

MEMORANDUM

May 5, 2016

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Subject: **Proposed Regulations on the Supplement, Not Supplant Provision That Applies to the Title I-A Program Authorized by the Elementary and Secondary Education Act**

This memorandum was prepared to enable distribution to more than one congressional office.

This memorandum has been prepared in response to broad congressional interest in the supplement, not supplant (SNS) provision that applies to Title I-A of the Elementary and Secondary Education Act (ESEA),¹ as amended by the Every Student Succeeds Act (ESSA; P.L. 114-95), and proposed regulations put forth by the U.S. Department of Education (ED) during the negotiated rulemaking process that ED must conduct in order to issue regulations on this provision.² More specifically, this memorandum provides an overview of the fiscal accountability requirements that apply to Title I-A, changes made to these requirements by the ESSA, and the proposed SNS regulations circulated by ED during the negotiated rulemaking process. It also includes a legal analysis of ED's authority to issue these regulations.³

Overview of Fiscal Accountability Requirements That Apply to Title I-A

A long-standing principle of federal aid to K-12 education is that federal funding should add to, not substitute for, state and local education funding.⁴ With respect to the ESEA, this goal is embodied in three types of federal fiscal accountability requirements: (1) maintenance of effort (MOE), (2) supplement, not supplant (SNS), and (3) comparability. Without such requirements, it would be possible for states and local educational agencies (LEAs) to reduce their own spending for education when they receive federal grants.⁵ All three fiscal requirements apply to the Title I-A program, which is the largest grant program authorized under the ESEA and is funded at \$14.9 billion for FY2016. It is designed to provide supplementary educational and related services to low-achieving and other students attending pre-

¹ 20 U.S.C. §§6301 et seq.

² Elementary and Secondary Education Act of 1965, as amended by the Every Student Succeeds Act, Negotiated Rulemaking Committee, *Issue Paper: Supplement Not Supplant*, Updated for Session 3, April 18-19, 2016, <http://www2.ed.gov/policy/elsec/leg/essa/session.html#session3>. The negotiated rulemaking provisions of the ESSA are found at P.L. 114-95, §1601.

³ This memorandum does not provide in-depth background information on the Title I-A program.

⁴ U.S. Department of Education, Title I Fiscal Issues: Maintenance of Effort; Comparability; Supplement, Not Supplant; Carryover; Consolidating Funds in Schoolwide Programs; and Grantback Requirements, February 2008, <http://www2.ed.gov/programs/titleiparta/fiscalguid.pdf>.

⁵ *Ibid.*

kindergarten through grade 12 schools with relatively high concentrations of students from low-income families.

More specifically, to meet the MOE requirement, recipient states and/or LEAs must provide, from state and local sources, a level of funding (either aggregate or per pupil) in the preceding year that is at least 90% of the amount provided in the second preceding year. The intent is for state and/or local effort to be substantially maintained so that federal funds provide a net increase in overall educational spending.⁶ With respect to the second fiscal accountability requirement, Title I-A funds must be used so as to supplement, and not supplant, state and local funds that would otherwise be available for the specific services or activities for which federal funds may be used under the program in question.⁷ SNS provisions have generally prohibited states and/or LEAs from using federal funds to provide services or support activities that state and/or local funds provide or purchase currently or which, in the absence of federal funds, they would provide or purchase.⁸ The third fiscal requirement that applies to Title I-A is comparability— services provided with state and local funds in schools participating in Title I-A must be comparable to those in non-Title I-A schools of the same LEA. Comparability is measured only with respect to the public schools within the same LEA.⁹

Supplement, Not Supplant Provision and Title I-A

The ESSA made substantial changes to the SNS provision that applies to Title I-A. This section discusses the SNS provision that applies to Title I-A as it was in law prior to the enactment of the ESSA and following the enactment of the ESSA.¹⁰

SNS Prior to the ESSA

Supplement, not supplant provisions appear to have originated with the 1970 ESEA amendments (P.L. 91-230). SNS provisions prohibit states or LEAs from using federal funds to provide services or support activities that state and/or local funds provide or purchase currently or which, in the absence of federal funds, they would provide or purchase.¹¹ Further, no LEA is required to provide services under Title I-A through a particular instructional method or in a particular instructional setting in order to demonstrate compliance with the SNS provisions. While SNS provisions apply to numerous ESEA programs (e.g., School Improvement Grants, Migrant Education, English Language Acquisition), the focus of this discussion is on the SNS provisions as they apply to Title I-A.

