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# Every Dollar Counts: In Defense of the Education Department’s “Supplement Not Supplant” Proposal

James S. Liebman\* & Michael Mbikiwa†

## Abstract

Evidence compellingly demonstrates—as Congress famously recognized in Title I of the Elementary and Secondary Education Act of 1965 (ESEA)—that, in order to succeed in school, low-income children require more educational resources than other students. Yet, a half century later, many school districts continue to spend dramatically less on their high-poverty schools than on those more privileged. Districts do this by permitting their most experienced and highly salaried teachers to opt into schools with more privileged students, then failing to count teacher salaries in school funding comparisons, disguising the fact that Title I schools with less experienced, lower salaried teachers spend less on instruction than schools with more advantaged populations.

To remedy this, the Department recently proposed a regulation requiring districts to account for *all* aspects of local funding in demonstrating compliance with the longstanding requirement that they use Title I funds to supplement and not to supplant local funds. Not surprisingly, the regulation has met stiff resistance from actors with partisan interests in maintaining the status quo. More troubling, the non-partisan Congressional Research Service (“CRS”) has added a seemingly show-stopping legal objection: that the proposed regulation so clearly contravenes the ESEA that it might not deserve *Chevron* deference.

This paper argues that the CRS Report is clearly wrong. The Education Department has crafted a reasonable regulation that adopts a long-established and well-respected strategy for identifying actions taken pursuant to an unlawful motive. Although partisans may object to making districts choose between using dollars currently spent on more privileged children to more adequately fund low-income schools, or forsaking federal dollars, that is the choice to which the law in existence for decades puts districts.

## Introduction

Evidence compellingly demonstrates—as Congress famously recognized in Title I of the Elementary and Secondary Education Act of 1965 (ESEA)—that, in order to succeed in school, low-income children typically require more educational resources than other students.<sup>1</sup> Yet, a half century later, many school districts continue to spend less money on their high-poverty schools than on their more privileged schools. In 2011, a study by the U.S. Department of Education (“the Department”) made the shocking discovery that nationwide, more than 40 percent of schools eligible for Title I funding due to their high-poverty status (“Title I schools”) receive *less* state and local funding for instructional and other personnel costs than non-Title I schools in the same districts at the same grade level.<sup>2</sup> A more recent study confirmed that more than 4.5 million low-income students attend

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<sup>1</sup> See *infra* notes 10-20 and accompanying text.

<sup>2</sup> RUTH HEUER AND STEPHANIE STULLICH, U.S. DEP’T OF EDUC., COMPARABILITY OF STATE AND LOCAL EXPENDITURES AMONG SCHOOLS WITHIN DISTRICTS: A REPORT FROM THE STUDY OF SCHOOL-LEVEL EXPENDITURES’ 29 (2011), available at: <https://www2.ed.gov/rschstat/eval/title-i/school-level-expenditures/school-level-expenditures.pdf>.

inequitably funded Title I schools that on average receive about \$1,200 *less* per student than non-Title I schools in the same district.<sup>3</sup>

Both studies attribute this result to two conjoined factors that together generate the nation's hottest school-finance controversy today.<sup>4</sup> First, districts often permit their most experienced and highly salaried teachers to opt into schools with more economically privileged students, leaving Title I schools with less experienced, lower-salaried teachers. Second, districts fail to count teacher salaries in their school-by-school funding comparisons. This latter accounting method disguises the fact that the former method of distributing teachers often leaves Title I schools with far fewer state and local funds to spend on instruction than schools with more advantaged populations.

To remedy this situation, the Department recently drafted and submitted for negotiated rule-making a regulation that would require districts to account for *all* aspects of state and local funding of schools in the process of demonstrating their compliance with the longstanding requirement that they use Title I funds only to supplement and not to supplant local funds.<sup>5</sup> Although the regulation has the support of the civil rights community,<sup>6</sup> it has met stiff resistance from actors as diverse as the major teacher unions<sup>7</sup> and Republican Senate Education Committee Chairman Lamar Alexander.<sup>8</sup> Joining these opponents of the regulation—who share converging partisan interests in maintaining the status quo—is the non-partisan Congressional Research Service (“CRS”), which has added a seemingly show-stopping legal objection: that the proposed regulation is so clearly in contravention of the ESEA that it might not even deserve *Chevron* deference.<sup>9</sup>

Surprisingly, the CRS Report's legal analysis has received little scrutiny. This paper fills that gap, arguing that the CRS Report is wrong. Partisans may well object to the proposed regulation on *policy* grounds because of the tough choice to which it puts school districts: increase overall local education funding in order to maintain levels of funding for schools with relatively privileged populations that previously were elevated by funds impermissibly supplanted by Title I dollars; maintain overall funding and decrease the amount previously spent on non-Title I schools; or decline federal funds in order to continue spending practices that leave high-poverty schools with fewer dollars for instruction. But from a *legal* perspective, that choice is exactly the one to which the law in existence for decades and recently reaffirmed by Congress puts school districts. The Department's

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<sup>3</sup> Robert Hanna, et al., *Comparable But Unequal: School Funding Disparities* CENTER FOR AMERICAN PROGRESS 1 (2015), available at: <https://cdn.americanprogress.org/wp-content/uploads/2015/03/ESEAComparability-brief2.pdf>.

<sup>4</sup> See, e.g., Nat Malkus, *The Title I Funding Fight: Funding for high-poverty schools is flawed, but the Education Department's overreach isn't the answer*, U.S. NEWS & WORLD REP., April 26, 2016, available at <http://www.usnews.com/opinion/articles/2016-04-26/obamas-education-department-overreach-wont-equalize-title-i-funding>; Andrew Ujifusa, *Civil Rights Groups to Feds: Your ESSA Rules Must Push Equity, Disruptive or Not*, EDUCATION WEEK (Apr. 28, 2016), available at: [http://blogs.edweek.org/edweek/campaign-k-12/2016/04/civil\\_rights\\_groups\\_essa\\_must\\_push\\_equity.html](http://blogs.edweek.org/edweek/campaign-k-12/2016/04/civil_rights_groups_essa_must_push_equity.html).

