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November 7, 2016

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

RE: Docket ID ED-2016-OESE-0056

Dear Secretary King,

On behalf of The Leadership Conference on Civil and Human Rights, a coalition charged by its diverse membership of more than 200 national organizations to promote and protect the civil and human rights of all persons in the United States, we offer the following comments in response to the Notice of Proposed Rulemaking (NPRM) published in the Federal Register on September 6, 2016 regarding Title I - Improving the Academic Achievement of the Disadvantaged—Supplement Not Supplant. Resource equity and the responsible use of Title I funds, the two issues considered in the “supplement, not supplant” provision, are both longstanding priorities of the civil and human rights community and issues we spoke to in comments submitted jointly with partners. Given that the Department of Education’s authority to advance the policy proposed in this regulation has been called into question, we seek to address that issue separately in this letter.

Throughout the reauthorization of the Elementary and Secondary Education Act (ESEA) and the implementation of the Every Student Succeeds Act (ESSA), we have sought to protect and defend the authority – and responsibility – of the Department of Education to issue clarifying regulations and non-regulatory guidance and to meaningfully oversee and enforce the law. The hard-learned lesson of the civil rights community is that the federal government serves as a vital backstop and protector of marginalized people whose rights and interests have been too long violated and dismissed by officials at the state and local level. While we are hopeful that this practice will soon become a relic of history, we are unwilling to forgo the indispensable tool of federal intervention on behalf of the communities we represent.

With that said, we would never seek to advocate that this Department, or any federal agency, act outside of its authority under law. Critics who disagree with the Department of Education’s objective in advancing the goal of funding equity within the enforcement of the “supplement, not supplant” requirement have contended that the proposal exceeds the statutory authority provided under ESSA. We have always vehemently disagreed with that interpretation of the law and maintain that the Department of Education is rightfully acting within its authority to clarify ambiguities and gaps in statutory language. In the interest of a



full examination of these legal issues, we requested outside legal counsel to provide us with a memorandum that evaluates the Department's proposal in light of the appropriate legal framework. That memo is included here for the official record. While we recognize that the particulars of the proposal have changed from the original concept offered during the negotiated rulemaking process to the NPRM published in September, we seek to demonstrate that the core requirement – that districts show that Title I schools receive at least as much state and local funding per-pupil as do non-Title I schools – is fully consistent with the law and does not exceed the Department's authority.

We appreciate your consideration of our perspective as the Department moves toward finalizing the regulations for this elemental provision of ESEA. The test of regulations, guidance, technical assistance and other implementation activities must be whether or not they advance educational equity and serve the interests of all students. Low-income students, students of color, students with disabilities, English learners, and Native students deserve no less than robust and thorough regulation by this Department to close opportunity and achievement gaps. If you have any questions about these comments, please contact Liz King, Leadership Conference Director of Education Policy, at [king@civilrights.org](mailto:king@civilrights.org).

Sincerely,



Wade Henderson  
President & CEO



Nancy Zirkin  
Executive Vice President

Date November 4, 2016

To The Leadership Conference on Civil and Human Rights

From Mark B. Rotenberg, Leslie A. Harrelson, Greg Schmidt, and Matt Worthington

Re **Legal Analysis of Department of Education Draft Supplement Not Supplant Regulation**

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This memorandum has been prepared at the request, and on behalf, of The Leadership Conference on Civil and Human Rights, in conjunction with its rulemaking comment on the Supplement Not Supplant (“SNS”) requirements of Title I of the Elementary and Secondary Education Act (“ESEA”) as amended by the Every Student Succeeds Act (“ESSA”). The memorandum specifically addresses certain legal issues related to the draft regulation circulated by the Department of Education (“ED”) prior to an April 6 through April 8, 2016 negotiated rulemaking session (“Session Two Draft”).<sup>1</sup> As this memorandum explains, the Session Two Draft is within ED’s statutory authority.

