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USED Publishes Notice Authorizing Districts with Schoolwide Programs to Consolidate Numerous Federal Education Program Funds While Exempting Them From Complying with “Supplement Not Supplant” Provisions Which Should Result in Even More Title I Funds Being Transferred Into Title I Schoolwide Programs

USED has provided guidance to states which encourage the commingling of numerous Federal program funds with Title I in schoolwide programs. On July 2, it published a notice to districts in the Federal Register clarifying the conditions under which certain Federal program funds can be commingled with Title I and exempting schoolwide programs from having to maintain records to demonstrate that the school meets Title I “supplement not supplant” provisions, which have been in effect for over three decades. In most cases, this will result in districts’ designating more schools with 40 percent or more poverty as schoolwide programs and/or transferring other Federal ESEA program funds -- under the “50 percent transferability” provision -- into schoolwide programs. In identifying specific Federal funding programs and how such funds can still meet the “intent” of the non-Title I Federal

programs, the Federal Register notice provides some examples which reflect USED perceived priority use of such funds.

As many school district officials are hesitant to commingle Title I and other Federal funds, the specific language in the notice is included below:

“A school operating a schoolwide program is not required to identify particular students as eligible to participate in the schoolwide program, or demonstrate that the services provided with Title I, Part A funds are supplemental to services that would otherwise be provided. The school is also not required to maintain separate fiscal accounting records, by program, that identify the specific activities supported by those particular funds, but must maintain records that demonstrate that the schoolwide program addresses the intent and purposes of each of the Federal programs whose funds were consolidated to support the schoolwide program. Each State educational agency (SEA) must encourage schools to consolidate funds from Federal, State and local sources in their schoolwide programs, and must modify or eliminate State fiscal and accounting barriers so that these funds can be more easily consolidated.”

Because some districts have used Title I funds to hire salaried employees who served as shared, itinerant teachers or

support staff among several Title I schoolwides, the notice for the first time makes it clear that such flexibility now applies to supplemental materials, equipment, etc. which can be purchased with commingled funds: "To provide schoolwide program schools maximum discretion in using resources from Federal education programs to their best advantage, the Secretary encourages local educational agencies (LEAs), to the extent possible, to provide Federal funds directly to those schools, rather than only providing personnel, materials, or equipment."

While the notice clearly excludes Reading First funds from being commingled in schoolwide programs, it not only identifies the other eligible Titles for commingling, but also gives examples on how funds could be used and still meet the intent of the merged Federal funding Title. For example, commingled Part B IDEA funds could be used for staff development to ensure that teachers of all core academic subjects be trained in the use of alternative assessment procedures for students with disabilities, in order to diagnose student achievement and monitor student progress on an ongoing basis. Such alternative assessment procedures may include individual reading inventories, writing samples, classroom observation, conferences, and self-assessments. In such cases, however, individual students with disabilities must be provided instruction in accordance with their respective IEPs.

As noted in the above excerpt, the Federal Register notice also mandates that states remove any accounting and

other barriers to increased flexible use and commingling of other Federal funds in Title I schoolwide programs. States may continue to require reporting on how much funds are allocated to Title I schoolwide programs for the purpose of determining "maintenance of effort," and "comparability," but not for determining whether Title I and other Federal funds are used to "supplement" services for students served. Over a year ago, the General Accounting Office, in response to a request from Senator Kennedy among others, recommended that the "supplement not supplant" provisions in Title I not be applicable to Title I schoolwide programs recognizing, in fact, they are "unworkable" because these schools did not have to report on how such funds were spent.

Without question, the July 2 notice will be interpreted as a "green light" by many districts which have thus far been hesitant to commingle Federal funds in Title I schoolwide programs and use such funds for supplanting purposes (e.g., designating a teacher who would otherwise have to be released as being a Title I teacher and, therefore, paid by Title I funds). On the other hand, there are at least two possible reasons why a district would redesignate Title I schoolwides as "targeted assistance schools," which can serve only eligible Title I students. The first reason is that, only in Title I schoolwides, must all paraprofessionals that provide instructional support meet the highly-qualified requirement in No Child Left Behind. In "targeted assistance schools" only those paraprofessionals paid for out of Title I must meet the requirement.