<sup>5</sup> UNITED STATES DEPARTMENT OF EDUCATION, ISSUE PAPER: SUPPLEMENT NOT SUPPLANT, Updated for Session 3, April 18-19, 2016, available at: <http://www2.ed.gov/policy/elsec/leg/essa/session.html#session3>.

<sup>6</sup> Andrew Ujifusa, *Civil Rights Groups to Feds: Your ESSA Rules Must Push Equity, Disruptive or Not*, EDUCATION WEEK (Apr. 28, 2016), available at: [http://blogs.edweek.org/edweek/campaign-k-12/2016/04/civil\\_rights\\_groups\\_essa\\_must\\_push\\_equity.html](http://blogs.edweek.org/edweek/campaign-k-12/2016/04/civil_rights_groups_essa_must_push_equity.html).

<sup>7</sup> See Randi Weingarten, *Equity and Education funding: When good intentions go bad*, MEDIUM (Apr. 19, 2016), <https://medium.com/@rweingarten/equity-and-education-funding-when-good-intentions-go-bad-d7ecc8ff86a8#h4pm5iy7g> (explaining the American Federation of Teachers' opposition to the proposed regulation).

<sup>8</sup> See, e.g., Jonathan Chait, *Obama Wants to Give Poor Schools More Money. Guess Who's Blocking Him*, N.Y. MAG., May 19, 2016, available at <http://nymag.com/daily/intelligencer/2016/05/whos-blocking-obama-from-helping-poor-schools.html> (discussing the “surprising . . . alliance between teachers unions and Republicans” in opposition to the regulation).

<sup>9</sup> JODY FEDER & REBECCA SKINNER, CONG. RESEARCH SERV., PROPOSED REGULATIONS ON THE SUPPLEMENT, NOT SUPPLANT PROVISION THAT APPLIES TO THE TITLE I-A PROGRAM AUTHORIZED BY THE ELEMENTARY AND SECONDARY EDUCATION ACT, (May 5, 2016), available at: [http://edworkforce.house.gov/uploadedfiles/sns\\_and\\_negotiated\\_rulemaking\\_5-5-16.pdf](http://edworkforce.house.gov/uploadedfiles/sns_and_negotiated_rulemaking_5-5-16.pdf); see *infra* note 50 and accompanying text (discussing deference due by courts to administrative regulations under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* 467 U.S. 837 (1984)).

proposed regulation is entirely appropriate —indeed imperative—to ensure high-poverty schools the funds to which they are legally entitled.

Below we discuss the compensatory purpose of Title I of the ESEA; explain the importance of the “supplement, not supplant” requirement in preserving the compensatory ideal; acknowledge the difficulty the Department faces in ascertaining whether a school district intends to spend less local money on Title I schools in recognition of the Federal dollars those schools can count on receiving; conclude that the Department’s proposed regulation takes a sensible and well-trod approach to resolving that question of motive; and respond to criticisms levelled at the proposed regulation.

## **I. Title I and the Goal of Compensatory Education**

In 1965, Congress passed and President Lyndon Johnson signed into law the landmark Elementary and Secondary Education Act (“ESEA”) as a key part of the War on Poverty. The Act was and continues to be “the most far-reaching and significant education legislation in the history of this country.”<sup>10</sup> Title I—the Act’s “crown jewel”<sup>11</sup>—authorizes State Education Agencies (SEAs) to request and distribute federal financial funds through school districts to qualifying schools with high numbers or proportions of low-income students. Congress premised Title I of the Act on two conclusions: (1) that schools with high concentrations of children in poverty need substantially *more* funding than other schools to compensate for the negative effects of economic deprivation on student learning, and (2) that the Federal government has a role to play in providing funds to even the playing field for those children.

Title I’s stated purpose is to “provide all children significant opportunity to receive a fair, equitable, and high-quality education, and to close educational achievement gaps.”<sup>12</sup> From the outset, it has tied federal aid to concentrations of poverty, so federal money distributed through SEAs to school districts will “follow the disadvantaged child” to any school she attends with many other students like herself.<sup>13</sup> Title I’s goal is explicitly compensatory; in order to close gaps between students whose economic backgrounds place them at different starting points, districts must use Title I funds, not to improve schools generally, but as direct assistance to meet the heightened learning needs of economically disadvantaged children<sup>14</sup> and, in particular, to compensate schools for taking on the extra, more costly, burden of educating many such children.<sup>15</sup> Title I’s premise thus is that, when concentrated in particular schools, low-income children require *more* resources and *more* services to achieve the same educational outcomes as their more privileged counterparts.

That premise has since been conclusively validated. First, the link between family poverty and poor educational outcomes was famously documented in the 1966 Coleman Report and has been fully established since.<sup>16</sup> Later research has confirmed that impoverished children concentrated in particular schools have especially weak learning outcomes.<sup>17</sup> Second, it is widely acknowledged that

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<sup>10</sup> PHYLLIS MCCLURE & RUBY MARTIN, TITLE I OF ESEA: IS IT HELPING POOR CHILDREN? i (1969).

<sup>11</sup> John F. (Jack) Jennings, *Title I: Its Legislative History and Its Promise*, 81 PHI DELTA KAPPAN 516, 517 (2000).

<sup>12</sup> Elementary and Secondary Education Act of 1965, Pub. L. 89-10, 79 Stat. 27 (1965), codified at 20 U.S.C. § 6301 et. seq.

<sup>13</sup> Jennings, *supra* note 11, at 517.

<sup>14</sup> McClure & Martin, *supra* note 10, at 4.

<sup>15</sup> *Id.*

<sup>16</sup> JAMES S. COLEMAN ET AL., U.S. DEP’T OF EDUC. & WELFARE, EQUALITY OF EDUCATIONAL OPPORTUNITY (1966); George Farkas & L. Shane Hall, *Can Title I Attain Its Goal?* BROOKINGS. PAP. EDUC. POLICY 59, 63 (2000) (estimating that American low-income children begin first grade a full instructional year below middle-class children, and by twelfth grade have skills that are, on average, at an eighth grade level); Sean F. Reardon, *The Widening Academic Achievement Gap Between the Rich and the Poor: New Evidence and Possible Explanations*, in WHITHER OPPORTUNITY? 91, 94–95 (Greg J. Duncan & Richard J. Murnane eds., 2011).