## **I. Executive Summary**

On December 10, 2015, President Obama signed into law the ESSA, which maintained the ESEA’s longstanding requirement that school districts use Title I, Part A (“Title I”) funds to supplement, and not supplant, state and local funding for schools that serve low-income students. *See* ESSA, § 1118(b), Pub. L. No. 114-95, 129 Stat. 1802 (2015). The ESSA amended the way school districts must comply with SNS. *Id.* In April 2016, ED circulated two draft regulations proposing ways that the ESSA’s new SNS compliance requirements could be implemented. The key principle of these draft proposals was that Title I funds are not truly supplemental when Title I schools are receiving less state and local funding than the typical non-Title I school. The first proposal reflecting this principle, the “Session Two Draft,” provided that districts would show compliance with the SNS requirements by demonstrating, on a per-pupil basis, that each school receiving Title I funds received at least as much state and local funding as the average for schools not receiving Title I funds. *See id.*

Opponents of the Session Two Draft’s approach have challenged ED’s statutory authority to issue such a rule. The legal argument against the draft regulation has been articulated in most detail by the Congressional Research Service, which issued a report on May 5, 2016 arguing that such a rule might not survive judicial scrutiny. *See* JODY FEDER & REBECCA SKINNER, CONG. RESEARCH SERV., PROPOSED REGULATIONS ON THE SUPPLEMENT, NOT SUPPLANT PROVISION

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<sup>1</sup> Available at <http://www2.ed.gov/policy/elsec/leg/essa/session/issue-paper-supplement-not-supplant-2nd-session.pdf>.

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(“CRS Report”) (2016).<sup>2</sup> As explained below, the CRS Report misapplies the relevant legal framework and relies on irrelevant legislative history. Its incorrect conclusions, and those of other opponents, should not drive ED to abandon a legally sound regulatory proposal. The Session Two Draft not only is legally permissible as a reasonable interpretation of an ambiguous statute, but also is wholly consistent with the text and purpose of the revised SNS requirement.

This memorandum analyzes the applicable legal framework, the *Chevron* doctrine, and its application to the Session Two Draft. While ED has issued subsequent regulatory proposals, this analysis focuses on the Session Two Draft because it was the Department’s first proposal providing that districts are in compliance with the ESSA’s SNS provisions only when each Title I school is receiving at least as much per-pupil state and local funding as the average for non-Title I schools.<sup>3</sup> Further, it was this draft that prompted the public debate over ED’s authority to issue such a rule.

ED has ample authority to promulgate a regulation featuring the key concepts of the Session Two Draft. Courts consistently have recognized that, like other executive branch agencies, ED should be accorded deference when it issues regulations that reasonably interpret unclear or ambiguous language in the statutes it administers. *See, e.g., Zuni Pub. Sch. Dist. No. 89 v. Dep’t of Educ.*, 550 U.S. 81, 89 (2007) (deferring to ED regulation determining calculation method for state aid program); *Ass’n of Private Sector Colleges & Univs. v. Duncan*, 640 F. App’x 5, 7 (D.C. Cir. 2016) (deferring to ED regulation establishing outcome measures for higher education programs). While the revised SNS requirements place certain limits on ED’s regulatory authority, the statutory language does not affirmatively specify how the SNS requirements shall be implemented. Thus, it falls to ED to establish those requirements consistent with a reasonable interpretation of the statute. The Session Two Draft not only is a reasonable interpretation of the statutory language, reflecting a policy choice informed by ED’s administrative experience and expertise with SNS and empirical data. The rule also clearly promotes the statutory purpose of the ESSA and the ESEA of eliminating educational inequality.

## II. Background

### A. From the outset, the ESSA has addressed inequitable funding.

The ESEA, enacted in 1965 as part of the War on Poverty, is directed at addressing inequities in educational resources for low-income students. *See* ESEA of 1965, H.R. 2362, Pub. Law 89-10, § 201 (Apr. 11, 1965) (“Congress hereby declares it to be the policy of the United States to

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<sup>2</sup> 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).

<sup>3</sup> This analysis does not address features of the Session Two Draft that relate to other issues, such as the draft’s requirement that each district must also “[a]llocate[] an amount of State and local funds that is sufficient to enable each Title I school to provide ... [t]he basic educational program as defined under State or local law.” Session Two Draft, § 200.XX(b)(1)(ii)(B).