Those hired to provide support services in special education, bilingual, or other programs do not have to meet these requirements in a “targeted assistance school.” The second reason, especially in a district with one predominant minority subgroup, is that a “targeted assistance school” is much more likely not to have a sufficient number of students to meet the minimum requirement of a subgroup in calculating AYP. This is why many states have requested amendments to their accountability plans which would increase the minimum number of students in each subgroup.

**Education Commission of States
Report on Implementation of
NCLB Provisions Among States
Finds Significant Progress over
the Last Year for Certain
Provisions While Its
Recommendations Identify
NCLB Provisions Which Are
Likely to Be Changed after
November Elections**

Under a \$2 million USED grant awarded slightly over two years ago, the Education Commission of the States (ECS) has developed a database on the progress being made by each state in implementing more than 40 major provisions of NCLB. Its 2004 report based on data collected as of March 2004, found:

- All 50 states had met or were “partially on track” meeting half of the 40 NCLB requirements, a

11 percent increase over March 2003;

- All but two states and Washington, D.C. have met or were “partially on track” to meeting 75 percent of the requirements, over a 100 percent increase over March 2003.

On the other hand, several provisions have been particularly “challenging” for states, including:

- Only ten states appear fully on track when it counts ensuring that both new and veteran teachers are qualified to teach in their subject area;
- Few states are on track to implementing high-quality professional development for all teachers;
- Many states do not have in place the technology infrastructure needed to collect, disaggregate and report data at the school, district, and state levels.

Some of the findings are rather surprising. For example, according to ECS, only 29 states appear to be “on track” to meeting the annual mathematics assessment requirements scheduled to begin in grades 3 through 8 in 2005. On the other hand, 37 states appear to be on track to meeting science assessment requirements which must occur at three grade levels no later than 2007.

In certain areas, such as assessment and accountability related to AYP, the ECS report is misleading for several reasons, the first of which is the ongoing “peer review and negotiated state plans process” which has resulted in almost a unique NCLB implementation for each state related to assessment and accountability. The second is related to recent USED policy changes and how states are integrating them into their state assessment and accountability plans. For example, new USED policy -- now reflected in draft regulations (June 24) -- states that an English language learner who becomes proficient and exits the ELL program may continue to be counted for two years as part of the subgroup for calculating AYP. As the ECS reports notes, California LEP students will continue to be included in the subgroup until the student scores proficient on the state assessment of English language proficiency and on state academic content assessments which could take 3-4 years. In another related example, the report indicates that 47 states appear to be on track to meet the assessment of English language proficiency requirement. Only beginning in September are most of the states which are participating in the three interstate consortia which are developing one or more English language assessment tools are tests being administered even on a pilot test basis. In a similar vein, the report notes that 51 states including Washington, D.C., appear to be on track to meet the inclusion of students with disabilities requirement. However, most states are modifying existing, or developing new, alternative assessments as a result of the recent policy change allowing only up to

one percent of students who take alternative assessments and achieve proficiency at a different level to be counted toward AYP.

As we have stated on several occasions, the two Achilles heels of NCLB are provisions related to students with disabilities and English language learners. Until these issues are confronted head-on, these are the areas in which opposition will grow and the number of lawsuits will increase dramatically.

The ECS report does however, identify some areas in which it recommends changes which are likely to occur during a lame duck Congressional session after the November 2 elections and the results are confirmed. Some of the recommendations include:

- Adequate yearly progress must continually be thoroughly analyzed to ensure that the assessments and results measure the effects of schools and districts on student progress, and should take into consideration the progress being made by subgroups of students over time.
- USED should allow for greater variation in testing options, including the use of computer-based adaptive and value-added assessments, that reflect the varying capabilities of students with disabilities; ECS notes that, beyond students with severe cognitive impairments, other categories of special education students have differing

- capabilities of achieving proficiency on alternative or regular state assessments;
- For English language learners, USED should allow students with different cultural backgrounds to be accommodated and provide more time to undergo acculturation;
 - USED should allow exceptions for states with large rural areas where district populations are less than 100 students by reconfiguring the one percent rule under AYP so at least two students doing well on an alternative assessment could be counted as proficient;
 - USED should ensure that interventions used by SES providers are based on scientifically-based research and that states should be able to set rigorous standards for SES services.