In practice, supplanting may be difficult to define operationally, in part because it may depend on knowing what states or LEAs may have done in the absence of federal funding. According to ED policy guidance, “any determination about supplanting is very case specific and it is difficult to provide general

⁶ ESEA Sections 1118(a) and 8521, as amended by the ESSA; §§20 U.S.C. 6321(a), 7901.

⁷ ESEA Section 1118(b); §§20 U.S.C. 6321(b).

⁸ U.S. Department of Education, Title I Fiscal Issues: Maintenance of Effort; Comparability; Supplement, Not Supplant; Carryover; Consolidating Funds in Schoolwide Programs; and Grantback Requirements, February 2008, <http://www2.ed.gov/programs/titleiparta/fiscalguid.pdf>.

⁹ ESEA Section 1118(b); §§20 U.S.C. 6321(c).

¹⁰ The SNS provisions included in the ESSA will take effect beginning in FY2017 per statutory requirements included in the Consolidated Appropriations Act of 2016 (P.L. 114-113).

¹¹ When making SNS determinations, an LEA or state education agency may exclude “State or local funds expended ... for programs that meet the intent and purposes” of Title I-A. Thus, the SNS test need not apply to state or local funds provided under programs that are similar in nature to Title I-A itself.

guidelines without examining the details of a situation.”¹² There are three conditions under which it is generally presumed that SNS violations have occurred. These include situations in which:

1. An LEA used Title I-A funds to provide services that the LEA was required to make available under federal, state, or local law.
2. An LEA used Title I-A funds to provide services that the LEA provided with non-federal funds in the prior year(s).
3. An LEA used Title I-A funds to provide services for children participating in a Title I program that the LEA provided with non-federal funds to children not participating in Title I.

A second set of SNS provisions are included for Title I-A schools that operate schoolwide programs. Schoolwide programs are generally authorized under Title I-A if the percentage of low-income students serviced by a school is 40% or higher.¹³ In schoolwide programs, Title I-A funds may be used to improve the performance of all students in a school. Schools operating schoolwide programs are required to use Title I-A funds to supplement the amount of funds that would, in the absence of Title I-A funds, be made available from non-federal sources for the school, including any funds needed to provide services that are required by law to students with disabilities and English learners. According to guidance provided by ED, it is generally an LEA’s responsibility, and not the school’s, to ensure the SNS requirement is met and that a school operating a schoolwide program receives all the state and local funds it would receive if it were not a Title I-A schoolwide program. That is, an LEA cannot reduce the amount of state or local funds received by a schoolwide program because the school receives federal funds to operate the schoolwide program. In its 2008 guidance, ED states that an LEA should be able to demonstrate through its regular procedures for distributing funds that state and local funds are distributed “fairly and equitably” to all schools without regard to the receipt of federal education funds. In 2015, ED provided additional guidance with respect to demonstrating SNS in schoolwide programs.¹⁴ For example, ED provided two examples of how an LEA might allocate non-federal funds to demonstrate that Title I-A funds were supplemental.¹⁵ Thus, ED does not currently prescribe a specific methodology for demonstrating that LEAs are not violating the SNS provision, nor does ED prescribe a specific result with respect to the distribution of state and local funds beyond specifying that state and local funds should be distributed “fairly and equitably.”

