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## MEMORANDUM

**DATE:** April 15, 2013  
**TO:** TechMIS Subscribers  
**FROM:** Charles Blaschke, Blair Curry and Suzanne Thouvenelle  
**SUBJ:** Special Report on Increased Flexibility and Title I Waiver Funding Alert

As a result of the anticipated education sequestration in July and the recent USED announcement that states may request waivers to carry over more than the Title I 15% carryover limit from this year to next year's Title I program due to LEA uncertainties regarding allocations, it is even more important now for firms to take advantage of increased flexibilities that districts are allowed but are not taking advantage of which can benefit firms. Below, we have provided a lengthy report on flexibilities announced by Secretary Duncan in March 2011 and those recently announced at the March CCSSO conference, as well as those that we have identified in the past. These flexibilities have been considered part of the Title I/IDEA "legal framework" for more than a decade and are accepted by most auditors. TechMIS subscribers should make district officials aware of these flexibilities, particularly those who are considering purchasing their products through sales calls and promotional literature, especially between now and September 30, 2013. We have referenced previous TechMIS reports which have detailed some of these flexibilities only highlighted in the enclosed report. Please call Charles Blaschke directly at 703-362-4689 for specific questions.

P.S. For those TechMIS subscribers who have not returned your subscription renewals for the May 1, 2013 to April 30, 2014 subscription year, we ask that you do so soon. Please contact Blair if you have any subscription-related questions.

**Special Report:**  
**USED Encourages States and Districts to Take Advantage of New  
Flexibilities to Meet Local District Needs in the Context of  
Sequestration and Federal Budget Reductions**

*A Technology Monitoring and Information Service (TechMIS)  
Special Report*

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*April 15, 2013*

During the annual legislative meeting of the Council of Chief State School Officers in mid-March, Secretary Duncan and high-level USED officials briefed state leaders on current and planned flexibilities in the use of Federal funds in the context of: (a) growing criticism of state waivers; and (b) reduced Federal funding as a result of sequestration and related education budget reductions. This prompted a recent Education Week Politics K-12 article entitled, “Will Funding Flexibility for Schools Come with Sequestration Cuts?”

In March 2011, given sluggish state funding and reduced Federal funding due to the final year of ARRA stimulus funding, Secretary Duncan sent governors a report entitled, “Flexibility in Using Federal Funds to Meet Local Needs,” highlighting some of the flexibilities, at that time, under ESEA/NCLB provisions that, for reasons ranging from ignorance to fear of potential Federal audit exceptions to bureaucratic inertia, many districts were not taking advantage of. Highlights of that report, along with additional flexibilities which Secretary Duncan did not address in his March 2011 report, were included in the TechMIS Special Report (March 16, 2011). This TechMIS report provides: (1) an update of flexibility areas identified two years ago in the TechMIS report (e.g., schoolwide programs); (2) new flexibilities stemming from 2012 state waiver guidance which is currently being updated through addenda; and (3) the current status of additional flexibilities which we have identified and to which TechMIS subscribers should alert district officials in promotional materials and sales calls. These issues are based on the March CCSSO presentation and/or discussions with key USED officials. All of these flexibilities can help many TechMIS subscribers, unlike the waiver of the April 11, 2013 15% Title I carryover limit, which only helps districts and which will be addressed in the enclosed alert.

**Schoolwide Program Flexibilities**

As we highlighted in our March 16, 2011 TechMIS Special Report, Secretary Duncan emphasized the existing flexibility of combining/co-mingling different Federal, state, and local funds in schoolwide programs, an approach which, for various audit and other reasons, SEAs

have not widely encouraged. As the Secretary's report noted, "This means that all funds are treated as if they are a single pool of funds -- individual program funds that can be used flexibly to support any activity of the schoolwide program that is identified in its schoolwide plan. Schools that fully consolidate all funds are subject to less burdensome Federal reporting requirements" and "...are not required to meet most of the statutory and regulatory requirements of consolidated Federal programs, provided the school meets the intent and purposes of those programs... Finally, an LEA with a schoolwide school is allowed to comply with Title I supplement not supplant requirement by demonstrating that it distributes state and local funds fairly and equitably to the schoolwide school without regard to whether the school is receiving Federal funds."

