

Congress of the United States
Washington, DC 20515

November 4, 2016

The Honorable John B. King, Jr.
Secretary
U.S. Department of Education
400 Maryland Avenue, SW
Washington, DC 20202

Re: RIN 1810-AB33

Proposed Rule on Implementing the Supplement, Not Supplant Provision Under Title I of the ESEA

Dear Secretary King:

We respectfully submit these comments in response to a Notice of Proposed Rulemaking (NPRM) to create new regulations to implement programs under Title I of the *Elementary and Secondary Education Act of 1965* (ESEA), as amended by the *Every Student Succeeds Act* (ESSA), which was published in the *Federal Register* on September 6, 2016. As Members of the United States Senate Committee on Health, Education, Labor and Pensions (HELP) and House of Representatives Committee on Education and the Workforce, we are writing to express our strong concerns about the U.S. Department of Education (“the Department”) proposals to regulate the supplement, not supplant (SNS) requirement found in section 1118(b) of ESSA.

ESSA was signed into law by President Obama on December 10, 2015, after passing the U.S. House of Representatives (359 – 64) and Senate (85 – 12) with overwhelming bipartisan support. The new law represents a broad consensus to restore to States, Local Educational Agencies (LEAs), educators, and parents the responsibility for making important decisions about how to improve educational opportunities and outcomes for all students.

In *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, the U.S. Supreme Court established that the test for reviewing an agency’s interpretation of a statute consists of two related questions. First, the question is “whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter” because the court and agency must “give effect to the unambiguously expressed intent of Congress.” Second, if “Congress has not directly addressed the precise question at issue” or “if the statute is silent or ambiguous” the question is “whether the agency’s answer is based on a permissible construction of the statute.”¹

Unfortunately, the NPRM does not reflect the clear and unambiguously expressed intent of Congress. In the new law, Congress directly spoke to the issue by both clarifying and

¹ 467 U.S. 837 (1984).

simplifying how LEAs demonstrate compliance with the SNS requirement under Title I of ESEA. The NPRM draws broad and inaccurate conclusions about what Congress intended when amending the SNS provision that are not supported by the statutory text and violate clear and unambiguous limitations on the Secretary’s authority. While the NPRM includes some provisions that accurately reflect the statute, it includes additional requirements on LEAs that are unlawful, unnecessary, and could result in harmful consequences to LEAs, schools, teachers, and students.

The intent of Congress in amending the SNS requirements under Title I of ESEA is clear and unambiguous in directly speaking to the issue of how LEAs must demonstrate compliance. As the Court has held, that should be “the end of the matter” for the Department, which through rulemaking should “give effect to the unambiguously expressed intent of Congress.” Instead, the NPRM violates this principle in imposing new requirements that reflect the Department’s own construction of the statute. We therefore strongly urge the Department to rescind this additional language and work with Congress in a bipartisan, bicameral way to implement ESSA as Congress clearly intended. The following outlines areas of agreement, and then describes the ways in which the Department’s proposal violates the letter and intent of the statute and could lead to negative results for low-income students and schools if it were implemented.

1. General Requirements in Compliance with ESSA and Congressional Intent

Sections 200.72(a) and (b)(1)(i) of the NPRM are consistent with the statute and Congressional intent by providing appropriate regulatory clarification that will enable LEAs to satisfy the requirements of the law. Consistent with section 1118(b)(1) of ESSA, the NPRM requires LEAs to use Title I, part A funds only to supplement the funds that would, in the absence of such funds, be made available from state and local sources for the education of students participating in Title I programs, and not to supplant such funds. This general requirement has been in ESEA since 1970 and is maintained under ESSA. Additionally, the NPRM repeats statutory language eliminating the non-regulatory “cost-by-cost” test. Accordingly, LEAs are no longer required to identify that an individual cost or service supported with Title I, part A funds is supplemental under ESEA. Finally, the NPRM also repeats statutory language that prohibits any requirement for LEAs to provide services with Title I, part A funds through a particular instructional method or instructional setting. Therefore, we recommend the Department maintain sections 200.72(a) and (b)(1)(i) of the NPRM.