Changes Made to the SNS Provision by ESSA

Under the ESSA, the SNS provisions that apply to Title I-A were altered. Essentially, the ESSA eliminated the first set of SNS provisions (three conditions) discussed above that apply to non-schoolwide programs. In their place, the ESSA applied to all Title I-A schools SNS provisions that are similar to those that are currently applied to schoolwide programs. More specifically, the ESSA added statutory language

¹² U.S. Department of Education, Title I Fiscal Issues: Maintenance of Effort; Comparability; Supplement, Not Supplant; Carryover; Consolidating Funds in Schoolwide Programs; and Grantback Requirements, February 2008, <http://www2.ed.gov/programs/titleiparta/fiscalguid.pdf>.

¹³ Ibid. During the 2013-2014 school year, the most recent year for which data are available, 77% of all Title I-A schools operated schoolwide programs. (U.S. Department of Education, *Fiscal Year 2017 Justifications of Appropriation Estimates to the Congress: Volume I*, 2017, pp. A-19, <http://www2.ed.gov/about/overview/budget/budget17/justifications/a-ed.pdf>).

¹⁴ U.S. Department of Education, *Dear Chief State School Officer Letter on Schoolwide Programs*, July 3, 2015, <http://www2.ed.gov/policy/elsec/guid/eseatitleiswguidance.pdf>.

¹⁵ The examples included using a weighted per pupil funding formula or distributing non-federal resources based on staffing and supplies.

specifying that LEAs are not required to identify that an individual cost or service supported with Title I-A funds is supplemental.¹⁶

In addition, the ESSA requires that an LEA demonstrate that the methodology used to allocate state and local funds to Title I-A schools ensures that the school receives all of the state and local funds it would have received in the absence of Title I-A funds. The new statutory language regarding SNS reads as follows:

(1) IN GENERAL.—A State educational agency or local educational agency shall use Federal funds received under this part only to supplement the funds that would, in the absence of such Federal funds, be made available from State and local sources for the education of students participating in programs assisted under this part, and not to supplant such funds.

(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.¹⁷

It is important to note that this statutory language does not appear to establish any type of standard or requirement regarding how to demonstrate that a Title I-A school receives all of the state and local funds it would have received in the absence of Title I-A funds. Finally, the ESSA maintained an ESEA provision that applies to all programs authorized under Title I, including Title I-A. This provision states: “Nothing in this title shall be construed to mandate equalized spending per pupil for a State, local educational agency, or school.”¹⁸ For SNS purposes, this provision appears to clarify that per-pupil expenditures in Title I-A schools do not have to be equal to the per-pupil expenditures in a non-Title I-A school.

Comparability

As previously discussed, there is another fiscal accountability requirement that applies to Title I-A. Referred to as comparability, this provision requires that a comparable level of services be provided with state and local funds in Title I-A schools compared with non-Title I-A schools prior to the receipt of Title I-A funds.¹⁹ The statutory language states that an LEA will be considered to have met this requirement if the LEA has filed a written assurance with the SEA that such LEA has established and implemented:

1. a LEA agency-wide salary schedule;
2. a policy to ensure equivalence among schools in teachers, administrators, and other staff; and
3. a policy to ensure equivalence among schools in the provision of curriculum materials and instructional supplies.²⁰

¹⁶ The ESSA also maintained a special rule that LEAs are not required to provide services under Title I-A through a particular instructional method or in a particular instructional setting to demonstrate the SNS is not being violated.

¹⁷ P.L. 114-95, §1012.

¹⁸ This provision is currently codified at 20 U.S.C. §6576, but it will be recodified at 20 U.S.C. §7372 when the ESSA takes effect. P.L. 114-95, §1012.

¹⁹ If all schools served by an LEA are Title I-A schools, an LEA may only receive Title I-A funds if the LEA will use state and local funds to provide services that, taken as a whole, are “substantively comparable in each school. ESEA Section 1118(b); §§20 U.S.C. 6321(c).

²⁰ ED has provided guidance on how LEAs can meet this requirement, including several examples of how comparability may be demonstrated. For more information, see U.S. Department of Education, Title I Fiscal Issues: Maintenance of Effort; Comparability; Supplement, Not Supplant; Carryover; Consolidating Funds in Schoolwide Programs; and Grantback Requirements, February 2008, <http://www2.ed.gov/programs/titleiparta/fiscalguid.pdf>.