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provide financial assistance ... to local educational agencies serving areas with concentrations of children from low-income families....”). In service of this goal, the ESEA created the Title I program of grants to schools serving low-income students. *Id.* § 202.

Ensuring that Title I funds actually result in an increase in the total funds available to low-income schools has been a goal of policymakers since the ESEA’s early years. In 1968, responding to reports that states and school districts were using Title I funds to provide services that otherwise would have been provided with state and local funds, ED’s predecessor office issued guidance instructing states and districts that “Title I funds [] are not to be used to supplant State and local funds which are already being expended in the project areas or which would be expended in those areas if the services in those areas were comparable to those for non-project areas.” Phyllis McClure, *The History of Educational Comparability in Title I of the Elementary and Secondary Education Act of 1965*, in CENTER FOR AMERICAN PROGRESS, ENSURING EQUAL OPPORTUNITY IN PUBLIC EDUCATION 15 (2008) (quoting U.S. Office of Education, Title I Program Guide #44 (issued Mar. 18, 1968)).<sup>4</sup>

In 1969, the NAACP Legal Defense and Educational Fund released a study showing that despite the intentions of Congress and the efforts of ED’s predecessor agency, Title I funding was not resulting in low-income schools receiving additional, or even adequate, funding. *See* NAACP Legal Def. & Educ. Fund, *Is It Helping Poor Children? Title I of ESEA* (1969).<sup>5</sup> In 1970, Congress amended the ESEA to place strict restraints on how Title I funds could be used; these restraints included the SNS requirement.<sup>6</sup> *See* H.R. 514, § 109, Pub. L. No. 91-230, 84 Stat. 121 (1970) (“Federal funds made available under this title will be so used (i) as to supplement ... funds that would, in the absence of such Federal funds, be made available from non-Federal sources ... and (ii) in no case, as to supplant such funds from non-Federal sources....”); *see also* Andrea Boyle & Katelyn Lee, *Title I at 50: A Retrospective*, at 4-5, AMERICAN INSTITUTES FOR RESEARCH (2015).<sup>7</sup> SNS requires that Title I funds “supplement the funds that would, in the absence of [Title I] funds, be made available from State and local sources” for Title I schools. § 1118(b). SNS precludes having federal funds take the place of funds that would have been provided from non-federal sources. *Id.* at 5.

B. In recent decades, enforcement of SNS has been onerous and ineffective.

Enforcement of the SNS requirements has proved difficult, in part because SNS is premised on a hypothetical question: How much money *would* a district have provided to low-income schools if Title I funds *were not* available? Prior to the ESSA, ED’s guidance and enforcement of SNS

<sup>4</sup> Available at [https://cdn.americanprogress.org/wp-content/uploads/issues/2008/06/pdf/comparability\\_part1.pdf](https://cdn.americanprogress.org/wp-content/uploads/issues/2008/06/pdf/comparability_part1.pdf).

<sup>5</sup> Available at <http://files.eric.ed.gov/fulltext/ED036600.pdf>.

<sup>6</sup> The ESEA of 1965 included a narrow SNS requirement that applied only to “library resources, textbooks, and other printed and published instructional materials.” ESEA of 1965, § 203(a)(5).

<sup>7</sup> Available at <http://www.air.org/sites/default/files/downloads/report/Title-I-at-50-A-Retrospective-July-2015.pdf>.

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relied on a series of presumptions and case-by-case analyses. *See, e.g.*, Non-Regulatory Guidance, Title I Fiscal Issues (“ED 2008 Guidance”), Dep’t of Educ. at 38-39 (Feb. 2008).<sup>8</sup> This approach has been criticized as confusing, unpredictable, and unadministrable by the Government Accountability Office (“GAO”) and by think tanks across the ideological spectrum. As the GAO has found, “monitoring the SNS provision is very challenging and requires significant audit resources.” U.S. GOV’T ACCOUNTABILITY OFF., GAO-03-377, DISADVANTAGED STUDENTS: FISCAL OVERSIGHT OF TITLE I COULD BE IMPROVED 24 (Feb. 2003).<sup>9</sup> A joint report by the Center for American Progress and the American Enterprise Institute traced the problem to the lack of any “single calculation” method for showing SNS compliance:

[I]t is nearly impossible to say with any certainty exactly what constitutes supplanting because the analysis varies from cost to cost, entity to entity, and reviewer to reviewer .... [S]tates, districts, and schools cannot perform one single calculation to demonstrate they have complied with supplement-not-supplant. Rather, they must justify each cost charged to Title I funds in light of the three presumptions....