For a copy of the ECS report go to www.ecs.org/ecsmain.asp?page=/html/newsMedia/governancenotes.asp.

New Study Identifies States and Districts That Have High Schools with Low Graduation Rates and High Drop-out Rates

A new report, prepared by the Center for Social Organization of Schools, Johns Hopkins University, entitled “Locating the Dropout Crisis,” has identified states

and cities which have high schools with the weakest “promoting power” (i.e., lowest graduation and highest dropout rates). This information should help TechMIS subscribers who have instructional and other programs and services designed to increase high school graduation rates and/or reduce the number of dropouts at the high school level.

Currently, in the United States, there are between 900 and 1,000 high schools in which graduation is at best a 50/50 proposition; these represent almost 10 percent of such schools with enrollments of 300 or more. Five southern states (Georgia, South Carolina, North Carolina, Florida, and Texas) collectively lead the nation in both the total number and level of concentration of high schools with “weak promoting power” (with graduation rates less than 50 percent). About 80 percent of the nation’s high schools that have produced the highest numbers of dropouts are in 15 states (Arizona, California, Georgia, Florida, Illinois, Louisiana, Michigan, Mississippi, New Mexico, New York, North Carolina, Ohio, Pennsylvania, South Carolina, and Texas). There are ten cities, that educate primarily minority students, which have ten or more high schools with very “weak promoting power.” These include New York, Los Angeles, Chicago, Philadelphia, Houston, Dallas, Detroit, Jacksonville, Cleveland, and Milwaukee. Cleveland has the highest percentage of high schools from which less than half of the entering freshmen graduate. Other cities that have at least half of their high schools from which less than 50 percent of students who enroll as

freshman actually graduate, include: St. Louis, Indianapolis, Kansas City, Rochester, Atlanta, Shreveport, Norfolk, San Antonio, Austin, Boston, Oakland, and Tacoma.

As previously reported in the January TechMIS, it is likely that high school reform will become the next focus of redirected Federal funding under the Perkins Vocational Technical Education reauthorization, Math and Science Partnership, IDEA, and even Title I. As reported in Education Daily (July 23), President Bush stated during a recent fund raiser, "Across America, teachers and parents and principals are now working hard to raise the standards at our elementary schools, and to see that every child can read by the third grade...Now we must move forward and make certain that our high schools are doing their jobs as well. Every high school diploma must mean that our graduates are prepared for jobs, for college, and for success." Additional funding has been provided for high school reform by the Gates Foundation.

For a copy of the report entitled "Locating the Drop-Out Crisis" go to www.csos.jhu.edu/tdhs/rsch/locating_dropouts.pdf.

**New Guide for Teachers on
Selecting Computer-Based High
School Science Curriculum
Could Be Useful to Publishers
Planning to Help Districts Meet
the NCLB Assessment Mandates
For Science in 2007**

A new report entitled *Selecting Computer-Based High School Curriculum: A Guide for Teachers* from the Education Development Center (funded by the National Science Foundation) was recently released ostensibly to help schools and districts and even publishers design or select technology-based science programs to meet the NCLB mandate in 2007. The Education Commission of the States, summarizing state implementation of NCLB, reported that by March 2004 forty-four states appear to be on-track or partially on-track in meeting the assessments in science requirements. The standard-based assessments must be administered by states in science in one grade level 3-5, one grade level 6-9, and one grade level 10-12 by 2007 or even earlier. More than 25 states have had science content standards and assessments in place for several years.

EDC, in releasing the report which includes a "curriculum review tool" for teachers, notes that it is different from many of the guides all readily available on the Internet for integrating technology or creating curriculum with technology as follows: "*Selecting Computer-Based High School Science Curriculum* is different from other resources currently available in that it permits teachers to evaluate whether material offered via the Internet or CD-ROM uses technology to support a sound curriculum." The curriculum review tool is also different from a previous version: "The curriculum review tool offered within *Selecting Computer-based High School Science Curriculum* differs from that earlier tool

in that it focuses on materials that are computer-based (rather than print-based) and targeted toward high school students.”