However, in making a determination regarding comparability, there is a statutory prohibition against LEAs using staff salary differentials for years of employment when determining expenditures per pupil from state and local funds or instructional salaries per pupil from state and local funds.²¹ That is, actual teacher salaries cannot be used in the determination of comparability. In practice, this means that when LEAs are making comparability determinations, LEAs are prohibited from making these determinations using actual per-pupil expenditures.²²

Following the enactment of the American Recovery and Reinvestment Act (ARRA; P.L. 111-5), LEAs receiving Title I-A funds have been required to report on per-pupil expenditures from state and local funds, including actual teacher salaries.²³ An ED report examining the data reported by LEAs for the 2008-2009 school year found that within LEAs that had both Title I-A schools and non-Title I-A schools, over 40% of Title I-A schools had lower personnel expenditures per pupil than did non-Title I-A schools at the same grade level.²⁴

Despite these disparities in personnel expenditures between Title I-A schools and non-Title-I-A schools, Congress did not alter these Title I-A comparability provisions or otherwise seek to require the use of actual teacher salaries in comparability determinations when it comprehensively reauthorized the ESEA via the ESSA.

Proposed ED Regulations

The ESSA requires ED to engage in a negotiated rulemaking process if the agency wants to promulgate regulations related to SNS.²⁵ This process was conducted in March and April 2016. During the negotiated rulemaking process, ED proposed draft regulations related to SNS.²⁶

Under the proposed regulations, LEAs would be allowed to select the methodology used to allocate state and local funds to schools (e.g., weighted student funding formula) in a way that complies with the SNS requirement. However, the regulations would also require that regardless of the methodology used to allocate funds, the methodology must result in the LEA spending an amount of state and local funds per pupil in each Title I-A school that is equal to or greater than the average amount spent per pupil in non-Title I-A schools.²⁷ Because this result does not appear to be explicitly required by the relevant statutory

²¹ This prohibition was initially promulgated through regulations published following enactment of the 1970 ESEA amendments (P.L. 91-230). It did not appear in statutory language until the enactment of the Improving America's Schools Act (P.L. 103-382). This prohibition is often referred to as the "comparability loophole."

²² On average, current expenditures for instruction account for about 61% of all current expenditures in public elementary and secondary education (U.S. Department of Education, National Center for Education Statistics, *Revenues and Expenditures for Public Elementary and Secondary Education: School Year 2012-2013 (Fiscal Year 2013)*, 2015, p. Table 3, <http://nces.ed.gov/pubs2015/2015301.pdf>).

²³ These data are currently collected through the Civil Rights Data Collection (CRDC) conducted by the Office of Civil Rights at ED. For more information, see <http://ocrdata.ed.gov/>.

²⁴ More specifically, the rates were 46% at the elementary level, 42% at the middle school level, and 45% at the high school level. For more information, see U.S. Department of Education, *Comparability of State and Local Expenditures Among Schools within Districts: A Report From the Study of School-Level Expenditures*, 2011, <http://www2.ed.gov/rschstat/eval/title-i/school-level-expenditures/school-level-expenditures.pdf>.

²⁵ P.L. 114-95, §1601.

²⁶ Elementary and Secondary Education Act of 1965, as amended by the Every Student Succeeds Act, Negotiated Rulemaking Committee, *Issue Paper: Supplement Not Supplant*, Updated for Session 3, April 18-19, 2016, <http://www2.ed.gov/policy/elsec/leg/essa/session.html#session3>.

²⁷ *Id.* at 3.

language or by current guidance on the application of SNS requirements to schoolwide programs,²⁸ ED's actions have raised questions about the agency's legal authority to issue these regulations.

