How "Supplement Not Supplant" Is Going to Trip Up Teacher Eval & Common Core

By Rick Hess on August 27, 2013 7:00 AM (2013-08-27T07:00:00-05:00)

From the "unintended consequences" file: State and district officials are well-acquainted with the manifold restrictions attached to federal funds.

One of the most pervasive of these is the "supplement not supplant" requirement, which has generally been interpreted as requiring that federal dollars be spent "on top of" whatever states, districts, and schools were already going to spend when serving the kids in question. It's generally been presumed that, if states have committed to doing something as a matter of policy or statute, then it'd be a violation to use federal funds to pay for it (since they've already committed to doing it, even in the absence of federal money. Get it?). For more information on this, check out the terrific AEI-CAP paper by Sheara Kvaric and Melissa Junge, "Tightening Up Title I: How the Supplement-Not-Supplant Requirement Can Work Against the Policy Goals of Title I." (The duo, who've guest blogged for RHSU, are seasoned attorneys who specialize in helping states and districts find their way through the federal regulatory thicket.)

Anyway, this is the backstory for a fascinating new headache that's soon to result from the Obama administration's Race to the Top and NCLB waivers. Keep in mind that a key component of both efforts has been trying to get states to voluntarily change policies and statute. The trick, of course, is that once states have followed suit... the things they've done with federal prodding can no longer be paid for with any federal dollars that are subject to the "supplement not supplant" dictum.

This created huge consternation over the past few weeks, as "waiver" states realized that they were not going to be allowed to use Title I funds to provide the supports and interventions they had promised to provide in their waiver applications (as part of the price for getting out from under SES and public choice requirements). Last week, ED managed to stamp out that fire, by announcing that a state law or policy enacted in order to implement ESEA Flex is presumed to be supplemental. The administration explained, "Because the State legal requirement is tied to the State's flexibility request, we would not consider the use of Title I funds to meet the requirement as presumptively violating the supplement not supplant requirement."

However, this doesn't resolve the main problem. It's only a stopgap. The much bigger and more interesting challenge, to which few states have yet given any thought, is how all this will play out with efforts to implement teacher evaluation and the Common Core. Why? Because ED's announcement also cautioned that its decision only applied to remedies for Title I schools and students—not to policies with more general implications. ED specifically explained that principles 1 and 3 of ESEA flex (Common Core and teacher evaluation) "raise issues regarding the allowable use of Title I, Part A funds because they pertain, respectively, to all students or all teachers and principals." Therefore, because those activities benefit all students in the state, Title I generally cannot be used to implement those systems.

Of course, most states have been planning to rely heavily on federal aid for both Common Core and teacher evaluation, but RTT and "waiver" states that have adopted these policies now face legal jeopardy if they use those funds in that fashion. Savvy education consultant Kvaric, who works with a slew of states and districts, explains, "They're putting themselves at risk. But no one is really focused on this yet. But they will be soon.''

Most state and district officials are so busy heaving a sigh of relief regarding the stopgap flexibility, that most haven't yet even begun to wrestle with the broader implications. Kvaric's law partner Junge explains, ED's guidance "solved 80% of what everyone has been focused on right now, but less than 20% of what they're going to be wrestling with by October."

Can this be fixed? Sure, though it won't be easy. Junge and Kvaric sketch out two options:

- ED could change these rules or issue regulations eliminating the "cost-by-cost" test for supplanting. ED has done this in the past with IDEA, which has a nearly identical "supplement not supplant" provision.

- Congress could issue clear language, either in an appropriations bill or whenever it eventually reauthorizes ESEA (nee NCLB), indicating that supplanting does not have to be tested in the currently required fashion.

Junge also notes that SEAs and LEAs could move more aggressively to employ flexibility that's already on the books. For example, Title I has an "alternate test" for supplanting in schoolwide programs that few SEAs promote and even fewer LEAs use. While this won't help much for strategies implemented in all schools (like Common Core and teacher eval), it can be an important tool particularly given that all priority and focus schools are now eligible for schoolwide status under ESEA Flex. And states and districts better prepare to move on this, because it's
doubtful that any federal fix will be done soon.

In the end, we're left with another frustrating illustration of what happens when well-intended federal officials try to write extensive rules to ensure that federal funds are used appropriately, and how much those rules can complicate the lives of educators—especially when the feds try to direct state and local improvement efforts.

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