

November 2, 2010

Thelma Meléndez de Santa Ana
Assistant Secretary
Office of Elementary and Secondary Education
U.S. Department of Education
400 Maryland Ave., SW
Washington, DC 20202

Dear Assistant Secretary Meléndez de Santa Ana,

We are writing to inquire about the process for rebutting a presumption of supplanting in a Title I, Part A program.

According to OMB Circular A-133, Compliance Supplement, Section III G.2.2, there are three tests that will give rise to the presumption of supplanting. A-133 says it is presumed supplanting has occurred if:

1. Federal funds are used to provide services that are required to be made available under other federal, state, or local laws (e.g., federal funds cannot be used take the place of services required for students with disabilities or limited English proficient students. Federal funds may be used to coordinate or supplement those services, but not supplant them.).
2. Federal funds are used to provide services that were provided with nonfederal funds in the prior year.
3. Federal funds are used to provide services to eligible students while those same services are provided to non-eligible students with non-federal funds (e.g., pay for full-day kindergarten with Title I funds in Title I schools while providing full-day kindergarten in non-Title I schools with other state and local funds).

Our inquiry concerns presumption #1 and the method for rebutting the presumption as it applies to Title I, Part A.

Guidance documents for Title II and V of the ESEA contain specific language on how local educational agencies (LEAs) can rebut this presumption of supplanting. Questions H-2 of the 2002 Guidance for Title V, Part A of the ESEA states that, "in certain instances, an SEA or LEA may overcome the presumption that supplanting will result if Title V-A funds are used in connection with a State-mandated program or activity... in those instances, the SEA or LEA should be able to demonstrate through written documentation (e.g., State or local legislative action, budget information, or other materials) that it does not have the funds necessary to implement the program or activity and that the program or activity would not be carried out in the absence of the Title V-A funds."

Question E-16 of the 2006 Title II, Part A Non-Regulatory Guidance says "in certain instances, an SEA or LEA may be able to overcome the presumption that supplanting will result if *Title II, Part A* funds are used for a State-mandated program or activity...in order to make such a case, the SEA or LEA should have available written documentation (e.g., budget information, planning documents, or other materials) demonstrating that it would not be able to meet State mandates without the use of *Title II, Part A* funds."

In February 2008, the Department released non-regulatory guidance on Title I fiscal issues, which lists all three presumptions and then states "...these presumptions, however, are rebuttable if the LEA can demonstrate that it would not have provided the services in question with non-federal funds had the federal Title I funds not been available...the LEA would need to ensure that it had contemporaneous records to confirm that there was in fact a reduced amount or lack of State and local funds available to pay for this position/program and that the LEA made the decision to eliminate the position/program without taking into consideration the availability of federal funding, along with the reasons for that decision—e.g., school board minutes."

Because supplanting appears in A-133 in the cross cutting section and further, based on the rebuttals outlined in the Title II and Title V guidance, as well as the general statement in the Title I fiscal guidance it appears presumption #1 can be rebutted for a Title I, Part A program in similar fashion to Title II and V, and as generally described in the February 2008 fiscal guidance. We would greatly appreciate it if you would confirm this understanding as correct as it is of great concern to many of our state and local clients.

Thank you for your attention to this pressing matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Leigh Manasevit". The signature is fluid and cursive, with a prominent initial "L" and a long, sweeping tail.

Leigh Manasevit, Esq.