GUIDANCE

WHEN TO TREAT EXPENDITURES OF EDUCATION JOBS FUNDS AS STATE OR LOCAL FUNDS FOR PURPOSES OF THE FISCAL REQUIREMENTS UNDER TITLE I, PART A OF THE ELEMENTARY AND SECONDARY EDUCATION ACT OF 1965

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Introduction

The Education Jobs Fund (Ed Jobs) provides assistance to States to save or create education jobs for school year (SY) 2010-2011, including many positions that State or local funds would have ordinarily funded. This U.S. Department of Education (Department) guidance describes how State educational agencies and local educational agencies should treat expenditures of Ed Jobs funds for the purposes of three fiscal requirements of Title I, Part A of the Elementary and Secondary Education Act of 1965, as amended (ESEA): comparability, supplement not supplant, and maintenance of effort.

This guidance provides the Department's interpretation of various statutory provisions and does not impose any requirements beyond those included in the ESEA and other applicable laws and regulations. In addition, it does not create or confer any rights for or on any person.

The Department will provide additional or updated program guidance as necessary. If you are interested in commenting on this guidance, please send your comments to OESEGuidanceDocument@ed.gov.

Comparability

1. How are school personnel who are paid with funds from the Education Jobs Fund (Ed Jobs) treated in determining comparability under section 1120A(c) of the ESEA?

In order to make this determination, it is important to consider the purpose of the comparability requirement and the purpose of Ed Jobs. The comparability of services requirement in section 1120A(c) of the ESEA requires an LEA to use State and local funds to provide services in each of its Title I schools that, taken as a whole, are at least comparable to the services it provides in its non-Title I schools. (If all of an LEA's schools are Title I schools, the LEA must use State and local funds to provide services that, taken as a whole, are substantially comparable in each school.)

The Ed Jobs program provides assistance to States to save or create education jobs for school year (SY) 2010-2011,[1] including many positions ordinarily paid for with State or local funds. A local educational agency (LEA) may use Ed Jobs funds for compensation and benefits and other expenses, such as support services, necessary to retain existing employees, to recall or rehire former employees, and to hire new employees, in order to provide early childhood, elementary, or secondary education and related services. An LEA may use Ed Jobs funds to support, for example, teachers, principals, academic coaches, paraprofessionals, counselors, librarians, secretaries, social workers, psychologists, speech therapists, nurses, athletic coaches, security officers, custodians, bus drivers, and cafeteria workers. (See the Ed Jobs guidance for more details on allowable uses of these funds; this guidance is available at: http://www2.ed.gov/programs/educationjobsfund/governors-ed-jobs-guidance-final-8-13-10.doc.)

Consistent with the purpose of Ed Jobs, the Department expects that Ed Jobs funds in many cases will be used to rehire school staff (such as teachers) who were previously paid with State or local funds, or to hire new school staff in order to provide an LEA's basic education program. In other words, we expect that many school staff supported with Ed Jobs funds will be staff that an LEA would normally include in its comparability determinations. This circumstance raises the question of how an LEA should consider such staff, who are working in positions that normally would be paid for with non-Federal funds but are now supported with Federal Ed Jobs funds when the LEA determines whether its Title I schools meet the comparability requirement under section 1120A(c) of the ESEA.

When determining whether its Title I schools meet the comparability requirement, an LEA with staff who are supported with Ed Jobs funds should assess how each position would be funded were Ed Jobs funds not available. School staff paid with Ed Jobs funds who are in positions that would ordinarily be supported with State or local funds and would ordinarily be included in comparability determinations should continue to be included in those determinations. On the other hand, school staff paid with Ed Jobs funds who are in positions that would otherwise be

[1] An LEA that has funds remaining after SY 2010-2011 may use those remaining funds through September 30, 2012.

supported with other Federal funds, with the exception of the Impact Aid funds (or funds from the State Fiscal Stabilization Fund (SFSF) program when those funds are used for activities authorized by Impact Aid), would continue to be excluded from comparability determinations.

An LEA should include an explanation of how it treats school staff paid with Ed Jobs funds in the comparability procedures it is required to develop under section 1120A(c)(3)(A) of the ESEA.

Supplement not supplant

2. How are Ed Jobs funds treated in determining compliance with the supplement not supplant requirements of Title I, Part A in sections 1120A(b) and 1114(a)(2)(B) of the ESEA in SY 2010-2011 and subsequent years?