<sup>17</sup> RACE, POVERTY, AND AMERICAN CITIES (John C. Boger & Judith Wegner eds., 1996); RICHARD KAHLENBERG, ALL TOGETHER NOW: CREATING MIDDLE-CLASS SCHOOLS THROUGH PUBLIC SCHOOL CHOICE 2 (2003) (citing “fifty years of sociological data” to conclude that “being born into a poor family places students at risk, but to be assigned then to a school with a high concentration of poverty poses a second, independent disadvantage that poor children attending middle-class schools do not face.”).

the provision of *additional* resources to high-poverty schools and students is necessary, if insufficient, to the improvement of educational outcomes.<sup>18</sup> Indeed, the national norm of weighted funding mechanisms, which multiply a base per-student funding amount by a need-based weighting factor, consistently recognize that to provide adequate funding to all children, more needs to be spent on those living in poverty.<sup>19</sup> Title I's formulae for determining the nature and size of federal grants and the schools eligible to receive them correlate precisely to these poverty-related obstacles.<sup>20</sup>

## II. The Requirement to Supplement, not Supplant

Yet early in the ESEA's history, observers discovered that Title I was falling far short of its compensatory ambition. Chief among the reasons was that school districts were using Title I funds in *place* of, and not *in addition to*, state and local funds. In its influential report on Title I's failures and the need for reform, the NAACP Legal Defense and Education Fund ("LDF") showed that instead of using federal funds to provide resources for low-income students *beyond* those available to other students, districts were using Title I funds to buy baseline books and supplies, pay everyday operating costs and teacher salaries, purchase school facilities, equip superintendents' offices,<sup>21</sup> pay for various programs for which state and local funds had previously sufficed, and generally allow local dollars previously spent on Title I schools to be diverted elsewhere in the district.<sup>22</sup> All told, children at high-poverty schools ended up getting less than they needed, and less than they were legally owed, while students with greater advantages tended to get more resources than before.

In reaction to these findings, Congress adopted new fiscal requirements in 1970. The new rules forbade districts to use Title I money to replace the local funding they otherwise would have provided to Title I schools. Among other requirements, the amendments directed that Title I federal funds be used to "*supplement* and, to the extent practical, *increase* the level of funds that would, in the absence of such Federal funds, be made available from non-Federal sources . . . and . . . in no case, to *supplant* such funds from non-Federal sources."<sup>23</sup>

## III. Flawed Tests for Whether Districts Intend to Supplant Local Funding with Federal Dollars

When LDF published its report, determining what districts would have spent on Title-I schools "in the absence of such Federal funds" was relatively straightforward. The report simply compared pre-Title I funding as of 1965 to actual funding in the next few years. A sudden decrease in state and local dollars for Title I schools upon the introduction of federal funding provided strong evidence that the district was intending to supplant local with federal dollars.

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<sup>18</sup> Saba Bireda, *Funding Education Equitably*, CENTER FOR AMERICAN PROGRESS 1 (2011), available at: [https://cdn.americanprogress.org/wp-content/uploads/issues/2011/03/pdf/school\\_budget.pdf](https://cdn.americanprogress.org/wp-content/uploads/issues/2011/03/pdf/school_budget.pdf) ("students attending high-poverty schools actually need more funding to achieve at the level of their wealthier counterparts"). See also John C. Boger, *Common Schooling in the 21<sup>st</sup> Century: What Future for American Education*, Remarks at the 20<sup>th</sup> Festival of Legal Learning, University of North Carolina law School, Chapel Hill, NC (Feb. 5, 2010), available at: [http://pulse.ncpolicywatch.org/wp-content/uploads/2010/02/Jack\\_Boger\\_education\\_speech.pdf](http://pulse.ncpolicywatch.org/wp-content/uploads/2010/02/Jack_Boger_education_speech.pdf); and John C. Boger, *Education's Perfect Storm? Racial Segregation, 'High Stakes' Testing, & School Inequities: The Case of North Carolina* 81 N. C. L. Rev. 1375, 1440 (2003).

<sup>19</sup> See BRUCE BAKER ET AL, IS SCHOOL FUNDING FAIR? A NATIONAL REPORT CARD 6 (4<sup>th</sup> ed. 2012) (noting that "Student and school poverty correlates with, and is a proxy for, a multitude of factors that impact the costs of providing equal education opportunity"). See also Kevin Carey, *State Poverty-Based Education Funding: A Survey of Current Programs and Options for Improvement* 2 CENTER ON BUDGET AND POLICY PRIORITIES (2002) (referring to recent studies suggesting that "the actual additional cost of educating low-income children is between two and two-and-a-half times the cost of educating non-poor students").

<sup>20</sup> Four formulae, which are based on census poverty data and the estimated cost of education in each state, are used to allocate federal funds to districts under Title I.

<sup>21</sup> McClure and Martin, *supra* note 10, at 5.

<sup>22</sup> *Id.*

<sup>23</sup> Elementary and Secondary Education Act Amendments, Pub. L. No. 91-230 §109 (a) (1970) (emphasis added).

Today, however, maintaining historical baselines is a retrograde and unworkable approach to local funding of public schools. Historical baselines are retrograde because they tend to entrench the underfunding of schools generally and high-poverty schools in particular. Indeed, numerous state constitutional decisions have found that historical spending levels deprive children—especially those in high-poverty schools—of an adequate education.<sup>24</sup>

In any event, historical baselines are no longer workable. For 50 years since the adoption of the ESEA, state and local education agencies have supported Title I schools with combinations of local, state, and federal dollars, to the point that it is impossible to look backwards one, five, or any other number of years to decide what the pre-Title I historical baseline might be. A half a century on, the calculation on which the LDF report relied—local funding before federal dollars were available minus current local funding—has no bearing on whether districts are motivated to spend less local money on high-poverty schools than they otherwise would do if federal money were not available.