One section of the guide walks the reader through 13 questions/criteria they should consider in selecting computer-based products for the classroom. The questions and criteria are divided into the following categories:

- Student learning, which includes alignment with standards and assessment strategies, among others;
- Teacher and professional development, which includes the level of training and support that may be required;
- Equity which includes, fairness and accessibility; and
- Feasibility which includes the cost of implementing the materials and the requirements of the technology features of the curriculum.

Another section of the guide includes profiles on 13 existing computer-based curriculum programs. Many of the models selected for review were at one time or another funded by the National Science Foundation and developed for the most part by universities and other non-profit groups. Undoubtedly other guides -- and perhaps even “suggested lists” of technology-based and other science programs -- in the near future are likely to be developed by some of the

same universities and groups involved in conducting reviews of reading programs under Reading First and other programs. For more information go to <http://cse.edc.org/products/selectingcomputerbased/default.asp>.

National Conference of State Legislatures Report Projects K-12 State Expenditures for School Year 2004-2005 to Grow By Five Percent Nationally

The NCSL recently released preliminary estimates for state “general fund” spending for K-12 which would grow by 4.9 percent with an additional 0.2 percent added from K-12 “earmarked funds” in certain states.

The increase in projected K-12 expenditures follows better news for total state budgets in the 44 states that responded to the recent NCSL survey. Final budgets for 2005 have yet to be determined for six states, including California and New York. Only three states, Alabama, Oregon, and South Dakota reported declines in total state budgets from last year. Eighteen states ended this last fiscal year (2004) with a surplus exceeding five percent.

Caution should be taken in making firm decisions based upon projected 2005 K-12 spending. As we have noted in several previous reports, percentage increases in K-12 funding from year to year do not reflect changes in average per-pupil allocations. For example, using 2002 census data, the Rockefeller Institute of Government prepared a

recent report entitled “K-12 Education: Still Growing Strongly” which adjusts for inflation and growth in pupil enrollment. Overall, after such adjustments, K-12 spending between 1997 and 2002 grew by 17 percent. However, such adjusted growth on a per-student basis over that five-year time period was highest for the District of Columbia (46 percent), Wyoming (30 percent), Vermont (29 percent), South Dakota (28 percent), and California (27 percent). On the other hand, largely due to significant growth in student enrollments, per-pupil state expenditure growth was the lowest in Florida (3.5 percent), Alaska (4.1 percent), Nevada (6.0 percent), Washington (6.8 percent), and New Jersey (7.8 percent). For a copy of the Rockefeller Institute of Government Report, “K-12 Education: Still Growing Strongly,” go to http://stateandlocalgateway.rockinst.org/fiscal_pub/state_news/sn_reports/sfnv4n5.pdf.

USED Provides Notice of Proposed Rule-Making on Recent Non-Regulatory Guidance Changes It Has Announced Regarding Assessment and AYP for Certain Limited English Proficient Students

Earlier this year, USED agreed to certain changes in the assessment and the way of determining AYP for certain limited-English-proficient students. It has now officially posted a Notice of Proposed Rule-Making which, after comments are

received, will become final regulations in this area. As the Notice indicates, there are approximately 5.5 million students who do not have English as their first language, which is about one million more than USED officially reported last year. Most of the “problems” confronting districts regarding implementing AYP and assessment provisions under NCLB relate to limited-English-proficient students and special education students. In February-March, USED identified “newly-found flexibilities” in the Law and was able to provide guidance to districts regarding limited-English-proficient students.

First, recognizing that students need time to be acclimated to their community and to schooling in the United States, “recently arrived” LEP students who have attended schools in the U.S. (not including Puerto Rico) for less than 10 months would be exempt from one administration of the state’s reading/language arts assessment. These students would still be required to participate in an English language proficiency assessment and the state’s math assessment which, during the first three years, could be provided in the students’ native language. States would not be required to include the results from the math or even the reading language test when calculating AYP. However, these students would be counted as participating in the assessment in order to achieve the multi-year average of 95 percent test participation rate.