2. Additional Requirements in Violation of ESSA and Congressional Intent

Section 200.72(b)(1)(ii) of the NPRM violates the “unambiguously expressed intent of Congress” and clearly contradicts provisions of the law that have existed since 1970 by outlining new and prescriptive methodologies from which LEAs must choose to distribute state and local education funding in order to demonstrate compliance with the SNS requirement under Title I, part A. Specifically, the NPRM would require each LEA to allocate “almost all State and local education funds to all of its public schools – regardless of Title I status” in a way that meets one of three federally prescribed tests. While the NPRM includes a “State-determined option for compliance” that the Department reasons is intended to “maximize flexibility for innovative approaches,” an LEA can only exercise this option if the methodology for distributing state and

local funds is as rigorous, and results in substantially similar amounts of state and local funding for Title I schools in the district, as the other federally prescribed options. Furthermore, exercising this option must be ultimately approved by federal peer reviewers and the Secretary. Section 200.72(b)(1)(iii) also includes a “special rule” that provides a fourth option for how an LEA could comply with the new regulatory requirement, which is essentially the same Department proposal that was rejected during negotiated rulemaking. These new requirements on how state and local funds are distributed, which are not included in the law, violate the plain language of the statute, including limitations on the Secretary’s authority, and conflict with the unambiguous intent of Congress in amending the SNS requirement.

i. Section 1118(b)(2) of ESEA Does Not Require a Particular Funding Outcome

Section 1118(b)(2) of ESEA, as amended by ESSA, reads as follows:

(2) COMPLIANCE- To demonstrate compliance with paragraph (1), a local educational agency 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.

The unambiguously expressed intent of Congress in adding the new paragraph (2) to the SNS provision was to clarify how LEAs should demonstrate compliance. This language replaces the test, established in non-regulatory guidance, that required most LEAs to demonstrate that each cost (i.e. material or service) charged with Title I funds was supplementary, which was criticized for being opaque, confusing, burdensome, incentivizing fragmented spending decisions, and otherwise in conflict with the purposes of Title I and the original intent of SNS. Instead, the plain language of ESEA now requires only that LEAs demonstrate that their methodology for allocating state and local dollars does not take into consideration a school’s receipt of Title I funds, which effectively means that the methodology must only demonstrate Title I neutrality. In other words, school districts cannot construct a methodology for distributing state and local funds to schools that deliberately reduces the amount of such funds that are allocated to Title I schools because they are also receiving Title I dollars. In doing so, Congress has directly spoken to the precise question at issue in setting forth an unambiguous auditable standard that does not require or support further regulatory clarification. That should be the end of the matter for the Department.

When the Senate passed its version of ESSA, entitled the *Every Child Achieves Act*, (S. 1177), which was approved unanimously by the Senate HELP Committee and passed the full Senate 81-17, it included language identical to paragraph (2) above, as well as a committee report negotiated between HELP Committee Republicans and Democrats. This report explained the unambiguously expressed intent of Congress in how LEAs must demonstrate compliance with SNS under Title I, saying:

Specifically, the bill allows States and LEAs to comply with SNS for title I, part A funds if they can document that the manner in which they allocate State and local resources to schools is “Title I neutral,” or that the methodology does not

account for the title I funds that schools will receive. Additionally, the bill removes requirements in regulation that force LEAs to identify individual costs or services as supplemental. Instead, the way in which State and local resources are allocated to a school must be examined as a whole to ensure that the methodology does not account for title I funds the schools will receive. This language will provide more flexibility for schools to utilize title I funds to implement comprehensive and innovative programs. LEAs will be able to demonstrate SNS compliance in a much less burdensome and restrictive way, while still making clear that Federal dollars are supplemental to State and local dollars and not be used to replace them.²

The plain language and unambiguously expressed intent of this provision is to provide more flexibility to LEAs in complying with SNS by demonstrating that their methodology for distributing state and local funds does not account for the Title I funds, and, therefore, any federal Title I dollars that a school receives is clearly supplemental to the state and local funds that they would otherwise receive. Compliance is established once this methodology is demonstrated. Thus, this should be the end of the matter. However, the regulatory clarification proposed in the NPRM goes well beyond the requirement set forth clearly in statute and unambiguously expressed intent of Congress. The Department's proposal prescribes four new standards from which school districts must choose, which collectively require either a specific methodology for distributing state and local funds or specific funding distribution outcomes. Congress deliberately chose not to create any such standards and added a paragraph on how an LEA would comply with the SNS provision to clarify that intent.

ii. The NPRM Violates Clear Prohibitions on the Secretary's Authority

In ESSA, Congress spoke directly to limit the Secretary's authority to regulate. First, section 1118(b)(4) of ESEA prohibits the Secretary from prescribing any specific methodology for allocating state and local funds. Second, section 8527(a) states:

Nothing in this Act shall be construed to authorize an officer or employee of the Federal Government, including through a grant, contract, or cooperative agreement, to mandate, direct, or control a State, local educational agency, or school's ... allocation of State or local resources, or mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under this Act.

