eight states with such alternatives in 1983. In its 1999 survey, then CEI found that nearly 80 percent of prospective secondary school teachers, when they began their preparation to teach, had degrees in fields other than education; the percentage at the elementary level was about 75 percent. Calling alternative routes for certification "one of the few, truly market-driven phenomena in American education," the report indicates that seventeen states have passed new legislation or created new alternative certification programs in just the last five years; and in Texas, 16 percent of new teacher hires come through the State's 34 alternative routes. Moreover, in terms of market size, it estimates that approximately 30 percent or about 25,000 teachers of the 75,000 newly-hired teachers annually over the last couple of years were certified through alternative routes. It also suggests that increased Federal funding for small programs such as Transition to Teaching ($35 million in FY 2002), as well as large programs such as Title II A/Teacher Quality (funded at slightly over $3 billion), will provide for the expansion of teacher certification through alternative routes. In March 2002, NCEI published the latest edition of "Alternative Teacher Certification: A State by State Analysis 2002" which includes state contacts for alternative teacher certification routes and actual alternatives in each state. For more information go to www.ncei.com/indepth.

2. Core Subject Certification

A similar opportunity exists with teachers who are certified in areas other than core subject content, as they have to be trained and certified in core content areas if they teach math, reading, or language arts to Title I students. For example, the regs clearly state that, while special education teachers or teachers of students with limited English proficiency may be licensed or certified in this specialty area, they must still be certified in core academic subjects if they teach these subjects to students. However, if they only provide consultation to other teachers of core academic subjects, assist in selecting accommodations, or provide other behavioral support, they do not have to meet the "highly-qualified" requirements placed on all teachers of core academic areas. Previous draft guidance clearly stated that vocational education teachers who do not teach core subject areas, do not have to meet the highly-qualified requirement. Interestingly however, in early December, the Massachusetts State Board of Education announced a proposal to require new voc ed teachers to take

more classes in English, math, and other core areas to earn career and technical education licensure in the State. The initial opposition to the teacher qualifications in No Child Left Behind were raised by Massachusetts over two years ago, but it now appears that there is a recognition that vocational education teachers need to demonstrate greater competency to teach in core subject areas, because vocational educational students must now pass state graduation exams in these core academic areas. Several directors of Title I programs in large districts who were recently interviewed indicate that their districts are only now able to compile lists of teachers that are certified in specialty areas who also meet the NCLB highly-qualified requirements relating to teaching core subject areas. In some states, between ten and twenty percent of existing teachers who teach core subject areas were thought to have not been "certified" by the state in these core areas. The final regulations do acknowledge that states should have flexibility to tailor tests to the subjects taught by teachers, including special education teachers and teachers of LEP students. As with other issues related to "high qualifications," the final regulations also state that the issue of local flexibility and design in administering assessments will be addressed in future nonregulatory guidance.

3. Paraprofessionals

A third opportunity noted in our last Washington Update, relates to training of paraprofessionals because districts are provided much more flexibility regarding the requirement that newly-hired teacher aides must be "highly-qualified." Greater flexibility exists in several areas: (a) a previously-employed aide who assumes an instructional support role, after having previously provided other types of support, does not have to meet the new requirements; (b) a previously-employed aide who provided tutoring support in a Title I or other school can be reassigned to a Title I schoolwide program without having to meet the new requirements; (c) if a teacher aide is "pink slipped" at the end of one school year but rehired at the beginning of next school year, he or she is to be considered an existing employee and does not have to meet the new requirements. To the extent districts and principals take advantage of this new "wiggle room," less money has to be allocated to provide financial incentives (signing bonuses, etc.) to ensure "higher-qualified" aides are hired. On the other hand, the final regulations also make it clear that Title II A (Teacher Quality) funds and Title I funds earmarked for training (at least 15 percent) in schools identified for improvement for the first time can be used to train paraprofessionals. These funds originally were to be used only for training teachers. Districts also have much greater flexibility in designing and selecting the type of

assessment to be used to "certify" instructional support aides as being highly-qualified. Measures that could be jointly developed with an outside training group in the district other than traditional paper-and-pencil tests may be used. As reported in The Heller Report, almost 30 states have contracted with the Education Testing Service to use its new paraprofessional "Parapro" assessment to certify aides.

These final regulations provide opportunities for alternative means of training, assessing, and certifying aides. The most recent USED estimates -- roughly a year ago -- indicated that approximately 1 million teacher aides or assistants were employed by public schools, with more than half being used to provide instructional and other support in special education programs. The number of aides paid out of Title I has been estimated at between 300,000-400,000. The total number of instructional support aides funded under Title I, special education, or other sources is likely to be in the neighborhood of 400,000 with about 50-60 percent not able to meet the "highly-qualified" requirements that must be met in approximately three years. These represent a potential market for training and certification.