Congress recognized these difficulties in its 2015 reauthorization of the ESEA—the Every Student Succeeds Act (ESSA)<sup>25</sup>—and forbade the Department to use a set of indirect proxies for supplanting that it had developed, including a presumption of supplanting if a school district “used Title I funds to provide services that the [district] provided with non-Federal funds in the prior year(s).”<sup>26</sup> Other proxies Congress rejected included a presumption of supplanting if districts used Title I funds to provide services for which they used local funds in other schools or, to provide services required by law.<sup>27</sup>

These proxies had at least two other flaws. First, they counterproductively encouraged districts to spend Title I funds on “pull-out” services provided exclusively to low-income and otherwise disadvantaged children, segregating those children and depriving them of the many benefits of “mainstreaming” with other children.<sup>28</sup> Additionally, and most importantly, the proxies shed little light on whether districts were allocating funds in keeping with a forbidden motivation to supplant. In response, ESSA forbids the Department to require districts to prove that any “individual cost or service supported under [Title I] is supplemental.”<sup>29</sup>

Although ESSA bars pre-existing methods of determining whether districts’ methods of funding Title I schools are motivated by a desire to supplant local with federal funding, it not only retains but actually *strengthens* the supplement, not supplant requirement. For the first time, the 2015 Act obliges districts to “*demonstrate* compliance” with the non-supplanting requirement: “[districts] shall demonstrate that the methodology used to allocate State and local funds to each school receiving assistance under this part ensures that such school receives all of the State and local funds it would otherwise receive if it were not receiving assistance under this part.”<sup>30</sup> ESSA, however, does not say

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<sup>24</sup> See, e.g., *Rose v. Council for Better Education* 790 S.W.2d 186 (Ky. 1989); *McDuffy v. Secretary of the Executive Office of Education* 615 N.E.2d 516 (Mass. 1993); *Roosevelt Elementary School District v. Bishop*, 877 P.2d 806 (Ariz. 1994); *Campbell County School District v. Wyoming*, 907 P.2d 1238 (Wyo. 1995); *Claremont School District v. Governor*, 703 A.2d 1353 (N.H. 1997); *DeRolph v. State*, 677 N.E.2d 733 (Ohio 1997); *Lakeview School District No 25 of Phillips County v. Huckabee*, 10 S.W.3d 892 (Ark. 2000); *Abbott v. Burke*, 798 A.2d 602 (N.J. 2002); *Montoy et al v. State of Kansas et al* 62 P. 3d 228 (Kan. 2003). See generally, Michael Heise, *State Constitutions, School Finance Litigation, and the Third Wave: From Equity to Adequacy* 68 TEMPLE L. REV. 1151 (1995).

<sup>25</sup> Elementary and Secondary Education Act 20 U.S.C. §§ 6301, as amended by the Every Student Succeeds Act of 2015, Pub. L. No. 114-95 (2015).

<sup>26</sup> UNITED STATES DEPARTMENT OF EDUCATION, NON-REGULATORY GUIDANCE, TITLE I FISCAL ISSUES: MAINTENANCE OF EFFORT; COMPARABILITY; SUPPLEMENT, NOT SUPPLANT; CARRYOVER; CONSOLIDATING FUNDS IN SCHOOLWIDE PROGRAMS; AND GRANTBACK REQUIREMENTS, 38-9 (2008), available at: <http://www2.ed.gov/programs/titleiparta/fiscalguid.doc>.

<sup>27</sup> *Id.*

<sup>28</sup> See, e.g., MICHAEL J. GAFFNEY & DANIEL M. SCHEMBER, U.S. DEP’T OF EDUC., THE EFFECTS OF THE TITLE I SUPPLEMENT-NOT-SUPPLANT AND EXCESS COSTS PROVISIONS ON PROGRAM DESIGN DECISIONS 11 (1982) (showing that 92% of districts surveyed, across various enrolment sizes, were using a pull-out design for part or all of their Title I programs); Farkas & Shane Hall, *supra* note 16, at 76-77 (questioning the effectiveness of Congress’s effort in its 1994 reauthorization of the ESEA to address the pull-out problem by promoting the use of schoolwide programs).

<sup>29</sup> Section 1118(b)(3)(A), 20 U.S.C. § 6321(b)(3)(A).

<sup>30</sup> Section 1118(b)(2), 20 U.S.C. § 6321(b)(2) (emphasis added).

how districts shall make that demonstration. Rather, the Act leaves to the Department to determine, how—without reference to historical benchmarks or indirect proxies that are tied to particular costs or services—a district may “demonstrate” that its chosen method of funding schools is not designed to use federal dollars to supplant state and local funds they otherwise would have spent on Title I schools.

#### IV. Established Ways of Assessing Motivation, Such as that to Supplant, Rather than Supplement

One way to assess an actor’s intention or motivation is to inquire directly—as is the norm, for example, in criminal cases in court. Doing so, however, requires a searching and skeptical “prosecutorial” inquiry into the relevant actor’s statements, beliefs, and patterns of prior and current behavior. When, however, the task of assessing motive is assigned to a federal agency of limited jurisdiction, and the relevant “actors” are state and local governing bodies, each made up of many public servants due a presumption of good faith, any such inquiry creates a serious risk of federal overreaching. Particularly in the public education context, in which there are over 13,000 such “actors”—school districts—under scrutiny at any given time, the administrative burden imposed by prosecutorial methods of assessing motivation is untenable.<sup>31</sup>

Not surprisingly, therefore, Congress—and administrative agencies administering federal law—often take a different, more objective, approach to implementing motivational standards. That approach begins (but, importantly, does not end) by asking what the result would be—what the relevant “actor” would do; what the objective facts would look like—if the relevant actor were proceeding according to an unlawful motivation. If it is found that the actor acts in a manner or achieves a result that is consistent with the forbidden motivation, the next step is to require the actor to come forward with—i.e., in ESSA’s word, to “demonstrate”—a different, *legitimate* explanation for the steps it took and the results it triggered. If it can do so, it avoids liability.

Among the variety of federal laws that court decisions and federal administrative regulations have administered in this manner are three passed in the same period as the 1965 ESEA: Title VII of the Civil Rights Act of 1964,<sup>32</sup> the Age Discrimination in Employment Act of 1967 (“ADEA”),<sup>33</sup> and the Fair Housing Act of 1968 (“FHA”).<sup>34</sup> Under these laws, if employers or housing officials take actions that result in fewer blacks, Latinos, or elderly individuals being hired or promoted, or result in the segregation of blacks or Latinos in units or neighborhoods different from where whites live, the burden falls on those employers or officials to provide a legitimate explanation for their actions that

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<sup>31</sup> See NATIONAL CENTER FOR EDUCATION STATISTICS, *Fast Facts* (Jul. 12, 2016) at <http://nces.ed.gov/fastfacts/display.asp?id=372> (“In 2012–13, there were about 13,500 public school districts [in the United States] . . .”).