Based on these clear prohibitions, that should have been the end of the matter for the Department. Instead, section 200.72(b)(1)(ii) of the NPRM violates the statute and the unambiguously expressed intent of Congress in two ways.

First, the NPRM violates section 1118(b)(4) by prescribing the methodologies that LEAs may use to distribute state and local education funding. The Department reasons the NPRM is consistent with this prohibition because it provides a menu of options from which school districts can choose. However, in doing so, the NPRM creates a set of finite conditions for compliance with SNS, the practical effect of which is to prescribe specific methodologies that states and

² S. Rep. No. 114-231 (2015).

school districts must choose from to allocate State and local funds to all public schools. The proposal is also in violation of the intent of this prohibition, which was added to protect against *any* federal interference with school district funding methodologies, so long as those methodologies comply with paragraph (2) as discussed above.

Second, under the proposal, the Secretary is violating section 8527(a) by mandating, directing, and controlling how state and local resources are allocated, or alternatively, mandating states and LEAs spend additional funds not paid for under the statute. The fact that the NPRM will “mandate, direct, or control” the allocation of State or local resources or how a state or LEA spends its funds is not in dispute. The NPRM itself estimates that LEAs not in compliance would have to reallocate \$800 million in State or local funds, or spend \$2.2 billion in new State or local funds, or do a combination of both, in order to comply. The prohibition on such a mandate in section 8527(a) is not new to the law and its meaning is clear – federal officers may not mandate, direct, or control how States and LEAs spend or allocate their own dollars. This understanding of section 8527(a) was confirmed by a federal district court in *School District of the City of Pontiac v. Secretary of the United States Department of Education*.³ Therefore, by prescribing the methodologies that LEAs may use to distribute state and local education funding and effectively mandating, directing, and controlling how state and local resources are allocated, the NPRM violates clear prohibitions in the law and the unambiguously expressed intent of Congress to limit the Secretary’s authority to regulate.

iii. The NPRM is Not Supported by the Legislative History

The NPRM is not supported by the legislative history of ESSA in amending the SNS requirements. The Department reasons the proposed regulations “would ensure that Title I funds are used to fulfill their statutory purpose,” including to provide all children with a fair and equitable education, rather than to make up for “inequitable allocation of State and local funding to title I schools.” Many states have examined and are continuing to examine whether their own state and local funds are being allocated equitably to Title I and non-Title I schools. However, SNS has never required, nor is it intended to require, equity or fairness in the allocation of state and local education dollars.

As explained in a 2008 report, published by the Center for American Progress, under SNS “[a] district could provide half as much money for poor schools as middle-class schools, get Title I money, and then keep its own spending the same, using the new Title I dollars entirely for special programs in high-poverty schools.”⁴ The fact that Title I schools have received less state and local money than non-Title I schools would not violate the SNS requirement. The Department has maintained this interpretation of SNS since 1970.

The amendments made under Title I of ESSA do not alter this understanding of the purpose and intent of the SNS provision. The purpose of section 1118(b)(2) was not to prescribe how state and local funds must be distributed to Title I schools in comparison to non-Title I schools. Instead, it was to replace a complicated test for compliance issued by the Department in

³ *Sch. Dist. of Pontiac v. Sec'y of the United States Dep't of Educ.*, 512 F.3d 252 (6th Cir. 2008).