Melissa Junge & Sheara Krvaric, *How the Supplement-Not-Supplant Requirement Can Work Against the Policy Goals of Title I*, CTR. FOR AM. PROGRESS & AM. ENTERPRISE INST., at 11 (2012).<sup>10</sup>

Moreover, recent research suggested that the SNS requirements had been not only onerous, but ineffective. A 2011 ED report, based on data collected for the first time through the American Recovery and Reinvestment Act of 2009, revealed that a substantial percentage of Title I schools receive fewer state and local funds than non–Title I schools in the same district. *See* Ruth Heuer & Stephanie Stullich, 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).<sup>11</sup> The report found that in districts that had both Title I and non–Title I schools, 52% of Title I schools had per-pupil personnel expenditure levels that were below the district average for non–Title I schools. *Id.* at 18. Similarly, over 50% of Title I schools had lower per-pupil non-personnel expenditures than non–Title I schools in the same district. *Id.* at 27.

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<sup>8</sup> Available at <https://www2.ed.gov/programs/titleiparta/fiscalguid.pdf>.

<sup>9</sup> Available at <http://www.gao.gov/new.items/d03377.pdf>.

<sup>10</sup> Available at [http://www.aei.org/wp-content/uploads/2012/03/-how-the-supplementnotsupplant-requirement-can-work-against-the-policy-goals-of-title-i\\_111823556546.pdf](http://www.aei.org/wp-content/uploads/2012/03/-how-the-supplementnotsupplant-requirement-can-work-against-the-policy-goals-of-title-i_111823556546.pdf).

<sup>11</sup> Available at <https://www2.ed.gov/rschstat/eval/title-i/school-level-expenditures/school-level-expenditures.pdf>.

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C. Since the 2015 passage of ESSA, ED has proposed three SNS regulations and faced criticisms.

It was against this backdrop that Congress, in 2015, completed the most recent reauthorization of the ESEA. In relevant part, the ESSA amended the SNS requirements by adding new language clarifying how LEAs were to demonstrate compliance, and prohibiting ED's past practice of requiring districts to identify any individual service as supplemental. § 1118(b).<sup>12</sup> The draft ESSA, in short, maintained the essential congressional objective of ensuring that Title I funds are supplemental, but sought to address that objective more effectively. In the year since ESSA's passage, ED has circulated three proposed regulations implementing the revised SNS requirements.

Prior to an April 6 through 8, 2016 ESSA negotiated rulemaking session, ED circulated the Session Two Draft. This draft eliminated ED's prior guidance and enforcement approach and instead, with certain exceptions, required districts to show, on a per-pupil basis, that *each* Title I school in a district received at least as much state and local funding as the *average* state and local funding received by non-Title I schools in the district.

Prior to an April 18 through 19, 2016 negotiated rulemaking session, ED circulated another revised proposal ("Session Three Draft") which was substantially similar to the Session Two Draft, but allowed districts to rebut a finding of SNS non-compliance by showing that high expenditures in specific non-Title I schools were the result of additional expenditures on high-need students. *See* U.S. Dep't of Educ., Issue Paper: Supplement Not Supplant, Updated for Session Three, April 18-19, 2016 (Apr. 1, 2016).<sup>13</sup>

In the months after the Session Two and Session Three Drafts were circulated, ED faced criticism, including from Senator Lamar Alexander and the CRS Report, that the draft regulations exceed ED's statutory authority. *See, e.g.*, CRS Report at 9 ("[I]t 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."); 162 Cong. Rec. S2692 (daily ed. May 11, 2016) (statement of Sen. Alexander) ("There's no question this regulation would violate both the letter and intent of the law, and it must be abandoned.").