<sup>32</sup> Title VII, Section 703(a)(1), provides that it is an “unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual” because of his or her “race, color, religion, sex, or national origin” or to “limit, segregate, or classify” employees or applicants “in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of” the same characteristics. In administering this law, the United States Supreme Court, see *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1970), and the federal Equal Employment Opportunity Commission (EEOC), see e.g., 29 CFR §1625.7(d) (2004), has adopted the objective approach described in text for assessing motivation.

<sup>33</sup> ADEA section 4(a) makes it “unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s age.” 29 U.S.C. § 623(a). Deferring to an administrative regulation promulgated by the EEOC, the Supreme Court adopted the objective approach to assessing motivation under this statute in *Smith v. City of Jackson*, 544 U.S. 228, 235 (2005) (plurality opinion); *id.* at 243–47 (Scalia, J., concurring in part and concurring in the judgment).

<sup>34</sup> FHA section 804(a) makes it unlawful to “refuse to sell or rent . . . a dwelling to any person because of race, color, religion, sex, familial status, or national origin.” 42 U.S.C. § 3604(a). In *Texas Dep’t of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct 2507, 2516–22 (2015), the Supreme Court approved and adopted its own rule, consistent with a Department of Housing and Urban Development regulation (Implementation of the Fair Housing Act’s Discriminatory Effects Standard, 78 Fed. Reg. 11460 (2013)), adopting the objective approach to adjudicating this motivational standard.

overcomes the implication of racial, ethnic, or age-based motivation. In other words, because the *objective* actions taken by the employers and officials correlate to the expected results of the forbidden racist, ethnic, or age-based *subjective* motivation, those actions justify giving the relevant actors the duty to “demonstrate” that their behavior was not driven by the forbidden motivation.

Consider, for example, a Title VII claim alleging that an unlawful motive to discriminate on the basis of race led to the denial of an African-American’s job application. Recognizing that employers rarely will create direct evidence of a motive to discriminate, the Supreme Court and Equal Employment Opportunity Commission (“EEOC”) have developed a more objective framework, now used in many contexts, for pursuing this inquiry.<sup>35</sup> The plaintiff employee is required to show that she belongs to a protected group, was qualified for the job for which she applied and was rejected, and that the position remained open subsequently.<sup>36</sup> Although that result is not decisive, it is *consistent* with what one would expect to happen if discrimination had occurred. As such, the Court and the EEOC treat that behavior as establishing a sufficient reason to ask the employer to give a “legitimate non-discriminatory reason” for the disparate treatment—that is, a reason based on sound employment-related grounds, and not a discriminatory motive.<sup>37</sup> The plaintiff then has a final opportunity to demonstrate that the reason given is pretextual, for example, through evidence of the favorable treatment of similarly situated people not in the plaintiff’s protected category. With the blessing of the Supreme Court as recently as last year, administrative officials and courts use similar approaches to adjudicate age discrimination under the ADEA and housing discrimination under the FHA.<sup>38</sup>

Importantly, Congress did not itself articulate these frameworks in the underlying laws. Rather, the relevant statutes simply prohibit actions taken “because of” a prohibited motivation. They say nothing about *how* to determine when the relevant motive is present. Congress thus left courts and administrative officials to decide how to answer precisely the kind of motivational question the Department of Education faces in adjudicating the “supplement, not supplant” requirement. And to do so, courts and administrators in each case crafted an objective framework for requiring the actor in question to provide a legitimate explanation for actions and results that mirror those the forbidden motive is likely to generate.

Applying the same analysis to the ESEA’s “supplement, not supplant” inquiry would begin by asking what school districts would do—what objective results they would generate—if they were driven by a forbidden motivation to supplant, *i.e.*, to spend less money on high-poverty schools than they otherwise would do in recognition of the federal dollars they know will flow to those schools under Title I. In instances in which school districts were behaving in this manner or generating these results, they would be called upon to demonstrate a different, legitimate explanation for their actions.

The most likely objective effect of a district’s motivation to use Title I funds to supplant local dollars it otherwise would direct to Title I schools would be an inverse relationship between the total amount of state and local money it spends on schools, and schools’ Title I status. The district, that is, would spend *less* money on one or more Title I schools—thus enabling it to spend *more* on non-Title I schools—in keeping with its intention to use Title I funds to make up the difference. Under the objective approach to assessing a motivation to supplant, therefore, the fact that a Title I school receives less in the sum total of state and local funds than do non-Title I schools, would suggest—not conclusively, but sufficiently to warrant further inquiry—that the district gives Title I schools fewer local funds *because* they are Title I schools. The district then would have to demonstrate a legitimate reason for directing fewer local dollars, all told, to Title I than to other schools.

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<sup>35</sup> *McDonnell Douglas Corp. v. Green*, 411 U. S. 792, 802-4 (1973).

<sup>36</sup> *Id.*

<sup>37</sup> *Texas Dep’t of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

<sup>38</sup> *Texas Dep’t of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct 2507, 2516-22 (2015).



## V. The Department's Proposed Regulation

The Department's proposed regulation operates in exactly this familiar fashion. Rejecting any disposition to subject public officials to a searching prosecutorial examination of their inner-most thoughts, the proposed regulation pursues a more objective inquiry. Consistently with courts' and administrators' interpretation of statutes adopted contemporaneously with the ESEA, the proposed regulation asks whether a district is behaving consistently with a forbidden motive to supplant: whether the district, in fact, provides one or more Title I school with less in the way of state and local funding, all told, than it provides on average to non-Title I schools. If the district acts in this manner, the regulation—proceeding more deferentially to school districts than the analogous Title VII, ADEA and FHA do to actors they affect—recognizes three common situations in which school districts are *assumed* to have a legitimate, non-supplanting explanation for allocating more local funds to non-Title I schools than to Title I schools. Even absent any demonstration by the district, that is, the Department will rule out any inference of supplanting, not only when districts spend more local money on Title I than on non-Title I schools, but also when (1) they have only one school or only one per-grade-span; (2) their spending disparities among Title I and non-Title I schools disappear when funding is considered on a grade-span or other similar basis; or (3) the disparities go away when spending on small schools (<100 students) is omitted from the calculation.