An LEA should treat Ed Jobs funds for purposes of determining compliance with the supplement not supplant requirements of sections 1120A(b) and 1114(a)(2)(B) of the ESEA in the same way it treats Ed Jobs funds for purposes of comparability. (See the previous question for how Ed Jobs funds are treated for comparability purposes.) That is, the analysis of whether Ed Jobs funds should be treated as Federal funds or as State or local funds, for purposes of determining compliance with the supplement-not-supplant requirements should be made based on the particular position or positions for which the funds are being used. If Ed Jobs funds are being used in SY 2010-2011 to pay staff in positions that would normally be supported with State or local funds, then those staff, even though supported with Federal Ed Jobs funds, should be considered to be supported with State and local funds. If, however, Ed Jobs funds are being used in SY 2010-2011 to pay staff in positions that would normally be supported with other Federal funds, those staff should be considered to be supported with Federal funds.

In a schoolwide program school, for example, this means that an LEA can satisfy section 1114(a)(2)(B) by including Ed Jobs funds in demonstrating that the school received all of the non-Federal funds it would have received if it were not operating a schoolwide program if the Ed Jobs funds are supporting positions that would normally be paid with State or local funds. On the other hand, if the Ed Jobs funds are supporting positions that would normally be paid with other Federal funds, the LEA would not include those funds in its demonstration of compliance with section 1114(a)(2)(B).

In a targeted assistance school, the analysis of supplanting would occur in SY 2011-2012. If an LEA uses Title I, Part A funds in SY 2011-2012 to support some of the same staff positions (assuming, of course, the positions are allowable under Title I, Part A) that the LEA supported with Ed Jobs funds in SY 2010-2011, a presumption of supplanting (*i.e.*, a presumption that the LEA would continue to conduct the activity with non-Federal funds if it had no Title I, Part A funds available) might arise.

For example, the use of Title I, Part A funds in SY 2011-2012 for a staff position that an LEA would normally support with State or local funds and supports in SY 2010-2011 with Ed Jobs funds generally would give rise to a presumption that the LEA would have continued to use non-Federal funds to support the position in SY 2011-2012 in the absence of Title I, Part A funds;

therefore, the use of Title I Part A funds for that position would constitute supplanting. The LEA may overcome this presumption, however, under the following conditions:

- The LEA can demonstrate that there is a reduction in SY 2011-2012 in the amount of non-Federal funds available to the LEA to support the staff position supported in SY 2010-2011 with Ed Jobs funds or the LEA can demonstrate that its educational priorities with respect to its use of non-Federal funds in SY 2011-2012 have changed.
- The LEA makes the decision to eliminate the staff position without taking into consideration the availability of Title I, Part A funds, as documented by fiscal and programmatic records confirming that, in the absence of Title I, Part A funds, the LEA would have eliminated the position. These records, for example, might document the reduction in non-Federal funds or explain what priorities changed to warrant a shift of non-Federal funds away from supporting the position in question and the LEA's reasons for choosing to eliminate non-Federal support for the position. Please note that such documentation must be *contemporaneous* with the LEA's decision-making process; it is very difficult to rebut a presumption of supplanting after the fact.
- The position, if supported with Title I, Part A funds, is allowable under Title I, Part A and consistent with all Title I fiscal and programmatic requirements. This means, for instance, that an employee must be (1) engaged in activities that are allowable under Title I, Part A; (2) meeting the academic needs of Title I students identified through a schoolwide program school's comprehensive needs assessment or providing supplemental services in a targeted assistance school; and (3) conducting activities consistent with the LEA's application approved by the SEA.
- Using Title I, Part A funds for the staff position also meets the general standards established in Office of Management and Budget (OMB) Circular A-87 *Cost Principles for State, Local, and Indian Tribal Governments* (OMB Circular A-87). OMB Circular A-87 requires that the use of funds for a specific purpose be necessary and reasonable for the proper and efficient performance and administration of the program and be authorized and not prohibited under State and local laws or regulations.

If an LEA can successfully rebut the presumption of supplanting, the LEA may use Title I, Part A funds to support a staff position in SY 2011-2012 that it is supporting in SY 2010-2011 with Ed Jobs funds. For additional information on the Title I, Part A supplement not supplant requirements, see the relevant section in the Title I Fiscal Guidance; this guidance is available at http://www.ed.gov/programs/titleiparta/fiscalguid.doc.

Maintenance of Effort

3. May an SEA or an LEA use Ed Jobs funds to meet the Title I, Part A maintenance of effort requirements in section 1120A(a) of the ESEA?