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<sup>12</sup> *See* § 1118(b)(2) ("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."); § 1118(b)(3)(A) ("No local educational agency shall be required to ... identify that an individual cost or service supported under this part is supplemental.").

<sup>13</sup> Available at <http://www2.ed.gov/policy/elsec/leg/essa/session/issue-paper-supplement-not-supplant-3rd-session.docx>.

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On September 6, 2016, ED published a substantially different SNS regulation through a Notice of Proposed Rulemaking (“NPRM Rule”), under which districts may show SNS compliance through any one of a variety of mechanisms: (1) adopting uniform funding formulas for allocating state and local funds to schools, (2) complying with state-created compliance tests subject to certain validation requirements, and (3) complying with a modified version of the Session Three Draft. *See* Title I—Improving the Academic Achievement of the Disadvantaged—Supplement Not Supplant, Notice of Proposed Rulemaking, 81 FR 61148 (proposed Sept. 6, 2016).

### **III. Legal Framework: Under the applicable legal framework, the *Chevron* doctrine, reasonable agency interpretations of ambiguous statutes receive deference.**

Courts evaluate claims that a regulation exceeds an executive agency’s statutory authority using the *Chevron* framework. The Supreme Court has held that agencies have considerable discretion to make reasonable policy choices when interpreting and implementing ambiguous federal statutes they administer. *See, e.g., Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). In *Chevron*, the Supreme Court established a two-part test for courts to use when evaluating arguments of the sort ED’s opponents have raised. First, a court must determine whether the statute is ambiguous, and second, if the statute is found to be ambiguous, the court must determine if the agency’s interpretation is reasonable. *Id.* at 842–43.

Under the first step of *Chevron*, a party challenging the Session Two Draft must show that the plain meaning of SNS unambiguously forecloses ED’s regulation. An agency’s interpretation is only foreclosed when the interpretation contradicts the “unambiguously expressed intent of Congress” which has “directly spoken to the precise question at issue.” *Id.* Step one of *Chevron* does not require ED to prove that the plain meaning of SNS requires precisely the regulation it has chosen. Rather, ED’s regulation is foreclosed only if SNS unambiguously establishes a different standard for ensuring compliance.

Where, as here, the statutory provision is ambiguous, a party challenging the Session Two Draft must show under the second step of *Chevron* that ED’s interpretation of SNS is unreasonable. *Id.* This would be a heavy burden. Courts rarely overturn regulations under step two of *Chevron*, which does not require “that the agency construction was the only one it could permissibly 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.” *Id.* at n.11.

Agency interpretations under *Chevron* step two are afforded substantial deference because agencies are better positioned to make expert policy decisions. The Supreme Court considers ambiguities in a statute within an agency’s jurisdiction as “delegations of authority to the agency to fill the statutory gap in reasonable fashion.” *Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005). Interpreting an ambiguous statute necessarily



“involves difficult policy choices that agencies are better equipped to make than courts.” *Id.* Indeed, when it comes to a “calculation method,” the Supreme Court has said the agency should receive enhanced deference because it is a “highly technical, specialized interstitial matter that Congress often does not decide itself, but delegates to specialized agencies to decide.” *See Zuni*, 550 U.S. at 90. A court must uphold the agency’s interpretation if it is reasonable. As explained in detail below, ED’s Session Two Draft considers Title I funds to be truly supplemental only if the state and local funds each Title I school receives are on par or greater than the average non–Title I school. That interpretation of SNS is not only reasonable, but is an effective, straightforward means to determine compliance with SNS.

#### **IV. *Chevron* Step One: The ESSA’s new SNS compliance provision is ambiguous.**

Under the first step of the *Chevron* framework, courts consider “whether Congress has directly spoken to the precise question at issue,” or whether “the statute is silent or ambiguous with respect to the specific issue.” *Chevron*, 467 U.S. at 842. As part of the step one inquiry, courts may also consider whether the legislative history clarifies an otherwise ambiguous provision. The revised SNS requirements leave significant ambiguity for ED to develop reasonable enforcement criteria. The legislative history of the SNS provisions does not undermine this conclusion—if anything, the limited legislative history shows that Congress wished to avoid excessively circumscribing ED’s authority.