If underspending of local funds on one or more Title I schools compared to non-Title I schools remains after considering these exceptions, the regulation then requires districts to explain their allocation method and their legitimate reason for the underspending on Title I schools. At that point, the proposed regulation invites districts to identify one or more “special circumstances related to a particular [non-Title I] school's population of disadvantaged students” for spending heavily on that school. Any such school is then removed from the calculation of the district's overall funding on its non-Title I schools. If doing so removes the funding disadvantage for Title I schools, the inquiry is at end, and the “supplement, not supplant” requirement has been satisfied.

The Department thus proposes an entirely sensible approach for resolving the difficult motivational question posed by the “supplement, not supplant” requirement—an approach that courts and executive and administrative officials have used for decades to implement parallel legislation. The proposed regulation thus:

- carefully and accurately describes objective conditions likely to be present when districts are motivated to use Title I dollars to supplant local funds in violation of law, namely, the spending of fewer local dollars on Title I than on non-Title I schools;
- makes a conscientious effort to anticipate the most common *legitimate* reasons why districts might spend less on Title I than non-Title I schools; and
- allows districts to avoid any implication of supplanting by identifying *other* educationally sound reasons, grounded in Title I's goal of providing compensatory support to schools with large numbers of students in need, for spending less on Title I than other schools.

Also supporting the Department's approach is *ESSA itself*. The Act's own terms indicate that Congress expected, and paved the way for, the Department to use an objective approach to the “supplement, not supplant” question. First, ESSA for the first time requires States and districts to collect and publically report data showing exactly how many local, state, and federal dollars—including dollars devoted to teacher salaries—they spend on each of their schools.<sup>39</sup> Second, as

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<sup>39</sup> Section 1111(h)(1)(C)(x) (requiring SEAs and districts to report “[t]he per-pupil expenditures of Federal, State, and local funds, including actual personnel expenditures and actual nonpersonnel expenditures of Federal, State, and local funds, disaggregated by source of funds, for each [district] and each school in the State for the preceding fiscal year.” 20 U.S.C. § 6311(h)(1)(C)(x) (emphasis added).

explained earlier, ESSA for the first time requires districts themselves to “demonstrate” that the methodology they use to allocate local funds is not designed to enable Title I funds to supplant local dollars. The first addition to the statute gives the Department and States (which enforce the supplement, not supplant requirement in the first instance) everything they need to take the initial step in the objective approach: comparing *all* of the local funding of Title I and non-Title I schools to see whether the former schools receive fewer local dollars than the latter ones. The second addition invites the Department to do exactly what its new regulation proposes: require districts that act consistently with a motive to supplant by spending less on Title I than on other schools, to “demonstrate” a legitimate, educationally sound reason for distributing local funds as they do.

The design of the proposed regulation is commendable, as well, because of how easily it can be improved through forthcoming notice and comment procedures. If, for example, there are other common and educationally sound reasons for directing fewer local dollars to Title I than to other schools—e.g., unpredictable emergencies associated with floods, fire, and the like—notice and comment can reveal them, and they would fit neatly into the structure of the regulation as initially drafted. Additionally, the Department may consider broadening its catch-all definition of legitimate, educationally sound reasons for funding non-Title I schools more richly than Title I schools. For example, in addition to policies that exclusively focus on the needs of disadvantaged students, the Department might credit policies that *equally* serve important educational or learning needs of *all* of the district’s school children in ways that cannot be accomplished as well or better without spending more money on non-Title I than on Title I schools.<sup>40</sup> If, for example, a non-Title I school is shown to be by far the least expensive location for equipment needed to expand secure internet access to all of a district’s schools, that could explain a temporary influx of disproportionate funding to the district’s non-Title I schools. On the other hand, a policy of retaining highly effective teachers by paying them extra—or letting them opt—to work in non-Title I rather than Title I schools would not suffice. The benefits of that policy would not be equally available to all students in the district, and the objective could as easily be accomplished by compensating highly effective teachers for working in schools that currently have few experienced and effective teachers.

Together, (1) the many problems with a prosecutorial inquiry into the subjective motivations of officials responsible for allocation decisions in thousands of districts nationwide, in contrast to the less intrusive objective approach, (2) the strong precedents for the objective approach in courts’ and federal administrators’ implementation of laws adopted contemporaneously with ESEA, and (3) ESSA’s own support for the objective approach, reveal the reasonableness of the objective approach the Department has proposed. Certainly, the contrary, prosecutorial approach is not obviously *more* reasonable or *unambiguously* required by the statute’s plain meaning. Under these circumstances, there is every reason to defer to the Department’s interpretation of a statute it has been responsible for interpreting and administering for decades.<sup>41</sup>

## **VI. Responses to Objections**

Without mentioning the longstanding precedents and recently adopted statutory provisions noted above, a recent Congressional Research Service Report (“CRS Report”) offers two objections to the draft regulation.<sup>42</sup> Neither is convincing.

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<sup>40</sup> This “less restrictive means” type approach mirrors established Title VII doctrine, under which an explanation proffered by a defendant for using an employment test or standard with a disparate negative effect on African Americans may be rejected if “other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer’s legitimate interest.” *Albemarle Paper Co. v. Moody*, 422 U. S. 405, 425 (1975).

<sup>41</sup> *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* 467 U.S. 837, 842-43 (1984) (quoted below in note 50 and accompanying text).

<sup>42</sup> Feder & Skinner, *supra* note 9.