The update on schoolwide program flexibilities provided in a letter dated March 15, 2013 signed by Assistant Secretary Deb Delisle and presented by her and USED staff at the CCSSO meeting, emphasized that schoolwide programs provide an important opportunity for schools to use Title I funds -- and, in some cases, other Federal, state, and local funds -- to implement comprehensive reform strategies designed to upgrade the entire educational program of a school. After reiterating many of the allowances noted in the Secretary's March 2011 flexibility report to governors, she provided in her March 15, 2013 letter to CCSSO a number of additional examples as opportunities in schoolwide programs, including:

- provide educators with professional development, materials, and supplies to implement schoolwide activities, which was previously understood, but not specifically stated in USED guidance;
- use Title I funds for comprehensive reforms designed to improve the school consistent with its needs as stated in a schoolwide plan, rather than just on specific services for individual low-achieving students, "...even if funds are not co-mingled/consolidated;"
- reorganize classes to promote personalized learning;
- upgrade the curriculum for the entire school;
- implement an early warning system, which has been allowed from the beginning of the School Improvement Grant program as an example of developing district-wide capacity;
- extend the school day or school year, which has been a personal priority of Secretary Duncan, as reflected in encouragements for districts to implement under School Improvement Grants and state waivers; and
- implement school safety programs, which will likely become a stronger encouragement following some of the current proposals for school safety included in the President's State of the Union speech and proposed FY 2014 budget.

Of particular importance is the emphasis on "flexibilities" in schoolwide programs, even if consolidation/co-mingling of other Federal, state, and local funds are not attempted. Assistant Secretary Delisle was formerly State Superintendent in Ohio which was one of two states (the other being Washington) which have been successful in encouraging and fostering consolidation/co-mingling of all Federal, state, and local funds in schoolwides. In her presentation, Delisle indicated that USED "is currently working to identify specific aspects of a schoolwide program where additional clarity is needed." In doing so, USED is evaluating the feedback that has been received from CCSSO and others in the field. Ultimately USED expects to develop a document for the field that will highlight and clarify the flexibilities of schoolwide

programs such as the examples provided above. She noted that USED is currently collecting best practices in this area.

One new intervention area in which USED is encouraging districts to take advantage of the flexibilities of schoolwide programs is the increased priority on improving school climate. As USED officials reported during the CCSSO conference, SEAs may use state level activity funds for a statewide initiative to assist districts in providing positive behavioral supports, especially using IDEA funds. At the local level, districts are permitted in schoolwide programs to use Title I funds to implement activities to improve school climate provided that the climate-focused interventions are part of the schoolwide plan. As we noted in our March 16, 2011 TechMIS Special Report, an Education Week article (March 2, 2011) reported, “RTI’s individual student focus philosophy often clashes with the rigid decades old school infrastructure of services provided based upon students grant eligibility.” The article refers to a 2008 Power Point presentation (still the latest USED guidance on funding RTI using Title I funds) which stated that, a non-schoolwide Title I program "can still use Federal money to implement RTI, but only in specific interventions and tiers.” Currently, a Title I working group involving the National Title I Association and the State Directors of Special Education is attempting to seek a regulatory change which would allow Title I funds alone, or in combination with IDEA CEIS 15% set-aside funds in a schoolwide program, to be used to implement both Tier 2 and Tier 3 RTI approaches, and Tier 1 high-quality "core-instructional programs" to instruct all students in a schoolwide program. During the CCSSO conference, it was also reported that districts may implement behavioral evaluations and interventions for non-identified students who need additional academic and behavioral support, especially using IDEA funds.

Without question, USED is strongly encouraging the use of schoolwide program designations as the backbone of many of its “newly found” flexibilities. For example, under state waiver flexibility guidance and School Improvement Grant (SIG) guidance, any priority or focus school, as well as Tier 1 or Tier 2 SIG schools, can be designated as schoolwide programs. As a result of this encouragement and flexibility, the number of Title I schoolwide programs has increased from 50 percent of all Title I schools over the last five years to almost 70 percent in 2012.

### **School Improvement**

Similar to its strong encouragements and greater flexibilities in schoolwide programs, USED has directed as much of Title I funds as possible, through state waivers, School Improvement Grants, and other initiatives, to the lowest-performing five percent and then ten percent of Title I schools. For example, under the August 3<sup>rd</sup> state waiver flexibility guidance, highlighted in our August 8, 2012 TechMIS Special Report, USED declared that the 4% SEA set-aside for school improvement (i.e., about \$500 million annually) could only be used to fund activities in Priority (lowest as five percent) and Focus Schools (next lowest ten percent). Under the initial SIG guidance in 2010, SEAs could decide to allocate portions of their 4% SEA set-aside for school improvement, not only to Tier 1 and Tier 2 SIG schools, but also to Tier 3 schools, which some did. However, unlike Tier 1 and Tier 2 schools (which are still required to do so), Tier 3 schools were not obligated to use one of the four SIG prescribed models. It appears, however, that waivers are now being provided that allow some states to use adaptations or modifications to one of the four models or their own state design model.