4. Distance Learning

The final Title I regulations and comments by USED in response to questions indicates an increasing priority on distance learning, particularly as an important means by which parent choice and supplemental services provisions can be effectively implemented. The priority placed upon distance learning/online instruction has evolved in the past 18 months. During the September 2001 EdNet Conference, Under Secretary Hickok was asked the question: "How can your office and the provisions currently in the draft ESEA legislation promote online assessments while limiting supplemental services to be provided by groups in "close proximity" to schools identified for improvement; why isn't distance learning or online instruction considered being promoted as an equally important alternative?" While his public response was evasive, he did acknowledge the importance of technology in delivering instruction. Between then and passage of No Child Left Behind, the Conference Committee Report included a specific discussion (inserted by key lobbyists for one large education service provider) to ensure that distance learning was not precluded by provisions in the law limiting supplemental service providers to those "in close physical proximity" to schools. Then, the June 2002 draft regulations on supplemental services, which were released

during the July 14 ELC conference (see June 25 TechMIS Special Report), "encourages the use of distance learning in rural areas and other areas which currently have a limited number of providers available in their district." In the final regulations, an even higher priority on distance learning appears to have evolved. For example, one participant asked the Secretary to clarify its guidance to "encourage states and LEAs to promote maximum participation by providers that utilize distance learning technology." USED response was that "The SEA does not give the Secretary authority to promote one type of provider over another. Rather it places responsibility for promoting participation by the maximum number of providers on SEAs which must develop standards for approving providers and maintaining an updated list of approved providers from which parents may select." Later, however, in response to another comment, USED agreed that the language in the draft rules "could be misconstrued to exclude technology-based or distance learning providers." As a result, USED has included in the final regulations "additional language requiring the updated LEA list of providers to include technology-based and distance learning providers serving the respective LEAs."

5. Supplemental Services

Several subtle changes related to supplemental services generally and providers specifically may also offer interesting opportunities, particularly for firms that may wish to carve out a sub-niche within this complex arena.

One of the subtle changes in the final regulations relates to whether a state can require a supplemental service provider to use highly-qualified teachers and aides and/or to use only scientifically-based, research-proven approaches. While the draft regulations prohibited states from imposing these requirements, the final regulations allow a state, if it so desires, to require a supplemental service provider to use "instruction grounded in scientifically-based research." It notes that the law requires such providers to use approaches that are only "research based," which is also mentioned in the December 12 nonregulatory guidance. The final regulations will continue to bar states from requiring supplemental service providers to hire staff who are "highly-qualified;" it does, however, allow a state to require that teachers be "certified" which is inconsistent with the December 12 NRG. As Julie Miller, Editor of Title I Reports stated in a recent discussion, "There is a big difference between being a 'certified teacher' and a 'highly-qualified teacher.' Being certified is only

one of the requirements for a teacher to be considered highly-qualified under NCLBA. The regs preclude states from requiring providers to use highly-qualified teachers but will allow them to require that they use certified teachers."

The final regulations modify proposed regulations stating that a qualified instructional support aide could provide one-on-one tutoring to students only in afterschool programs under the supervision of a teacher. The final regulations indicate that such tutoring by a qualified instructional support aide could also occur in a regular classroom "when a student is not receiving instruction from a teacher." The initial draft rule was clearly designed to benefit supplemental service providers.

In another change, USED confirmed that a school identified for improvement cannot be approved as a supplemental service provider even if it has an effective program in one or two classrooms to provide afterschool tutoring and even if parents select it. Then, almost as an afterthought, USED goes even further by adding "an LEA that has been identified for improvement or corrective action is not eligible to be a supplemental education service provider." While there are not many school districts that have been identified for improvement under Federal Title I statutes and provisions (as opposed to some state statutes which would include Philadelphia and Baltimore City Public Schools among others), in some states a large number of districts requested and were approved as supplemental service providers whereby teachers from approved high-performing schools can provide afterschool tutoring in schools identified for improvement in order to keep the "Title I funds" within the district. For example, in Georgia almost half of the 140+ approved service providers are districts. Some of these districts may no longer be eligible to provide such services. On the other hand, the regulations make it clear that in a targeted school, a highly-qualified teacher who has demonstrated competency in improving student performance could be selected as a supplemental service provider to provide afterschool tutoring independently or as a hired consultant by an approved service provider. For the most part, the strategy of working with such districts in most cases would still apply and provides a good opportunity for firms with online and other instructional programs to work in partnership with such districts.

6. School Choice

In another very subtle change, the final regulations place responsibility upon states and districts to

"identify and approve providers that will be available to serve 'special education' students with necessary accommodations." Hence, an LEA could limit the choices of parents of special education students only to service providers that are capable of serving their child with necessary accommodations. On the other hand, the regulations also place the major responsibility upon LEAs to provide such necessary accommodations for these students in the absence of a service provider. As with other key provisions, additional nonregulatory guidance will be issued in the future, particularly as lawsuits are increasingly likely to be filed by both parents and advocacy groups.