First, the CRS Report suggests that the regulation runs afoul of a provision in ESSA prohibiting the Department to require states or districts to equalize per-pupil spending.<sup>43</sup> Manifestly, however, the proposed regulation does not require funding equalization. Consistently with Title I’s fundamental premise, the regulation assumes that Title I schools typically should receive *more* local, state, and federal funding per pupil than the *average* received by non-Title schools—an outcome, as the CRS Report acknowledges, that is the opposite of requiring *equal* per-pupil expenditures for each school considered *separately*. Additionally, through its three exceptions and its broader catch-all invitation, the draft regulation recognizes a number of legitimate, educationally sound reasons why non-Title I schools may receive more funding per student than Title I schools—and why individual Title I and non-Title I schools will receive different amounts of per pupil funding than other schools in their category. The proposed regulation thus is no more a requirement of “equalization” than Title VII or the ADEA is a requirement that all employers have a race- or age-balanced workforce. Like those precedents, the proposed regulation does not impose a quota system. Instead, it allows unequal spending whenever there is an educationally legitimate, non-supplanting reason for doing so.

The CRS Report also contends that the proposed regulation violates a caveat in the ESEA’s longstanding “comparability of services” requirement. At the same time as Congress added the “supplement, not supplant” provision to ESEA in regard to the “level of [local] *funds*,” it also added a requirement that school districts receiving federal support provide comparable “*services*” to Title I and non-Title I schools. To comply with the requirement, districts must provide written assurances to the SEA that they have a district-wide salary schedule and policies to ensure per-pupil equivalence both in the number of teachers, administrators, and other staff across schools in materials and supplies. When determining per-pupil equivalence of services, “staff salary differentials for years of employment shall not be included.” As many observers have noted and the CRS Report acknowledges,<sup>44</sup> if applied not only to the distribution of “services” (the sole focus of the comparability provision), but also to the distribution of “funds” (the subject of the distinct, supplement, not supplant provision), this treatment of teacher salaries would allow districts to systematically assign their most experienced, most expensive teachers to non-Title I Schools and thus spend *less* on instruction at Title I than at non-Title I schools—in direct contradiction of Title I’s compensatory purpose. What the CRS report suggests is that Congress, though it never says so explicitly, silently intended the treatment of teacher salaries it wrote into the comparability provision to apply as well to the supplement, not supplant provision.

This interpretation is flawed. The “comparability” and “supplement, not supplant” provisions are distinct, and must be interpreted as distinct. As their words plainly signify, comparability applies only to the distribution of “services”; supplement, not supplant applies only to the expenditure of “funds.” That distinction must make a difference, or each provision would render the other superfluous—violating longstanding rules (i) against interpreting statutes to contain “surplusage”<sup>45</sup> and (ii) requiring statutes to be construed “so that effect is given to all its provisions [and] no part will be inoperative or superfluous . . . .”<sup>46</sup>

And Congress itself has long treated the provisions distinctly. Although it has limited the comparability provision to service differentials other than those tied to differences in teacher seniority, it has never seen fit to add a parallel constraint on the supplement, not supplant provisions. For this reason, as well, the CRS Report’s insistence upon reading into the statute a requirement that

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<sup>43</sup> Section 1605: “Nothing in this title shall be construed to mandate equalized spending per pupil for a State, local educational agency, or school.” 20 U.S.C. § 6576.

<sup>44</sup> Feder & Skinner, *supra* note 9, at 5 (noting “disparities in personnel expenditures between Title I-A schools and non-Title I-A schools” that arise when teacher salaries are omitted from calculations of local spending on schools).

<sup>45</sup> Caleb Nelson, *What is Textualism?*, 91 VA. L. REV. 347, 355 (2005) (discussing the longstanding “presumption against surplusage . . . .”); Brian M. Saxe, *When a Rigid Textualism Fails: Damages for ADA Employment Retaliation*, MICH. ST. L. REV. 555, 578 n.145 (2006).

<sup>46</sup> *Hibbs v. Winn*, 542 U.S. 88, 101 (2004).

Congress added in one place but left out of another violates an established principle of statutory interpretation, that “the exclusion of language from one statutory provision that is included in other provisions of the same statute” must be assumed to be intentional.<sup>47</sup>

Even more importantly, Congress has perfectly sensible—indeed, compelling—administrative reasons for treating the distribution of *services* and *funds* differently in regard to teacher seniority and salaries. Absent the “staff . . . differentials” caveat, the requirement of comparable teacher *services* might be thought to depend on the quality of individual teachers providing the services. If that were so, the comparability provision would require districts separately to rate each teacher to identify how much “value added” she or he provides, and then use the aggregate of all teachers’ “value added” to see if different schools get less or more. As Congress recognized, there are three serious problems with using teacher salary or teacher seniority (the key determinant of teacher salary) as a proxy for teacher quality: doing so would be inaccurate;<sup>48</sup> administratively burdensome, given the many millions of teachers nationwide; and (worst of all) demoralizing to teachers, as districts would be impelled to declare some teachers to be worth more than others. The simple solution is the one the ESEA’s comparability provision has long used: treating each teacher as equal to all others by defining comparability of services in terms of pupil-teacher ratios and district-wide salary schedules.

The supplement, not supplant provision is quite different. It applies to something classically and inherently fungible: money. Because each dollar actually spent is no different from or more administratively burdensome to track than any other dollar, no matter what the dollar pays for, there is no reason for districts not to count *every* dollar spent on each of its schools, including dollars spent on teachers—which ESSA itself now requires districts to do and to report publicly. Indeed, proceeding in the opposite direction, as the CRS Report proposes, and treating money spent on teachers differently from money spent on other things, has all of the problems Congress aimed to avoid through the comparability of services caveat: it is inaccurate (making schools that spend vastly different amounts look like they spend the same), administratively burdensome (because of the need to segregate and track different types of dollars), and demeaning (to the disadvantaged children on whom the interpretation would allow districts to spend less).

So Congress acted consistently and sensibly in taking steps *both* to prevent districts from differentiating among teachers based on their salaries or seniority for purposes of the comparability of *services* they provide to schools, *and* to forbear differentiating among dollars districts spend in calculating the amount of *funds* they allocate per school. There is no inconsistency for Congress to treat each teacher the same when talking about *services*, and each dollar the same when talking about *spending*. And it thus makes perfect sense for the Department to use the *spending* data that Congress now requires districts to make public—and that it requires them to calculate by treating dollars spent on teachers the *same* as dollars spent on everything else—for purposes of supplement, not supplant.