During the CCSSO meeting, in a departure from almost four decades of district allocation of Title I funds to schools, USED officials wrote in the March 15<sup>th</sup> letter that Title I funds could be focused on areas which "have the greatest need" by, for example:

- reserving funds for district support to low-performing schools;
- allocating more funds for low-income students to schools with higher poverty rates and, after allocating Title I funds to schools above 75 percent poverty, deciding whether to allocate any additional funds to elementary, middle, or high schools; and
- as noted earlier, providing educators with professional development, materials, supplies, to implement schoolwide programs.

### **Teacher Quality Title II Funds**

One area which USED has previously not addressed is the use of Title II Teacher Quality, funded at almost \$3 billion annually, of which less than a quarter is spent on professional development with most of the remainder allocated for reducing class size (i.e., hiring more teachers). Over the last year, the Administration has attempted to make major changes by converting about 25% of the state funding under Title II to competitive grants that are run as national grant competitions. Two areas which appear to be priorities for use of Title II funds relate to SEA assistance to teachers using educator evaluation data to improve instruction and determining how teacher effectiveness will be measured. Moreover, LEAs may use Title II funds to recruit and retain highly-qualified teachers using differential pay and to provide monetary incentives based on high educator effectiveness ratings. On the other hand, some of the areas in which Title II funds cannot be used were presented during the CCSSO meeting generating many questions and much opposition among state leaders. These included propositions that Title II funds may not be used to:

- develop curriculum associated with implementing college- and career-readiness standards;
- provide subject-specific professional development in non-core areas;
- raise educator awareness about state-mandated evaluation systems;
- purchase evaluation-related data systems to link student and teacher data; and
- purchase equipment such as iPads for schools and district administrators for use in evaluations.

On the other hand, the USED presenter said Title II funds may be used to train evaluators as part of a teacher and leader evaluation system. It appears that USED is very concerned about the use of Title II or any Federal funds in the development of curriculum related to Common Core Standards or the provision of professional development in non-core areas. A number of state superintendents expressed serious opposition to the presentation; it is likely that USED will provide numerous clarifications of how Title II funds can be used in a more flexible manner to support college- and career-readiness standards and other activities directly-related to core instruction involved with the Common Core Standards. One state superintendent expressed concern that Federal guidance thus far has not addressed the use of Title III English Language Acquisition funds and that more needs to be done in that area to increase flexibility under state waiver initiatives.

## **Incidental Use**

Some of the areas which we addressed, based on our knowledge of flexibilities in the use of Title I funds, in our March 16, 2011 report were not addressed during the public CCSSO discussion, but were clarified during offline discussions with key USED officials. During the Q&A period, USED officials noted that Title I funds may not be used for activities for non-Title I students except where there is a specific authorization in the law; for funding purposes, all students in a schoolwide program are considered Title I students, not just those who are Title I eligible. In our March 16, 2011 report, we described the "incidental use" provision which has been in effect for almost a decade in Title I and, since 2006, in IDEA. Under the "incidental use" provision, IDEA funds can be used, for example, to purchase a network software license for special education teachers to use with special education students for teaching or instructional purposes; it can also be used on an "incidental use" basis by non-special education teachers or non-special education students in that school under the following conditions:

- the price is the same regardless of the number of students or teachers using it, such as a one-price schoolwide license;
- no special education teacher or special education student is denied access; and
- the wear and tear of additional users is minimal.

In an online discussion with a veteran USED Title I lawyer, I specifically asked whether the "incidental use" provision was still in effect and would pass muster with auditors, to which she said, "if it's incidental use, then yes."

During the Q&A period, a key leader in the Common Core Standards assessment arena asked whether Title I funds could be used to pay for the cost of infrastructure for online assessments which are proposed by each of the two CCSS assessment consortia. The Title I lawyer referred him to the September 2009 Title I guidance for the use of ARRA funds which still remains effective, as we have noted in several previous reports. An unwritten, but allowable, use of Title I funds for cabling/wiring, for example, for an instructional software network purchased with Title I funds would allow up to "ten percent" of the cost of that network, including installation, to be used for wiring, cabling, and related infrastructure equipment, support, etc. (i.e., the so-called 10% rule).