A. A plain reading of the SNS provisions leaves significant ambiguity for ED to develop reasonable enforcement criteria.

A plain text reading of the SNS statutory requirements makes clear that the statute leaves significant room for ED to interpret. As amended by the ESSA, the SNS requirement contains three relevant sets of provisions. First, the ESSA maintains the longstanding requirement that states and districts use Title I funds only to supplement, and not supplant, state and local funds that would otherwise be made available to Title I schools. ESSA § 1118(b)(1). Second, the ESSA added a new provision providing that to show SNS compliance, a district “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.” § 1118(b)(2). Third, the ESSA added or maintained three limitations on how the SNS requirements may be enforced: districts may not be required to identify individual costs as supplemental, § 1118(b)(3)(A); districts may not be required to use a particular instructional method, § 1118(b)(3)(B); and districts may not be required to use “a specific methodology [] to allocate State and local funds to” each Title I school, § 1118(b)(4).

The analysis below shows that nothing in the new § 1118(b)(2) compliance requirement forecloses ED from adopting the Session Two Draft approach. While ED’s authority is statutorily circumscribed by § 1118(b) in three specific ways, none of these provisions precludes

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the Session Two Draft. Further, ED's authority to issue the Session Two Draft is not barred by other provisions of the ESSA beyond the SNS statutory requirements.

1. *The § 1118(b)(2) compliance requirement is ambiguous.*

Under the revised SNS compliance requirement, a district must demonstrate that its methodology for allocating state and local funds ensures that each Title I school "receives all of the State and local funds it would otherwise receive if it were not receiving assistance under this part."

§ 1118(b)(2). The statute thus establishes a compliance requirement based in part on the amount of state and local funds each Title I school is receiving. Critically, however, the statute is silent on exactly how to calculate the amount the district's methodology must ensure that such schools receive, other than providing generally that it should be as much as each Title I school "would otherwise receive if it were not receiving" Title I funds. This is, of course, a hypothetical question, and could plausibly be answered through multiple approaches.

The Session Two Draft's approach is not necessarily the only permissible way to implement the § 1118(b)(2) compliance test. But when a statutory provision "does not tell the Secretary which of several different possible methods the Department must use" to interpret a statutory requirement, the Secretary is not required to adopt any specific one of the multiple methods that "the statute's literal language covers," nor is the Secretary required to allow the regulated entity to select among those methods. *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 94–97 (2007). Where Congress declines to specify a particular approach and instead "use[s] more general language," the Secretary has "the authority to resolve such subsidiary matters at the administrative level." *Id.* at 98.

Critics of the Session Two Draft's approach, including the authors of the CRS Report, have argued that the § 1118(b)(2) compliance provision forecloses the Session Two Draft's approach because the statute "does not appear to require" the draft's interpretation, and can be read to allow other permissible alternatives for district compliance. *See* CRS Report at 7–8. Such arguments misconstrue the *Chevron* analysis, which provides precisely the opposite: when a statute can be read in multiple ways, it falls to the agency to exercise its own judgment and adopt a reasonable interpretation.

Notably, the CRS Report concedes that § 1118(b)(2) "*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.*" CRS Report at 4 (emphasis added). This, of course, should end the *Chevron* step one analysis. The report's suggestion that the absence in the statute of "any type of standard or requirement" requires ED to leave districts adrift without any specific regulatory guidance is a clear misreading of the *Chevron* framework. "[A]mbiguities in statutes within an agency's jurisdiction to administer are delegations of authority *to the agency* to fill the statutory gap in reasonable fashion." *Nat'l*

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*Cable & Telecommunications Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) (emphasis added).