Second, the regulation would also allow states to include “former LEP” students

within the LEP subgroup in making AYP determination for up to two years after they no longer meet the state's definition for limited English proficiency. This "commonsensical" rationale, which was made known to drafters of NCLB before it was passed, is now stated by USED as follows, "Because LEP students exit the LEP subgroup once they attain English language proficiency, school assessment results may not reflect the gains that LEP students have made in academic achievement." A similar rationale and decision will likely be made in the near future regarding students with disabilities who exit special education programs. However, USED response has been slow. The change could occur in the IDEA reauthorization legislation.

One of the big issues is whether or not such changes will be made retroactive to the 2002-2003 school year. Schools identified as failing to meet AYP, under the new proposed regulations, may not have failed to meet AYP. Congressman George Miller and Senator Ted Kennedy have proposed the NCLB Fairness Act to make these LEP regulations retroactive along with other changes that USED has issued. The Act could result in a significant decrease in the number of schools identified for improvement nationwide. Although Chairman John Boehner has agreed with the changes made by USED, both he and Secretary Paige have stated that these and other regulatory changes should not be made retroactive. A host of education associations, as well as NCLB advocates such as The Education Trust, support the Miller/Kennedy NCLB Fairness Act which has only a slight chance to be

enacted before the November election and a much better chance after the election during a "lame duck" session. For a copy of the Notice of Proposed Regulations go to page 35462, Federal Register, June 24, 2004.

Highlights of Pending Federal Legislation, Which Could Be Addressed During a Lame Duck Session, Could Have Important Implications for Most Education Publishers and Vendors

Below, we highlight certain provisions in pending legislation which could have significant implications for certain types of education publishers and vendors of technology-based products. For some of the bills, there is still time to influence certain provisions prior to conference mark-ups or final floor votes. In most cases, if legislation is to be enacted, it will likely be done during a lame duck session after the election.

IDEA Reauthorization

Different versions have been passed by the House and Senate and await a conference committee markup. Senator Kennedy is refusing to appoint Senate conferees until a written agreement on key provisions is reached regarding differences. Some of the following provisions could have serious implications.

- If the House "pre-referral intervention" language passes, up to 15 percent of IDEA funds could be used by districts to purchase and use pre-referral

interventions for “borderline” students in grades K-3 before placing them in special education.

- While the Senate version requires professional development and scientifically-based interventions, the House version would limit interventions to those which had all five essential elements required for approval for Reading First.
- The Senate version would increase the momentum of ensuring that over time, universal design principles be incorporated into instructional products and assessments to ensure that all students with disabilities can access quality content.
- Both versions currently include continuation of the “incidental use” provisions which allow IDEA funds to be used to purchase instructional and related products that can be used by non-special education students on an “incidental use” basis as long as the cost is the same regardless of the number of students using it, there is little wear and tear, and no special education student is denied access, all of which support network instructional software sold on a schoolwide license basis.

The “bones of contention” between the Senate and House version are: how to deal with disruptive students which are

placed in alternative settings; and whether IDEA should be a mandatory vs. discretionary item in terms of the appropriations process.

Reauthorization of Perkins Act

The Vocational and Technical Education for the Future Act, is likely to be passed by the House shortly. The Senate has just released its version which had not been acted upon through the end of July. The House version would adopt many of the NCLB provisions such as increased accountability, the use of incentives and sanctions on programs that don’t meet district/state goals, and a heavy emphasis on professional development. The House version also appears to be based upon some of the findings of the recently-released National Assessment of Vocational Education which found that reading and math scores on the twelfth grade NAEP test increased somewhat for vocational education students. Yet an overall gap continues to exist between vocational education students and others. The report concluded, “While positive change is certainly happening at the high school level, secondary vocational educational itself is not likely to be a widely effective strategy for improving academic achievement or college attendance without substantial modifications to policy, curriculum, and teacher training.” Consequently, the House version would:

- ensure academic courses for vocational and technical students are rigorous and challenging;

- support student achievement in core academic subjects as defined by NCLB;
- emphasize math and science education that incorporates the use of technology;
- establish a new provision for state development of model “sequences of courses” for vocational and technical program areas.