Legal Analysis

If the proposed SNS regulations were to be promulgated in their current form, any judicial ruling as to their validity would hinge on the level of deference paid to ED's decision by the reviewing court. The standard for judicial review of such agency action was originally delineated in *Chevron U.S.A. Inc. v. Natural Resources Defense Council*.²⁹ There, the Supreme Court established that judicial review of an agency's interpretation of a statute consists of two related questions. First, the court must determine whether Congress has spoken directly to the precise issue at hand. If the intent of Congress is clear, the inquiry is concluded, since the unambiguously expressed intent of Congress must be respected. However, if the court determines that the statute is silent or ambiguous with respect to the specific issue at hand, the court must determine "whether the agency's answer is based on a permissible construction of the statute."³⁰

It is important to note that the second prong does not require a court to "conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding."³¹ The practical effect of this maxim is that a reasonable agency interpretation of an ambiguous statute must be accorded deference, even if the court believes the agency is incorrect.³² On its face, therefore, the *Chevron* rule is quite deferential. One might expect that a court's conclusion as to whether Congress has directly spoken to the issue would be decisive in most cases, that most of the myriad of issues that can arise in the administrative setting would not be directly addressed by statute, and that, consequently, courts would most often defer to what are found to be "reasonable" agency interpretations.³³ However, the Court has frequently determined that, in fact, Congress has settled the matter, and that consequently there is no need to proceed to the second, more deferential step of the inquiry.³⁴ The Court has also found that, even though Congress has left a matter for agency resolution, the agency's interpretation was unreasonable.³⁵

Notably, both prongs of the *Chevron* inquiry involve a degree of statutory interpretation. Generally, the starting point in construing a statute is the language of the statute itself. The Supreme Court often recites the "plain meaning rule," that, if the language of the statute is plain and unambiguous, it must be applied

²⁸ As previously mentioned, during the 2013-2014 school year, the most recent year for which data are available, 77% of all Title I-A schools operated schoolwide programs. U.S. Department of Education, *Fiscal Year 2017 Justifications of Appropriation Estimates to the Congress: Volume I*, 2017, pp. A-19, <http://www2.ed.gov/about/overview/budget/budget17/justifications/a-ed.pdf>.

²⁹ 467 U.S. 837 (1984).

³⁰ *Id.* at 842-43.

³¹ *Id.* at 843, n. 11.

³² *Id.* at 845. *See also*, *National Cable and Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (U.S. 2005) (ruling that a federal court under the "*Chevron* doctrine" is required to defer to an agency's interpretation of law — even if it differs from the court's own views — if the particular statute is within the agency's administrative authority, if it is ambiguous on the point in contention, and if the agency's interpretation is "reasonable").

³³ *See, e.g.*, *Sullivan v. Everhart*, 494 U.S. 83 (1990); *Smiley v. Citibank (South Dakota)*, 517 U.S. 735 (1996); and *Lopez v. Davis*, 531 U.S. 230 (2001).

³⁴ *See, e.g.*, *Sullivan v. Zebley*, 493 U.S. 521 (1990) (regulations "are simply inconsistent with the statutory standard"); *Dole v. Steelworkers*, 494 U.S. 26 (1990) (deference to Office of Management and Budget interpretation of Paperwork Reduction Act is foreclosed by Court's finding of clear congressional intent to contrary).

³⁵ *See, e.g.*, *Whitman v. American Trucking Ass'n, Inc.*, 531 U.S. 457 (2001).

according to its terms.³⁶ Thus, if the language of the statute is clear, there is no need to look outside the statute to its legislative history or other extrinsic sources in order to ascertain the statute's meaning or underlying congressional intent.

There is no single test to determine the clarity of statutory language. A narrow focus on the meaning of particular words and phrases is the frequent starting point, but this view is commonly supplemented by perspectives provided from elsewhere within the statute. Under text-based analysis, the cardinal rule of construction is that the whole statute should be drawn upon as necessary, with its various parts being interpreted within their broader statutory context in a manner that furthers statutory purposes.³⁷ According to the Court, "Statutory construction ... is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme."³⁸ Thus, the meaning of a specific statutory directive may be shaped, for example, by that statute's definitions of terms, by the statute's statement of findings and purposes, by the directive's relationship to other specific directives, by purposes inferred from those directives or from the statute as a whole, and by the statute's overall structure.³⁹

During the negotiated rulemaking process, ED specifically cited section 1118(b) of the ESEA, as amended by the ESSA, as the source of statutory authority for its proposed SNS regulations.⁴⁰ As noted above, the new statutory language regarding SNS reads as follows:

(1) IN GENERAL.—A State educational agency or local educational agency shall use Federal funds received under this part only to supplement the funds that would, in the absence of such Federal funds, be made available from State and local sources for the education of students participating in programs assisted under this part, and not to supplant such funds.

