UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF ELEMENTARY AND SECONDARY EDUCATION

THE ASSISTANT SECRETARY

JAN 05 2011

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Dear Mr. Manasevit:

This is a response to your November 2, 2010 letter regarding the supplement not supplant requirement as applied to Title I, Part A (Title I) of the Elementary and Secondary Education Act of 1965, as amended (ESEA).

In your letter, you asked whether a State educational agency (SEA) or local educational agency (LEA) can rebut the presumption of supplanting when Title I funds are used for activities that are required by State or local law in the same way it can for Title II, Part A (Title II) and Title V, Part A (Title V) of the ESEA. In so doing, you cited portions of the U.S. Department of Education's (ED) non-regulatory guidance on Titles II and V that discuss how an SEA or LEA may rebut the presumption that supplanting will result when Federal funds are used for State-required services. In addition, you cited a portion of ED's non-regulatory guidance for Title I fiscal issues (Title I Fiscal Guidance) that generally discusses how the presumptions of supplanting may be rebutted.

As an initial matter, the supplement not supplant requirements for Title I, Title II, and Title V operate in the same manner. Hence, the various presumptions of supplanting that you identify as contained in the Office of Management and Budget (OMB) Circular A-133 Compliance Supplement, Section III G.2.2, and the circumstances under which each presumption may be overcome are the same. With respect to situations where an activity is already required by State or local (or other Federal) law, it is reasonable to assume that State and local officials will work to find a way to comply with that requirement using the resources at their disposal. We believe that this reasonable assumption is built into the supplement not supplant requirement. Thus, while it is conceivable that an SEA or LEA could demonstrate that its loss of revenue is so great that it cannot meet a legal requirement, we believe that it typically would be extremely difficult for the agency to do so – and to document that it could not meet that requirement – given both the amount of non-Federal funds available to the agency and the degree of discretion available to the agency in deciding how to use such funds. In other words, the bar for rebutting this presumption of supplanting is very high.

In your letter, you cite an example from page 39 of the Title I Fiscal Guidance which indicates that, under certain circumstances, an LEA can rebut a presumption of supplanting by providing contemporaneous records to confirm that there was a reduced amount or lack of State funds to

pay for a particular service. However, the guidance notes that this example pertains to the second presumption of supplanting identified in the Compliance Supplement, which is applicable when an LEA uses Title I funds for an activity that it previously supported with non-Federal funds. The guidance does not suggest that documentation sufficient to rebut this second presumption would, by itself, be sufficient to rebut the first presumption. Moreover, because we strongly believe that, in the absence of ESEA program funding, SEAs and LEAs will work to comply with existing State, local, or Federal laws, the kind of documentation that an SEA or LEA could use to rebut the second presumption of supplanting based on a reduced level of available revenue to pay for services previously paid with State or local funds, would be insufficient to rebut the "required by law" presumption. The portions of ED's Title II or Title V guidance that you cite are not inconsistent with this interpretation.

You mentioned that this matter is of "great concern" to many of your clients. Given the current fiscal constraints faced by many SEAs and LEAs, we understand this concern. However, for the reasons discussed above, we urge your clients to exercise extreme caution in using current fiscal constraints as a reason to avoid legal requirements. In addition, as you know, determining whether use of Federal program funds in a given situation violates the supplement not supplant requirement requires an analysis of the unique level of financial resources, spending decisions, responsibilities of each SEA or LEA, and other case-specific facts. For these reasons, we are unable to comment further in this response on whether or when a specific agency has produced sufficient documentation to rebut the presumption of supplanting when Federal funds are used to pay for activities that are required by State, local, or Federal law.

If you have additional questions about Title I's supplement not supplant requirements, please contact the Student Achievement and School Accountability Programs (SASA) office directly. Ms. Patricia A. McKee is the Acting Director of SASA, and she may be reached at Patricia.McKee@ed.gov or (202) 260-0826.

Sincerely,

Thelma Meléndez de Santa Ana, Ph.D.