

**Stimulus Funding Alert:  
Recently Released Draft USED Non-Regulatory Guidance on  
“Waiver Requests” Would Slightly Reduce the Number of  
Districts Identified for Improvement Which Could Operate  
Their Own SES Programs; However, “Freed-Up”  
SES Set-Asides Funds Would Create Additional  
Opportunities for Firms With Certain Products**

*A Technology Monitoring and Information Service (TechMIS)*  
**SPECIAL STIMULUS FUNDING ALERT**

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On July 8<sup>th</sup>, USED published on its home page Draft Non-Regulatory Guidance (NRG) to states and districts wishing to request waivers from certain Title I regulations. This NRG would likely reduce the number of districts identified for improvement which would otherwise be allowed to provide their own SES programs rather than contracting with third-party entities. However, in some other situations where SEAs/districts receive approved requests to exclude Title I ARRA stimulus funding from the SES (20 percent) and professional development (10 percent) set-asides, additional opportunities should be created for firms which have data-driven decision-making tools and diagnostic assessments for identifying individual school and student needs and assisting in the selection of interventions.

Our April 9<sup>th</sup> TechMIS Special Report analyzed an April 1<sup>st</sup> letter from Secretary Duncan to Chief State School Officers in which he stated he would consider waivers of a regulation which would not allow districts identified for improvement to be approved to provide their own SES. We noted, “These changes will not only have a major impact on SES participation rates and district officials’ attitudes toward SES, but most importantly for many TechMIS subscribers, but will create specific immediate partnering opportunities as districts allocate Title I stimulus funds; also longer-term revenue streams” for districts to continue after-school programs funded under SES set-asides. The draft NRG, if published as final form, would reduce slightly the number of districts taking advantage of such opportunities, at least during the 2009-10 school year. While the NRG reaffirms that even if a district’s waiver is approved, the SEA has a final say-so in the SES approval process. Moreover, it states, “The Secretary’s grant of a waiver would not

constitute approval of a particular identified school or LEA to serve as an SES provider, nor would it constitute a waiver of any State law or policy that prohibits all or certain identified schools or LEAs from serving as an SES provider.” At least one state (Florida) passed a state law four years ago, which is a mirror-image of the USED regulation. This, according to a knowledgeable former SEA official, might make districts in the state ineligible. Many other states have approved Accountability Workbooks on state accountability policies or rules which include mirror-image versions of the USED regulation which is being nullified. SEAs who wish to take advantage of waivers will be required to make such changes, which may take time. However, the NRG does state, “An SEA that intends to apply for a waiver in response to this invitation may invite identified schools and LEAs to apply to the SEA for conditional approval to be an SES provider.” However, such districts receiving conditional approval may not begin to provide SES until the SEA has received waiver approval. This uncertainty could constrain the number of LEAs which apply and are approved. On the other hand, the NRG does include a ruling which will allow more districts to provide SES or the choice option during the first year a school is identified for improvement which will increase student participation rates in SES. And while some states (Alabama, Alaska, Arkansas, North Carolina, Tennessee, Utah, and Virginia) have been granted flexibility through a USED pilot program to offer SES in Year One of improvement, districts in these and other states, if waivers are approved, may count the funds allocated for SES in these schools newly-identified for improvement against the 20 percent set-aside. Four other states (Florida, Georgia, Indiana, and Illinois) which have been approved under the Differentiated Accountability Pilot, have additional flexibilities which remain in effect through 2011-12 and therefore, these SEAs do not have to submit waiver requests related to this regulatory change.

In most instances, SEAs will be the entity requesting the desired waiver from USED related to the SES and professional development set-asides. In some cases, however, an LEA may apply directly to USED for a waiver. The NRG also clarifies that EdFlex states are treated somewhat differently in the waiver approval process. Like any other SEA, an EdFlex state must apply for a specific waiver regarding the set-asides; however, an EdFlex state does not have to request approval to waive the limitation on the carryover more than once every three years (see below).