(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.⁴¹

In the draft proposed rule, however, ED provided only a limited discussion of how this statutory language gives ED the legal authority to require parity in expenditures in Title I-A and non-Title-I-A schools. According to ED, the reason that the proposal requires that Title I-A schools receive at least as much in state and local funding as non-Title I-A schools is "so that Title I funds can provide truly supplemental support in Title I schools."⁴²

On its face, however, the plain language of the SNS provisions does not appear to require such a result. Notably, the statutory language does not establish any type of standard or requirement regarding how to demonstrate that a Title I-A school receives all of the state and local funds it would have received in the absence of Title I-A funds. For example, the statutory language does not specify that the amount of funds

³⁶ See, e.g., *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002); *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997).

³⁷ See, e.g., *United Savings Ass'n v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365 (1988).

³⁸ *Id.* at 371 (citations omitted).

³⁹ CRS Report 97-589, *Statutory Interpretation: General Principles and Recent Trends*, by Larry M. Eig.

⁴⁰ Elementary and Secondary Education Act of 1965, as amended by the Every Student Succeeds Act, Negotiated Rulemaking Committee, *Issue Paper: Supplement Not Supplant*, Updated for Session 3, April 18-19, 2016, 1, <http://www2.ed.gov/policy/elsec/leg/essa/session.html#session3>.

⁴¹ P.L. 114-95, §1012.

⁴² Elementary and Secondary Education Act of 1965, as amended by the Every Student Succeeds Act, Negotiated Rulemaking Committee, *Issue Paper: Supplement Not Supplant*, Updated for Session 3, April 18-19, 2016, 2, <http://www2.ed.gov/policy/elsec/leg/essa/session.html#session3>. ED also noted that section 1111(h)(1)(C)(x) of the ESEA requires states and LEAs to report per-pupil expenditures, including personnel and non-personnel expenditures, for each school and district on state and local report cards. *Id.*

provided to a given Title I-A school has to be equal to or greater than the amount of funding provided to a non-Title I-A school in the aggregate or on a per-pupil basis. That is, it appears that if a given Title I-A school were to receive less than a non-Title I-A school based on whatever methodology is used by the LEA to allocate funds, the LEA would not be out of compliance with the statutory requirement so long as the Title I-A school received all of the funds it would have received in the absence of Title I-A funds. Thus, ED's interpretation appears to go beyond what would be required under a plain language reading of the statute.

Other Title I-A provisions may also be instructive in determining the scope of the Secretary's authority to establish the proposed SNS regulations. For example, as noted above, the ESSA retained the Title I prohibition that states: "Nothing in this title shall be construed to mandate equalized spending per pupil for a State, local educational agency, or school."⁴³ The proposed SNS regulations, however, appear to directly conflict with this statutory language, which seems to place clear limits on ED's authority. This prohibition against equalized spending thus raises significant doubts about ED's legal basis for proposing regulations that would require Title I-A per pupil expenditures to meet or exceed those of non-Title-I-A schools. As a result, a reviewing court could conclude that Congress's decision to expressly prohibit ED from requiring equalized expenditures among schools indicates that Congress did not intend to impose such a requirement in the SNS context, particularly in light of the absence of explicit language to the contrary.