The final regulations have a number of disconnects which may be intentional because they enhance the Administration's support of faith-based organizations as options for parents to have their child receive tutoring and other services outside of the public school arena. For example, the final regulations clearly require that any teacher or teacher aide paid out of Title I funds who provides instructional and related services to eligible students enrolled in a nonpublic school must meet the "highly-qualified" requirements under NCLB. However, if that same nonpublic school wishes to provide supplemental services to a public Title I school identified for improvement in close proximity, then it could provide afterschool tutoring if the parents select them as an approved service provider; the non-public school could use non-certified teachers and instructional aides that do not meet the highly-qualified requirements under the law.

Under the current Public School Choice draft nonregulatory guidance published on December 4 and as reiterated in the final regulations, a school district, "may not use the lack of capacity to deny students the option to transfer under the new choice mandates." The final regulations appear to override local or state health and safety codes regarding capacity limits in particular schools. Indeed, the final regulations and the December 4 draft guidance state, "The LEA must create additional capacity or provide choices of other schools." One window of opportunity may exist here for firms with appropriate distance learning programs. If a parent is forceful in demanding that his or her eligible child, who is enrolled in a failing Title I school, be provided services by an outstanding, highly-effective school that has no additional capacity, then this outstanding school could offer an afterschool distance learning tutoring program conducted in consultation with or by its teachers as a choice option.

A discussion last April with key Democratic staff members involved in drafting the original legislation agreed that "transportation costs" could be defined not only as taking the child physically to another facility, but also as bringing the instruction to the child enrolled in a failing school, if that is demonstrated to be a cost-effective approach. If the "highly-effective school" to which a parent wants to transfer their child or from which to receive distance learning instruction is a non-Title I school, the December 4 guidance states, "As a general rule, Title I dollars and services do not follow a child who transfers from a Title I school identified for improvement to a non-Title I school. However, in subsequent school years, the receiving school may become eligible for Title I funds if a sufficient number of low-income students transferring into a receiving school causes that school to be designated a Title I school, then it will receive Title I funds." The types of schools that have the greatest financial incentive to become state-approved supplemental service providers are high-performing non-Title I schools to whom parents of eligible children in failing schools wish to have their child transferred. As a supplemental service provider, such a school can be assured of receiving Title I funding equal to the annual funding per eligible student in that school which ranges between $600 and $1,500 across the country.

The December 4 draft nonregulatory guidance on choice addresses the question of whether special education funds follow a special education student to the school of his or her parent's choice by stating that it is up to the school district to determine how the money is distributed among individual schools within the district.

Another potential opportunity in certain districts will have been created by final Title I regulations supplemented by the December 4 draft choice guidance. The final regulations are clear that, unless a lesser amount is needed to meet the demands for choice-related transportation and satisfy all requests for supplemental education services, an LEA must spend up to an amount equal to 20 percent of its Title I Part A allocation on choice-related transportation, supplemental services, or a combination of the two. The December 4 guidance makes it clear that all of the 20 percent allocation does not have to come from Title I but can include funds that are transferred from other titles, such as Title II D/Education Technology Enhancement Grants, and Title V/Innovative Program Grants, among other sources. Several directors of large Title I programs have indicated that, even though the number of parent requests for transfers and hence transportation cost and/or similar requests for supplemental

services will be significantly less than what could be requested, they will maintain in their Title I "reserve" approximately 20 percent of the district Title I program until the actual transportation and supplemental services costs are identified. Then, next spring, they will begin spending the remainder of that reserve on "pressing needs" at that time which could be training for teachers and/or aides or to purchase additional products and services for "failing schools."

The final Title I regulations also include a number of rules which could have significant implications for firms with specific product lines and/or services as noted below.

First, several comments questioned the definitions of "graduation rate" at the high school level and "other academic indicators" which must be used in determining AYP at the elementary and middle school levels. The USED position is that graduation rates are based upon the number of students who graduate with a "regular diploma"; as such, the final regulations state, "A regular diploma may not include an alternative degree that is not fully aligned with the state's academic standards, such as a certificate or GED." For those firms with GED preparation-type instructional materials and approaches, there could exist opportunities to work with certain states which wish to have a customized GED which is aligned with their state standards. As we and others in the media have reported, because of high stakes testing in states such as New York, the number of 17-21 year old students taking and passing GEDs in place of state regents and other required graduation exams (which are more likely to be failed), have doubled or even tripled the last few years.