While the House version would consolidate the Tech Prep component under the larger state grant program, the Senate version would maintain the integrity of both programs separately. While LEA-operated components would not be converted to a high school Title I program, as the Administration initially proposed, without question there will be a greater emphasis in funds allocated toward math, science, and basic skills content areas in the final version.

No Child Left Behind Fairness Act

S. 2542 and HR. 4769, proposed by Senator Edward Kennedy and Congressman George Miller, would allow recent regulatory changes (see related article) -- which are in the process of being finalized into regulations affecting some LEP and students with disabilities -- to be applied “retroactively” to test scores of these students for 2002-2003. This would have the net effect of reducing the number of schools failing to meet AYP and otherwise identified for improvement during the SY 2003-2004 timeframe. The likelihood is much

higher that such action will be taken during a lame duck session than prior to the election.

No Child Left Behind Support Act

S. 2617 and HR. 4769, also sponsored by Senator Edward Kennedy and Congressman George Miller and introduced on July 7 to the Appropriations Committee, would allow for a supplemental appropriations of \$237 million which would “hold harmless” school districts which received less funding under Title I in FY 2004 than they did in FY 2003. Because states must reserve for school improvement four percent of the state allocation, even if the supplemental passed, these districts would not receive an allocation before adjustments equal to the allocation last year. On the other hand, some districts with large numbers of schools identified for improvement could receive unexpected increases during SY 2004-2005, if they applied for school improvement grants in the four percent state earmark.

Administration Continues Argument that Federal Education Funding is Increasing More Quickly Than States Can Spend the Money

In response to continuing arguments by Democrats that NCLB is an unfunded mandate, on July 27 Congressman John Boehner, Chairman of the Committee on Education and the Workforce and a primary advocate of NCLB, reinforced an argument made earlier this year that states have “more than \$16 billion in

unspent Federal education funds including more than half a billion appropriated during the Clinton Administration.” On June 30, the Council of Chief State School Officers sent a letter to members of Congress which unequivocally stated this was not true and/or “deliberately misleading.” That letter signed by CCSSO President Ted Stillwater of Iowa, cited a more recent USED report which found that the level of unexpended funds has actually dropped from \$5.7 billion to \$2.7 billion over the last six months. Other points in the letter included:

- certain NCLB funds could not be expended until USED regulations were provided which took almost two years;
- while some funds are unexpended, much of these funds had been obligated.

Even though the above claims by the Administration are good politics for an election year, there exist some realities which will affect when Federal funds are spent.

First, most of the unspent funds are likely under Title I which allows districts to carry over up to 15 percent to the following year and with a waiver from the SEA, to carry over more than 15 percent once every three years. In August 2003, Secretary Paige sent a letter to Chief State School Officers providing them an exception by allowing districts to carry over more than 15 percent as long as such funds would be earmarked for parent choice transportation and supplemental

education services where appropriate. Most of the funds which were “unspent” were previously earmarked funds for the above two sanctions.

Second, over the last several years, virtually all of the increased funding for Title I was “advanced funded” which meant that districts did not receive such allocations (i.e., 60-70 percent) until October through March. Texas districts did not receive their final allocation until mid-March 2004 which is resulting in a large number of Texas districts carrying over 15 percent or more to this coming school year.

Third, as the CCSSO letter points out, under the so-called Tidings Amendments, districts have approximately 27 months to expend Federal education funds across most programs. The official end of the Federal fiscal year is September 30 in all but four states.

Fourth, while the Administration has argued that unspent Federal funds could be used to implement NCLB mandates, the CCSSO letter correctly points out that much of the actual unspent Federal funds still would be “earmarked for specific Congressionally-mandated purposes and could not, in most cases, be used to implement provisions of NCLB.” As noted in another [Washington Update](#) item, USED finally posted a Notice of Rule Making regarding schoolwide programs regarding what Federal funds can be commingled with Title I funds without being subject to “supplement not supplant” requirements.

And last, one reality of the current Title I formula is that district allocations are to be based upon the most current annual census data which could result in significant changes from year to year in district allocations. As a result, an increasing number of districts are likely to carry over, where possible, the maximum amount of funds from year to year, especially when changes in the number of students falling below poverty lines are anticipated.