⁴ Robert Gordon, *More Equity and Less Red Tape: Rethinking the Comparability Provisions in Title I of the Elementary and Secondary Education Act*, Center for American Progress, October 2008, Page 4.

non-regulatory guidance with a simplified statutory requirement regarding how LEAs may comply with SNS. The Title I neutral test established by this provision is not new to the program. Guidance issued by the Department as recently as 2015 permitted LEAs to utilize a Title I neutral test to demonstrate compliance with SNS in schools operating a schoolwide program. Specifically, as articulated in the guidance, “the supplement not supplant requirement for a schoolwide program is simply that the school receive all non-Federal funds it would receive if it did not receive Title I funds.” The Title I neutral test does not change the purpose or expand the scope of SNS. As explained in a 2012 report by the Center for American Progress and the American Enterprise Institute, which recommended amending the SNS provisions in ESEA to provide the Title I neutral test for compliance that Congress ultimately included in ESSA:

It is important to note that this proposed test would not look at whether the amount of state and local money a Title I school receives is equitable. Given the significance of the problems caused by the current supplement-not-supplant test, this issue should be addressed on its own, separate from other Title I fiscal issues.⁵

The legislative history of ESEA demonstrates Congress was aware of and considered language to address concerns about equity and fairness in the allocation of state and local education funds. Congress considered but did not approve proposed language that would have required spending in Title I schools to be measured against spending in non-Title I schools using actual per-pupil amounts. This proposal had been debated for years leading up to the enactment of ESSA. For example, the Senate HELP Committee debated but did not approve an amendment to ESEA’s comparability provision offered during Committee consideration of the *Every Child Achieves Act* by Sen. Michael Bennet (D-CO) that would have required LEAs to demonstrate that combined state and local per-pupil expenditures, including personnel and non-personnel expenditures, in each Title I school were not less than the average combined state and local per-pupil expenditures in non-Title I schools. Additionally, the House Education and the Workforce Committee debated and defeated a similar amendment offered by Rep. Marcia Fudge (D-OH) during Committee consideration of the *Student Success Act*. Instead, Congress added a new provision in section 1111(h)(1)(C)(x) that requires states and LEAs to publicly report actual per-pupil expenditures. Congress recognized the need for public scrutiny of funding allocations among schools. But Congress also recognized any mandates regarding actual per-pupil funding differences similar to what is proposed in the NPRM would cause far more harm than good for low-income students and chose not to enact them. Nobody involved in the negotiations that led to ESSA can plausibly argue that Congress intended to provide statutory authority for the requirements laid out in this NPRM.

Beyond the addition of this reporting provision, the issue of equitable funding between Title I and non-Title I schools was never raised during the subsequent Congressional negotiations that resulted in ESSA. During this process, the White House and the Department provided a list of priorities for Congressional consideration. This was not among those priorities. No member of the Conference committee ever proposed to amend either the comparability or SNS provisions under ESEA to address differences in actual per-pupil spending between Title I

⁵ Melissa Junge and Sheara Krvaric, *How the Supplement-Not-Supplant Requirement Can Work Against the Policy Goals of Title I: A Case for Using Title I, Part A, Education Funds More Effectively and Efficiently*, Center for American Progress and American Enterprise Institute, March 2012, Page 19.

and non-Title I schools.

The NPRM does not reflect the plain language of ESEA or the unambiguously expressed intent of Congress in amending the SNS provisions in Title I of ESSA. As held by the U.S. Supreme Court, if “Congress has directly spoken to the precise question at issue” and “the intent of Congress is clear, that is the end of the matter.” ESSA clearly reflects the intent of Congress to clarify and simplify how LEAs must demonstrate compliance with the SNS requirements of Title I-A and places clear limitations on the Secretary’s authority to regulate beyond those requirements in statute. In requiring a particular funding outcome, prescribing the methodologies that LEAs must choose from to demonstrate compliance with SNS, and mandating, directing, or controlling how state and local funds are distributed to schools, the NPRM violates the unambiguously expressed intent of Congress. Furthermore, the NPRM is not supported by the legislative history of the SNS provision that has been in the law since 1970 or the amendments made to it under ESSA. Rather than deferring to Congressional intent, the Department, through the NPRM, seeks to impose its own construction of the statute, which does not stand up to scrutiny.

3. Potential Negative Impact of the Proposed Rule

The NPRM, if implemented, will have a harmful impact on low-income students, teachers, schools, and LEAs. First, the NPRM gives the federal government unprecedented control over state and local education finance systems and requires states to govern LEAs’ compliance, possibly in violation of some state and local laws. This will create chaos for State and local education systems and distract them from the important work of raising student achievement, especially for the most disadvantaged. Rather than improving academic outcomes, the NPRM would force state and local leaders to focus on arbitrary compliance targets.