Second, as noted in previous TechMIS reports, there are numerous provisions requiring districts or schools, as well as Title I officials, to communicate with parents for a variety of reasons, including the availability of options, school report cards, and whether the child is being taught by a teacher who doesn't meet the highly-qualified requirements of the law. As found in the recent Acorn survey (see December TechMIS), most states and districts are providing little, if any, information to parents in terms of notifications. The December 4 nonregulatory guidance not only re-emphasizes the need for schools to communicate and otherwise report to parents, but also identifies a number of questions which parents may wish to ask schools, including:

- What is the academic achievement level of their student in reading, language arts, English and math, as well as other subjects, and how has this achievement changed over

time?

- How does a school teach reading and does it follow scientifically-based strategies?
- What percentage of teachers are highly-qualified?
- Does the school offer challenging coursework or other academic challenges at the middle or high school level?

Because the December 4 Parent Choice guidance will likely be provided to parents by Title I schools, one can anticipate that many of these questions will be raised over the next year and in the future; any school-parent communication system should be able to address them.

7. Additional Guidance

There are a number of areas in which further guidance will be provided. In response to a question as to what programs can be combined in schoolwide programs, USED acknowledged that the programs listed in the 1995 Title I regulations are not all appropriate nor do they include new programs created under NCLB. The final regulations state that a new list of such programs will be published "soon after the issuance of Title I final regulations." It is likely that the updated list will have many more programs which can be combined (with funding commingled) in Title I schoolwides. Another comment suggested that when Title II D/Technology Enhancement funds are transferred to Title I schoolwide programs, they should be used in a manner consistent with the "intent and purpose" of Title II D. The final regulations clearly indicate that when such funds are allocated to Title I schoolwide programs, they must be used to meet the intent and purpose of schoolwide programs, noting "the proposed change would take away the flexibility a school would have in operating schoolwide programs." This regulation along with others, provides continuing incentives for eligible schools to become designated as schoolwide programs because of the flexibility in use of funds they have and the lack of any requirements to report how such funds are used.

Without question, USED is placing a greater emphasis on schoolwide programs than did the previous Administration. Acting national Title I director Dr. Jackie Jackson has emphasized that schoolwide programs properly implemented are much more effective in increasing student performance than targeted assistance schools. However, beneath the surface, this Administration is aware that NCLB

gives districts and schools much more flexibility to use Federal funds without having to report on how the funds were spent, which in many cases is an open invitation to "supplanting" (e.g., using Title I funds to pay the salaries of teachers who were in the same school last year but were paid through local funds). Final regulations add a new section on the core elements of a schoolwide program. Sales staff should be aware of these components as some Title I directors are responding to sales calls that the newly-designated schoolwide programs have already decided upon their approach and what products and services, if any, are to be purchased. A newly-designated Title I schoolwide program can take up to five or six months for planning. The core elements of a schoolwide program include:

- A comprehensive needs assessment conducted by the individuals who will carry out the schoolwide plan;

- A comprehensive plan based on the needs assessment which clearly indicates how those students in greatest need will demonstrate proficiency and meet AYP criteria, generally and for each subgroup;

- An evaluation plan which include iterative formative evaluations through which teachers are provided achievement test scores on students which can be used to refine or add instructional intervention strategies.

The instructional approach to be used must be "based on scientifically-based research" and provide an "enriched and accelerated" curriculum which can include afterschool programs. Moreover, any newly-hired teachers and instructional support aides must meet the new requirements for being "highly-qualified." While a schoolwide program must maintain records that demonstrate that as a whole it addressed the intent and purposes of Federal programs which are commingled with Title I funds, the school is <u>not</u> required to maintain separate fiscal accounting records on how the money is spent. Moreover, the new regulations state that each state must "encourage schools to consolidate funds from other Federal, state, and local sources into their schoolwide programs; and modify or eliminate state fiscal and accounting barriers so that schools can easily consolidate funds from other Federal, state, and local sources in their schoolwide program." Sales staff should ask Title I directors if the newly-designated Title I schoolwides have met all of the above criteria for core component elements specified in the regulations. In most cases, it will take almost a year to ensure all of the core elements are in place.

There are a number of additional areas where further guidance will be provided, including:

- whether more than .5 percent of students in a district or state can be exempt from taking the state's regular assessment and otherwise be allowed to take alternative assessments;

- numerous questions related to how "homeless children" are to be identified and provided services.

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There appears to be consensus among key Title I directors in large districts that the final regulations do provide more flexibility relating to operational questions although there appears to be less flexibility provided to states in terms of defining adequate yearly progress and directly related issues. There also appears to be consensus that, over the next year or two, nonregulatory guidance and even revised final regulations will continue to be published which could serve the purpose of clarification. However, potential for greater confusion and redirection of Title I initiatives midyear could create even more caution. For a copy of the lengthy Title I final regulations go to www.ed.gov/legislation/FedRegister/finrule/2002-4/120202a.pdf.