Meanwhile, the legislative history behind Title I's comparability provisions raises similar questions about ED's legal authority to establish the proposed SNS regulations in their current form.⁴⁴ Over the eight-year period during which Congress considered a comprehensive reauthorization of the ESEA, several bills and amendments were introduced that would have modified the comparability provision to require that actual school-level expenditures be used in the determination of comparability, but none of these proposals have been adopted. Most recently, during consideration of S. 1177 in the Senate Health, Education, Labor, and Pensions Committee, Senator Michael Bennet offered and withdrew an amendment to require that comparability determinations be based on state and local per-pupil expenditures (including actual personnel and non-personnel expenditures). Ultimately, the ESSA, which comprehensively reauthorized the ESEA, did not make any changes to the comparability requirement, leaving in place the statutory prohibition on the use of staff salary differentials for years of employment when determining expenditures per pupil from state and local funds or instructional salaries per pupil from state and local funds. In other words, the ESSA did not alter the existing statutory language that prohibits the use of staff salary differentials for years of employment when determining expenditures per pupil from state and local funds or instructional salaries per pupil from state and local funds in making comparability determinations.

Nevertheless, the proposed regulations related to SNS would require that an LEA's methodology for allocating state and local funds to schools within the LEA results in the LEA spending an amount of state

⁴³ This provision is currently codified at 20 U.S.C. §6576, but it will be recodified at 20 U.S.C. §7372 when the ESSA takes effect. P.L. 114-95, §1012. The meaning of this provision does not appear to have been litigated in any reported case, so it is unclear how a court would interpret this provision, perhaps distinguishing it on the grounds that the SNS provision in question discusses average per-pupil expenditures as opposed to per-pupil spending.

⁴⁴ For more information on judicial consideration of legislative history, see CRS Report 97-589, *Statutory Interpretation: General Principles and Recent Trends*, by Larry M. Eig. ("A distinct but related inquiry focuses not on the explanations that accompanied committee or floor consideration, but rather on the sequence of changes in bill language. Consideration of the 'specific history of the legislative process that culminated in the [statute at issue] affords ... solid ground for giving it appropriate meaning' and for resolving ambiguity present in statutory text. Selection of one house's version over that of the other house may be significant. In some circumstances rejection of an amendment or earlier version can be important, but there is no general 'rejected proposal rule.' While courts are naturally reluctant to attribute significance to the failure of Congress to act, that reluctance may be overcome if it can be shown that Congress considered and rejected bill language that would have adopted the very position being urged upon the court.") (citations omitted).

and local funds per pupil in each Title I school that is equal to or greater than the average amount spent per pupil in non-Title I schools. These proposed regulations do not provide an exception related to consideration of staff salary differentials for years of employment. Thus, the proposed SNS regulations appear to effectively require LEAs to use actual teacher salaries for SNS purposes despite the fact that the ESSA did not address this matter. Because a reviewing court could view this legislative history as relevant evidence of congressional intent to maintain current statutory requirements related to comparability determinations, a court could potentially conclude that ED lacks the statutory authority to attempt to impose a similar requirement via other methods, including promulgation of the proposed SNS regulations.

Based on the plain language of the above provisions in conjunction with the legislative history and the statutory scheme as a whole, it therefore seems unlikely that Congress intended section 1118(b) to authorize ED to establish regulations that would require Title I-A per-pupil expenditures to meet or exceed those of non-Title-I-A schools.⁴⁵ Given some of the concerns identified above, it seems that a legal argument could be raised that ED exceeded its statutory authority if it promulgates the proposed SNS rules in their current form.

⁴⁵ An argument could also be made that the proposed SNS regulations would violate section 8527(a) of the ESEA, as amended by the ESSA, which states that “nothing in this Act shall be construed to authorize an officer or employee of the Federal Government to ... mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under this Act.” 20 U.S.C. 20 U.S.C. §7907. Because the legal effect of this provision is currently unclear, such an analysis is beyond the scope of this memorandum. For more on litigation surrounding section 8527(a), see CRS Report RS22839, *The No Child Left Behind Act and “Unfunded Mandates”*: A Legal Analysis of *School District of the City of Pontiac v. Secretary of the United States Department of Education*, by Jody Feder.