Under the NRG rules to allow “exclusion of Title I ARRA funds in the set-aside calculations,” increased opportunities, beyond partnering with districts to provide SES exists, may be preferred by certain firms. If an SEA receives approval of a waiver request to exclude set-asides (20 percent set-aside for SES and 10 percent for professional development), the SEA must provide assurances as to how the “freed-up money” will be used by districts to serve students who would otherwise be eligible for SES. The total amount of “freed-up” funding could be as high as \$2-\$3 billion. The draft NRG states that an SEA “must include the following assurances with respect to the specific “set-aside” requirement for which the waiver is requested:

- “That the SEA will only implement the waiver for an LEA that provides assurances to the SEA that:

- The LEA will comply with its statutory and regulatory obligations for the set-aside with respect to its regular Title I, Part A allocation;
  - The LEA will use the funds freed up by the waiver to address needs identified based on data, such as Statewide or formative assessment results;
  - The LEA will comply with all of its other Title I, Part A statutory and regulatory obligations, including the obligations in sections 1114 and 1115 to have schoolwide and targeted assistance programs that ‘use effective methods and instructional strategies that are based on scientifically based research’; and
  - The LEA will submit an application for Title I, Part A funds (referred to herein as ‘LEA application’) or, if necessary, an amendment to its existing LEA application that describes the data on which it relied to identify needs that will be addressed using the funds freed up by the waiver and the evidence that supports the strategies it intends to use to address those needs.
- That the SEA will not approve an LEA’s application or amendment to an LEA’s application unless or until it determines, based on the LEA’s description, that the LEA has satisfied its obligation to identify needs based on data and address those needs using evidence-based strategies.
  - That the SEA will not approve an LEA to implement the waiver unless or until the LEA has an approved application (or amended application) that includes the required description of the data on which the LEA relied to identify needs and the evidence that supports the strategies to address those needs.
  - That, if necessary to carry out the assurances above, the SEA will require an LEA seeking to implement the waiver to amend its application in accordance with the SEA’s usual process for changing an LEA’s application.”

More than half of the above “conditions” that LEAs must meet relate to different types of tools and instruments used in implementing data-driven decision-making at the school/student level, including the use of formative assessments to inform instruction, selection of instructional strategies based upon evidence following principles of scientifically-based research, and the use of a school “diagnostic framework” to identify problems in chronically low-performing schools before developing an intervention strategy.

Another marketing opportunity relates to the exclusion of Title I ARRA funds in determining the per-pupil amount for SES. In our April 9<sup>th</sup> TechMIS Special Report, we suggested this opportunity as more districts are approved to provide their own SES with additional stimulus funding. The new NRG is much more explicit in presenting an argument for districts not to exclude a large portion of the 20 percent set-aside in order to provide higher per-pupil allocations for students with disabilities and ELLs: “For example, an LEA might provide the per-pupil amount based on its regular FY 2009 allocation to most students but provide a higher amount (based on its regular allocation plus some or all of its ARRA allocation) to students for whom it is more costly to provide SES, such as students with disabilities, limited English proficient students, or students in remote rural areas.” On several occasions, Secretary Duncan has pointed

to online distance learning as a means of providing SES/parent choice in rural schools which have limited staff or other school building options.

Guidance on a number of other waiver request opportunities is also addressed in the NRG. One relates to the 15 percent, every-three-year limitation on carryover of Title I funds from one year to the next. The guidance states that an SEA may permit an LEA to apply for a waiver early in the 2009-10 school year “so that the LEA may plan to exceed the carryover limitation if the LEA anticipates needing the waiver of the carryover limitation because of the availability Title I, Part A ARRA funds” that school year. This may be necessary to ensure that the LEA “uses those funds in a prudent manner to improve academic achievement of its students.” It should be noted that much of the May-June sales increases experienced by TechMIS subscribers this year is a direct result of districts spending unspent Title I funds which had to be expended by June 30<sup>th</sup> in more than 40 states. As noted above, the ten EdFlex states are allowed to exclude the carryover limitation without a waiver.

The NRG also would allow an SEA to apply for a waiver of the 14-day notice requirement on behalf of LEAs if the SEA needs to change its assessment schedule or existing contract with a test vendor. Hence, during the next school year, an LEA in a state that receives such a waiver would not be required to provide parents of students eligible for SES or choice with the notice of their public school choice options at least 14 days before the start of the school year. School groups such as AASA have argued that districts do not have control over receipt of state assessment scores; only SEAs do. During the following year, the waiver would not be in effect. This 14-days notice would be one of several requirements which districts must meet in 2010-11 in order to be allowed to reallocate unspent SES set-asides in one year to purchase other allowable products and services under Title I.

When the final guidance is published, we intend to provide a more detailed analysis; in the meantime, TechMIS subscribers who wish to provide comments under the draft NRG can go to: [www.ed.gov/programs/titleiparta/title-i-waiver.doc](http://www.ed.gov/programs/titleiparta/title-i-waiver.doc) and send comments on the guidance to [OIRA-Submission@omb.eop.gov](mailto:OIRA-Submission@omb.eop.gov). If anyone has questions or wishes to discuss how the draft NRG will affect them and their products, please contact Charles Blaschke directly.