## **Professional Development**

Another area not addressed during the CCSSO conference, but in the August 3, 2012 USED state flexibility guidance was a provision that will allow low-performing districts in approved waiver states the flexibility to spend Title I funds for professional development for any district teachers to improve the performance of all students in the entire LEA. A waiver was provided under the September 2009 ARRA guidance that allowed districts "identified for improvement" to have similar flexibility in using Title I funds to cover the cost of training all teachers in the district in the low-performing area (e.g., math) for which the district was "identified for improvement." Hence, the flexibilities currently allow districts "identified for improvement," which have not sought or had their state flexibility waivers approved, to continue the same flexibility they had in the past, as well as low-performing districts in states with approved waivers. Hence, districts identified or defined as low-performing under state waiver flexibility could use the ten percent set-aside, which might have been accumulated over past years, to provide professional

development for all teachers in the district (see also the Aug-Sept TechMIS Special Alert). For districts in states with approved waivers, the flexibility would be provided for all LEAs defined as low-performing, but not necessarily having Priority or Focus Schools. This appears to be much more encompassing than in those states still operating under NCLB provisions without waivers.

### **Targeted Assistance Schools SNS Flexibility**

The August 3, 2012 state waiver guidance addendum not only reinforces previous guidance regarding allowed flexibilities in schoolwide programs, but also attempts to address Title I schools which are non-schoolwide Title I programs, referred to as "Targeted Assistance Schools" (TAS) which heretofore, have remained under the strict interpretation of supplement-not-supplant (SNS). As we described in our August 30, 2012 TechMIS Special Report, the August 3<sup>rd</sup> guidance provides three presumptions of a violation of supplement-not-supplant (SNS) which can be "rebutted" in such a way that supplement-not-supplant requirements can be overridden. One area relates to whether the activity is required by local or state law and hence Title I funds cannot be used to pay for such services. As described in more detail in that August 30th TechMIS report, if a state passes "mirror-image" state laws reflecting the Federally-mandated waiver conditions or provisions, then, before August 3, use of Title I funds to pay for an activity they in state law would violate Federal SNS requirements. Under the new August 3<sup>rd</sup> guidance, if the new state law regulation is a "mirror-image" which is "precisely in the form of a federal mandate under the state waiver initiative guidance," then in Targeted Assistance Schools, Title I funds can be used to pay for that activity. The SNS clarification required regarding "required by state law" has significant implications relating to RTI approaches. About 12-14 states require the use of RTI approaches versus the use of discrepancy IQ tests to determine whether a student has a disability (versus having a reading problem) and should be placed in a special education program. If the state requires RTI, then Title I or IDEA funds could not be used to support RTI intervention approaches in Targeted Assistance Schools. Because 15 percent of IDEA funds must be set aside for CEIS/RTI interventions if districts have "disproportionality," then, IDEA funds (and Title I funds) can be used to implement RTI interventions without violating SNS in those states that require RTI under state law. If USED interprets IDEA and Title I SNS requirements equally apply regarding RTI, it appears that the presumption of violating SNS because an activity is required by state law could then be rebutted. Thus, Title I funds could be used to pay for Level/Tier 1 "core instructional" interventions if the IDEA 15% set-aside for CEIS/RTI were included in the state's approved waiver request or amendment for use in Priority and Focus Schools. Chances are that the number of states requiring RTI, which heretofore would have been a disincentive for Title I funds to be used to implement RTI, would increase by a factor of three or four, thus expanding the market.

Another presumption which can be rebutted based on the August 3<sup>rd</sup> document, especially for Targeted Assistance Schools, is whether a Title I activity can be provided to non-Title I students with non-Federal funds. One implication here is that as we noted in our September 15, 2009 TechMIS Special Report, if a service provided to non-Title I students meets the intent and purpose of the Title I Part A program, as the September 2, 2009 USED guidance stated, "...the LEA may exclude those services from supplement-not-supplant considerations... For example, if an LEA offers after-school tutoring for any student who scores below proficient on the state's mathematics assessment, paying for Title I students with Title I funds and non-Title I students

with supplemental local funds would not violate the supplement-not-supplant requirement because the students in non-Title I schools, by virtue of being non-proficient in mathematics, are failing to meet the state’s mathematic standards and thus would be eligible for Title I services if they attended a Title I school.” The August 3<sup>rd</sup> State waiver addendum guidance document would allow Title I funds to be used to purchase an effective program already used in Title I schools to be used in similarly situated non-Title I schools without violating SNS as long as non-Title I funds were used to pay for the purchase of the program. Similar to the use of the Title I 10% professional development set-aside to train all teachers, not just Title I teachers in low-performing schools, this provision would allow a district to purchase a product as opposed to training for use not only in Title I, but also in non-Title I schools without violating SNS.