2. *The three SNS-specific statutory limitations do not preclude the Session Two Draft approach.*

While the § 1118(b)(2) language does not specify how the compliance requirement should be enforced, it does provide that the requirement may *not* be enforced in three specific ways: First, no district may be required to “identify that an individual cost or service supported under this part is supplemental.” § 1118(b)(3)(A). Second, no district may be required to “provide services under this part through a particular instructional method or in a particular instructional setting.” § 1118(b)(3)(B). Third, the Secretary may not “prescribe the specific methodology a local educational agency uses to allocate State and local funds to each school receiving” Title I funds. § 1118(b)(4). The Session Two Draft does not violate any of these three specific limitations.

The first two requirements may be dispensed with quickly.<sup>14</sup> Regarding the third requirement, the Session Two Draft does not “prescribe the specific methodology a local educational agency uses to *allocate State and local funds*” to Title I schools. § 1118(b)(4) (emphasis added). Throughout Title I and the ESEA, the term “allocate” is used to mean a determination of which specific programs or entities are to receive funds from which specific funding streams, and in what amounts. *See, e.g.*, § 1003(b)(1)(A) (“the State educational agency ... shall allocate not less than 95 percent of that amount to make grants to local educational agencies”). Similarly, the Oxford English Dictionary defines “allocate” as “[t]o set aside or designate as being the special share or responsibility of a particular person, department, etc., or as being required for a particular purpose; to apportion, allot.” *Allocate*, OXFORD ENGLISH DICTIONARY (3d ed. 2012); *see Zuni*, 550 U.S. at 94 (“examin[ing] dictionary definitions” where a statute “uses technical language ... and seeks a technical purpose”).

The Session Two Draft establishes a method to determine compliance with the SNS requirements by making a *post-allocation* assessment of whether the combined result of all state and local funding allocation decisions indicates a pattern of supplanting. It does not prescribe how states and districts are to allocate any specific funds—it does not address, for instance, how teachers are to be paid or which instructional materials are to be ordered. *See* Session Two Draft, § 200.XX(b)(1)(ii) (“An LEA may determine the methodology it will use to allocate State

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<sup>14</sup> First, the Session Two Draft does not require that a district identify that an individual cost or service is supplemental. *See* Session Two Draft, § 200.XX(a)(2)(i). While ED’s past guidance had established such a showing as a means for demonstrating SNS compliance, the Session Two Draft adopts a different method that assesses the total state and local funds available to a school. *Compare* ED 2008 Guidance, at 38-39, *with* Session Two Draft, § 200.XX(b)(1)(i). Second, the Session Two Draft’s total-spending comparison does not require any particular instructional method or setting. *See* Session Two Draft, § 200.XX(a)(2)(ii). Neither of these points is in dispute.

and local funds to its schools....”). While avoiding micromanaging individual funding allocation decisions, ED clearly has the authority to establish a standard by which the cumulative result of those allocation decisions shall be measured against the SNS requirements. *Cf. Ass’n of Proprietary Colleges v. Duncan*, 107 F. Supp. 3d 332, 362 (S.D.N.Y. 2015) (“Federal law does prevent DOE from dictating state schools’ curricula or otherwise micro-managing their day-to-day operations, but it says nothing about ... conditioning schools’ eligibility for federal student aid on performance-based metrics....”). Calling an out after three strikes is different from telling the batter when to swing.

In sum, while these three provisions do place specific limitations on ED’s authority, they do not otherwise constrain ED’s authority “to fill the statutory gap in reasonable fashion” by establishing a method for measuring SNS compliance. *Brand X*, 545 U.S. at 980. Indeed, these specific limitations demonstrate that Congress knew how to limit ED’s authority to regulate under the SNS provisions, and did not include more sweeping limitations on its authority to fill a statutory gap left by the absence of any criteria for determining compliance with SNS. *See Whitfield v. United States*, 543 U.S. 209, 216 (2005) (“Congress has included an express overt-act requirement in at least 22 other current conspiracy statutes, clearly demonstrating that it knows how to impose such a requirement when it wishes to do so.”). Nothing in the text of § 1118(b) indicates that Congress intended to further limit ED’s authority to enforce SNS.

3. *Other ESEA provisions do not limit § 1118(b)(2)’s ambiguity in a way that bars the Session Two Draft.*

Limitations on ED’s authority could potentially be found outside the SNS-specific requirements of § 1118(b). As detailed below, an analysis of arguably related provisions elsewhere in the ESEA does not disturb the conclusion that the SNS provisions leave room for ED to adopt the Session Two Draft approach.