Second, the NPRM would undermine school-based budgeting reforms. State and local leaders around the country have recognized that one of the best ways to improve school performance is to hire good principals and provide them the autonomy to hire the staff and develop the programs that will best meet the needs of their students. The prescribed methodologies set forth in the NPRM will likely require district office staff to make final decisions about which teachers and programs are placed in which schools. This is the only way to ensure spending is distributed in compliance with the NPRM. Staffing and program decisions will be based on a “numbers game” that focuses on meeting regulatory spending targets rather than the needs of students.

Third, most communities will not have the option of raising spending to comply with the NPRM. Therefore, because staff salaries are by far the largest cost within LEAs, the NPRM will force LEAs to transfer teachers out of their current schools to other schools chosen by the district. This will force many LEAs to violate collective bargaining agreements. But more importantly, it will likely exacerbate existing teacher shortage crises and in some cases force LEAs to place less effective teachers in higher need schools. Driving staffing decisions by arbitrary compliance requirements will harm low-income students.

Fourth, the NPRM ignores the reality of how certain costs critical to school operations, such as costs for school construction, transportation, and employee benefits and pensions, are accounted for by districts. The NPRM would force “almost all” state and local funds to be allocated directly to the school level, making it impossible for districts to reserve funds for these important functions. We are not aware of any LEAs that currently distribute “almost all” state and local funds to the school level – thus, this NPRM would drastically upset how local schools finance these costs.

It is unfortunate that, once again, the Department has refused to adhere to the letter and intent of the law, or listen to the many stakeholders who helped shape ESSA, are responsible for implementing the new law, and have already articulated the problems this NPRM would create. Congress will do everything in its power to ensure that this proposed rule never becomes final.

Sincerely,



Lamar Alexander
Chairman
Senate Committee on Health, Education,
Labor, and Pensions



John Kline
Chairman
House Committee on Education and
the Workforce



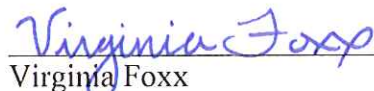
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United States Senator



Joe Wilson
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Johnny Isakson
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Virginia Foxx
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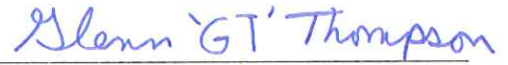
Susan M. Collins
United States Senator



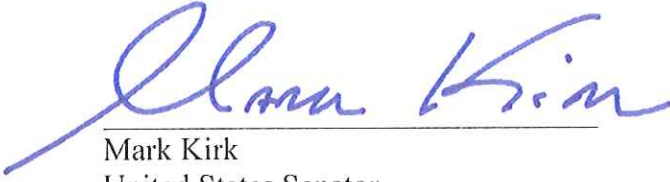
Phil Roe, M.D.
Member of Congress



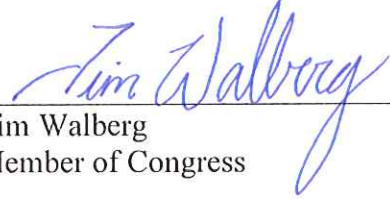
Lisa Murkowski
United States Senator



Glenn 'GT' Thompson
Member of Congress



Mark Kirk
United States Senator



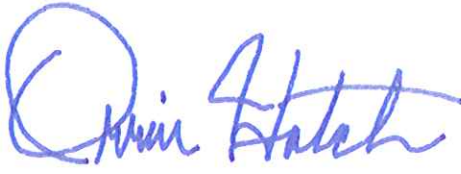
Tim Walberg
Member of Congress



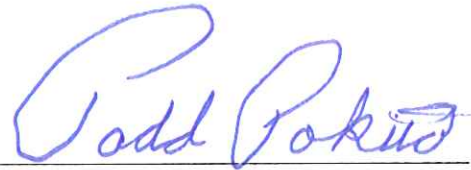
Tim Scott
United States Senator



Brett Guthrie
Member of Congress



Orrin Hatch
United States Senator



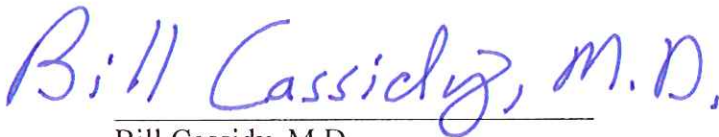
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Joe Heck, D.O.
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Bill Cassidy, M.D.
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Luke Messer
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Bradley Byrne
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