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The implications of these flexibilities, should districts take advantage of them, could be significant for many TechMIS subscribers. Schoolwide programs that combine/consolidate Federal, state, and local funds -- or even districts/schools that do not combine/consolidate funds, but which implement comprehensive reform based on a needs assessment -- could create a critical mass of funds for purchasing products and services that would potentially benefit all students in a school and could increase demand and sales opportunities in those schools. Another implication is that districts in states without waivers, as well as those with waivers, that take advantage of flexibilities of using the 10% set-aside for professional development (or even more) to train all teachers, not only Title I teachers, in districts/schools identified for improvement or districts identified as low-performing in state waivers, increases sales opportunities once again in individual schools thus increasing individual school purchasing opportunities at lower sales costs. The clarification to allow Title I funds to be allocated to schools "with the greatest needs," allows for greater purchases of products and services, especially those that can be integrated into, or become part of, the four SIG intervention models or state waiver interventions, which are extremely similar. The new waiver guidance relating to supplement-not-supplant requirements also provides opportunities for firms with products, which can be incorporated into, or form the basis for, RTI approaches or related professional development activities in TAS Title I schools. As Assistant Secretary Delisle mentioned during the CCSSO legislative conference, USED is collecting best practices relating to flexibilities in schoolwide programs and will likely be providing new guidance not only in this area, but also in areas relating to the more flexible use of Title II funds as they relate to "improving teacher and leader" quality relating to Common Core State Standards.

And as the *Politics K-12* blog (March 22<sup>nd</sup>) noted, another big question being asked is: Would USED be willing to allow districts and states who have not received a waiver to eliminate requirements for 20% set-asides for tutoring and choice? As the blog notes, “That sort of flexibility could be a big deal, politically, since it would give states a chance to get out of a major requirement of the NCLB law, without necessarily promising anything in return as waiver states have.”

# **Waiver Funding Alert: USED Allows Title I Carryover Limitation Waiver for States and Districts**

*A Technology Monitoring and Information Service (TechMIS)  
Special Report*

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*April 15, 2013*

In a policy letter, dated April 11<sup>th</sup>, to Chief State School Officers, Assistant Secretary Deborah Delisle notified SEAs that they can request a waiver to allow districts to carry over more than the 15% Title I waiver carryover limitation more than once every three years due to “uncertainty faced by LEAs concerning the amount of its Federal fiscal year (FY) 2013 Title I, Part A allocation due to the possibility of sequestration...” which “...may be a reasonable and necessary reason for an SEA to grant an LEA a waiver...” Please note that the Administration still refers to the “possibility of sequestration” which means, as several other USED officials have noted, things may still happen before July 1<sup>st</sup> when the cap for FY 2014 would go into effect. USED has also confirmed to us that preliminary Title I district allocations will not be available until the end of April or the beginning of May, which we believe means the latter or even later. In any event, USED calls the uncertainties “a reasonable and necessary” justification for the waiver.

The letter also states, that “...it is important that each SEA ensure that its LEAs obligate their Title I, Part A funds in a timely manner. At the same time, I am aware of the enormous need to provide continued support for meaningful education reform and the need to offer flexibility to an SEA to enable its LEAs to conserve its remaining FY 2012 funds. This method carries additional benefits by allowing LEAs to use the FY 2012 funds in combination with FY 2013 funds to support activities that might otherwise be affected by an FY 2013 Title I, Part A allocation that is reduced by the sequester.” And then the letter states, to request this waiver, an SEA must, among other statutory requirements, “Describe how the waiver will enable the SEA to grant LEAs the flexibility to use the funds that are carried over after September 30, 2013 to increase the quality of instruction for students, improve their academic achievement, and continue to assist the same populations served by the programs for which the waiver is being requested in accordance with applicable program requirements”; and “Hold schools and LEAs accountable based on the SEA’s annual measurable objectives (AMOs).” The letter then requires SEAs to gather the appropriate comments and make them available attached to the waiver request, which could follow a template that is provided.

The waiver letter does emphasize that any funds carried over from this year to next year must be

used to increase the quality of instruction for students and improve their academic achievement, but at the same time the districts must continue to serve the same number of students previously served which means maintaining staff and their salaries. It is not clear how these conditions will be monitored or even “weighed” in the approval process. The bottom line is that more Title I funds, which have been withheld at the district level because of sequester uncertainty, will most likely be carried over to next year unless the “possibility of sequestration” is removed for FY 2014 over the next several months through Congressional negotiations on the debt ceiling or the FY 2014 budget. In this case, another purchasing cycle could occur between mid-summer and September 30<sup>th</sup>.

Obviously, we will continue to monitor the situation. Please call Charles Blaschke directly (703-362-4689) if you have any questions.