Compounding its failure to consider the long line of precedents for the Department’s objective approach, ESSA’s new provisions aligned to those precedents, and ESEA’s key distinction between “services” and “funds,” the CRS Report fails to say *how* the Department should ascertain what funds the Title I school “would have received” had Title I funds not been available. That leaves the Report to reach the untenable conclusion that ESSA neither “establish[es]” nor evidently *allows* “any type of standard or requirement regarding how to demonstrate that a Title I-A school receives all

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<sup>47</sup> *Hamdan v. Rumsfeld*, 548 U.S. 557, 578 (2006); see *Russello v. United States*, 464 U.S. 16, 23 (1983) (Congress must be assumed to have acted “intentionally and purposely in the disparate inclusion or exclusion.”).

<sup>48</sup> See, e.g., Steven G. Rivkin, et al., *Teachers, Schools, and Academic Achievement*, 73 *ECONOMETRICA* 417, 449, 419 (2005) (noting that “there is little evidence that improvement continues after the first three years” and concluding that “experience is not significantly related to achievement following the initial years in the profession”); Boyd, et al., *The Narrowing Gap in Teacher Qualifications and its Implications for Student Achievement* 27 *J. POL. ANAL. MANAG.* 793, 810 (2008) (limiting the correlation between experience and effectiveness to the single point when teachers “mov[e] from being completely inexperienced to having a full year of experience”).

of the state and local funds it would have received in the absence of Title I-A funds.”<sup>49</sup> The Report’s conclusion thus appears to be that the statutory provision that obliges the Department to assure that districts don’t supplant local funding with Title I dollars is both uninterpretable and unenforceable. This despite the fact that ESSA not only retained, but went out of its way to strengthen, the supplement, not supplant requirement.

The CRS Report falls short because it mistakes the statute’s *silence* on the Department’s proposed test for the test’s *prohibition*. But as the Supreme Court has held in regard to the Education Secretary’s rulemaking authority, “if Congress left a ‘gap’ for the agency to fill—then we must uphold the Secretary’s interpretation as long as it is reasonable.”<sup>50</sup> And as we have shown, faced at once with congressional silence on the applicable “supplanting” standard, and with the crippling intractability of possible alternatives, the Department’s proposed approach is both eminently reasonable and consistent with myriad judicial and administrative precedents.<sup>51</sup>

## Conclusion

It is now well-established that the education of children from low-income families requires more funds than that of their more privileged counterparts. Congress founded Title I of the ESEA on this premise and designed it to provide additional, compensatory funds to children who need them. Since then, in the face of various attempts to undermine that ambition, amendments to Title I have insisted upon protecting and advancing the goal. Chief among these steps has been the requirement—given *stronger*, obligatory force in the Act’s latest iteration—that Title I funds supplement, and do not supplant, state and local funding for disadvantaged children.

Today those children face new threats to the compensatory purpose of Title I. Relying on an exception in the distinct comparability of services provision, and exploiting the difficulty of ascertaining a subjective motivation to underspend on Title I schools, districts seek to exclude the many millions of dollars they devote to teacher salaries from their comparisons of school funding. The effect is that disadvantaged children in Title I schools across the nation receive substantially less in state and local funds than more privileged children in non-Title I schools—precisely as one would expect if districts were using Title I funds to supplant local funds.

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<sup>49</sup> Feder & Skinner, *supra* note 9, at 3. The CRS Report makes no effort to defend the only alternative to the Department’s proposed objective test, which would have the Department prosecutorially inquire into the subjective beliefs and bona fides of thousands of public officials.

<sup>50</sup> *Zuni Public School District No. 89 v. Department of Education* 550 U.S. 81, 89 (2007); see *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* 467 U.S. 837, 842-43 (1984) (“a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency”).

<sup>51</sup> Tellingly, the CRS Report omits a third objection to the Department’s proposed regulation that has been offered by others: that the regulation violates ESSA’s prohibition on any prescription of a specific methodology for allocating funds among Title I and non-Title I schools. See Lamar Alexander, Press Release: Administration’s ‘Supplement Not Supplant’ Regulation “Raises Grave Questions,” May 18, 2016, at <http://www.alexander.senate.gov/public/index.cfm/pressreleases?ID=44D1CEFF-06D9-40A6-8124-07275D8B319F>. As the CRS evidently concluded, steps by the Department to forbid a particular allocative methodology—one that uses federal dollars to supplant local funding—are precisely what the statute’s supplement, not supplant provision requires and are not the same thing as prescribing any other particular methodology.

Another potential objection, not levelled against the proposed regulation by anyone, as far as we know, is that it contravenes the Spending Clause, U.S. CONST. art. I, § 8, cl. 1, as interpreted in *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2011)—the only case to find an exercise of Congress’ spending power unconstitutionally coercive of the States. As Eloise Pasachoff has convincingly argued, however, the factors that led the *Sebelius* Court to find the Affordable Care Act’s Medicare funding provisions unconstitutional—pre-existing funding conditioned on compliance with an entirely new and unanticipated program and economic dragooning—have little or no application to ESEA. See Eloise Pasachoff, *Conditional Spending after NFIB v Sebelius: The Example of Federal Education Law* 62 AM. U. L. REV. 577, 613-29 (2012-2013) (showing that (1) recent ESEA amendments such as the No Child Left Behind Act do not qualify as new programs attached to a pre-existing one and merely augment, rather than radically altering, longstanding legislative requirements and (2) Title I funds typically constitute between only 2 and 3 percent of all funds available for elementary and secondary education, and less than 1 percent of a state’s total budget, unlike Medicaid, which was 64.6 percent federally funded and amounted to approximately 10 percent of many States’ budgets).

To tackle this problem, the Education Department has crafted a reasonable regulation that adopts a long-established and well-respected strategy for identifying actions taken pursuant to an unlawful motive. Rather than inquiring directly and invasively into the subjective intentions of school officials, this strategy looks to see if a district's actions and results are objectively consistent with a motivation to supplant and, if so, it invites the district (in ESSA's word) to "demonstrate" that it has a legitimate explanation, aligned to the purposes of Title I, for its spending patterns. As reasonable as it is, moreover, we expect that the regulation can be improved even further through the upcoming notice and comment process, and we urge those who genuinely share the Department's commitment to improving the educational outcomes of our low-income children to join in that process.