Yes. For the purpose of meeting the maintenance of effort requirements, Ed Jobs funds are treated the same as funds provided by the SFSF program. More specifically, section 14012(d) of the ARRA, which under the Ed Jobs legislation also applies to Ed Jobs funds, provides that, with prior approval from the Secretary, an SEA or LEA may treat expenditures from the SFSF program that are used for elementary, secondary, or postsecondary education as non-Federal

funds for the purpose of any requirements to maintain fiscal effort under any other program that the Department administers, including Title I, Part A.[2] See the following questions and answers for further explanation regarding using Ed Jobs funds to meet the Title I, Part A maintenance of effort requirements, including the criteria and process for obtaining prior approval.

4. What criteria will the Department apply in determining whether to give prior approval to an SEA to treat Ed Jobs funds as State or local funds for purposes of meeting the Title I, Part A maintenance of effort requirements?

The Secretary will permit an SEA and its LEAs to treat Ed Jobs funds as State or local funds for the purposes of meeting the Title I, Part A maintenance of effort requirements if the following criteria are met:

- The SEA maintains auditable data to demonstrate that it is complying with the maintenance of effort requirements of Ed Jobs. (See the Ed Jobs guidance for the different ways a State may meet maintenance of effort requirements; this guidance is available at: http://www2.ed.gov/programs/educationjobsfund/governors-ed-jobs-guidance-final-8-13-10.doc.); and
- The SEA maintains auditable data to demonstrate that the percentage of total State revenues that was available to support elementary, secondary, and public higher education combined in the most recently completed fiscal year did not decrease from the previous fiscal year.

These data may be reviewed by Department staff or others as part of program monitoring, audits, and other oversight activities.

5. Must an SEA apply to the Secretary for prior approval to treat Ed Jobs funds as State or local funds for meeting the Title I, Part A maintenance of effort requirements?

No. The Secretary grants prior approval to an SEA and its LEAs to treat Ed Jobs funds as State or local funds for purposes of meeting the Title I, Part A maintenance of effort requirements so long as the SEA meets the two criteria listed in Question 4. This means that an SEA that meets those criteria already has prior approval from the Secretary to treat Ed Jobs funds as State or local funds for purposes of maintaining effort. (As described in Question 6, if an SEA does not meet the criteria in Question 4, it may request approval from the Department.)

6. If an SEA does not meet both of the criteria in Question 4, is it possible for Ed Jobs funds to be treated as State or local funds for meeting the Title I, Part A maintenance of effort requirements?

Yes. In such a case, an SEA would need to submit a letter to the Department requesting permission for it and its LEAs to treat Ed Jobs funds as State or local funds for the purpose of maintaining effort. An SEA's request should identify any exceptional or uncontrollable circumstances contributing to the SEA's inability to meet both of the criteria listed in Question 4.

[2] Section 101 of Ed Jobs generally extends sections 14001 to 14013 of the ARRA, including section 14012(d), to Ed Jobs funds.

This letter should be sent to Thelma Meléndez de Santa Ana, Ph.D., Assistant Secretary for Elementary and Secondary Education, at TitleIWaivers@ed.gov.

If an SEA does not meet both of the criteria in Question 4, the SEA and its LEAs may treat Ed Jobs funds as State or local funds for the purpose of maintaining effort only if the Department approves the SEA's written request.

7. Which expenditures paid for with Ed Jobs funds may be treated as State or local funds for the purpose of meeting the Title I, Part A maintenance of effort requirements?

If an SEA has approval under the process described in Question 4 or Question 6, any Ed Jobs expenditures by an SEA or an LEA for free public education (*i.e.*, using Ed Jobs funds for the activities listed in section 9101(14) of the ESEA or in 34 C.F.R. § 299.5(d)(1), respectively) may be included as part of determining whether the SEA or LEA maintained effort.

8. How would treating Ed Jobs funds as non-Federal funds affect maintaining effort for an SEA or its LEAs under Title I, Part A in SY 2010-2011 and subsequent years?

Expenditures of Ed Jobs funds in SY 2010-2011 would first affect maintenance of effort with respect to SY 2012-2013 Title I, Part A allocations. Counting Ed Jobs funds in determining maintenance of effort may reduce the incidence of an SEA or an LEA failing to maintain fiscal effort and the need to seek a waiver from the Department. Ed Jobs funds would then be included in the SEA's or LEA's expenditures on which maintenance of effort is calculated in subsequent years (see section 14012(e) of ARRA, applicable to Ed Jobs funds).