- a) Comparability Requirements

The ESSA made no changes to a longstanding ESEA provision that requires that districts provide services to Title I schools that are comparable to those provided in non-Title I schools (“comparability” requirements). *Compare* No Child Left Behind Act of 2001 (“NCLB”), § 1120A(c), Pub. L. No. 107-110, 115 Stat. 1425 (2002), *with* ESSA § 1118(c). Nevertheless, criticisms of the Session Two Draft’s approach, including the CRS Report, have used the comparability requirements to argue that the Session Two Draft would exceed ED’s authority. Specifically, the CRS Report notes that the comparability requirements exclude teacher salary differentials when assessing the services provided to Title I schools, and faults the Session Two Draft for “not provid[ing] an exception related to consideration of staff salary differentials for years of employment” in the SNS context. § 1118(c)(2)(C). There is no reason, on the face of the text, that the comparability requirements should control the analysis of ED’s authority to

regulate under the SNS requirements. The text unambiguously establishes different requirements in service of different goals.

The comparability requirements address the provision of services rather than the allocation of funds. *Compare* ESSA § 1118(b), *with* § 1118(c). The comparability requirements provide generally that districts may receive Title I funds “only if State and local funds will be used in [Title I schools] to provide *services* that, taken as a whole, are at least comparable to *services* in [non–Title I schools].” § 1118(c)(1)(A) (emphasis added). To address this goal, the statute provides that an LEA may show compliance with the comparability requirements in substantial part through a written assurance that it has established a uniform salary schedule; schools will then be compared as if every teacher was paid the average teacher salary for the district. *See* § 1118(c)(2). This provision, which allows for services to be considered comparable even when spending is not, underscores that the comparability requirements are concerned with services, not funding, which is the focus of SNS.

The SNS statutory requirements do not themselves provide for any special treatment of teacher salaries, and address only the total “state and local funds” a Title I school receives. The fact that the comparability provisions effectively exempt variations in teacher salaries from school-to-school comparisons, while the SNS provisions do not, is significant. *See BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537 (1994) (“[I]t is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another.”). The fact that Congress addressed this issue in the comparability context, but left it unspecified in SNS, reinforces that Congress intended ED to “fill the statutory gap” as to how SNS compliance was to be assessed. *Brand X*, 545 U.S. at 980.

Moreover, the Session Two Draft does not result in any conflicts with the comparability requirements. The Session Two Draft requires that Title I schools receive an amount of state and local per-pupil funding that is “equal to or greater than” the average amount in non–Title I schools. Session Two Draft, § 200.XX(b)(1)(ii)(A). The comparability statutory provisions require that Title I schools receive services that are “at least comparable” to services provided in non–Title I schools. § 1118(c)(1)(A). Both sets of requirements work in tandem to establish floors—whether of services or funds—that a district must clear.

#### b) Interpretive Rule Regarding Equalized Spending

ESSA maintained, without amendment, a longstanding provision that “[n]othing in this title shall be construed to mandate equalized spending per pupil for a State, local educational agency, or school.” *Compare* NCLB § 1906, *with* ESSA § 1605. This provision does not alter the conclusion that the § 1118(b)(2) compliance requirement is ambiguous, and does not bar the Session Two Draft’s interpretation that SNS compliance should be measured based on whether

each Title I school receives at least as much per-pupil funding as the average for non-Title I schools.

First, the Session Two Draft does not require “equalized spending per pupil for a State.” It addresses only within-district disparities, and does not require any comparisons across districts in a state. *See* Session Two Draft, § 200.XX(b)(1)(ii). This conclusion holds whether federal grants to the state are included in the state’s spending or not.

Second, the Session Two Draft does not require “equalized spending per pupil for a ... local educational agency.” As an initial matter, the draft’s requirements apply only to the combination of “State and local funds,” and it is silent on the relative amounts of state versus local funds being provided to schools. But assuming this provision counts both state and local funds as “spending per pupil for a ... local educational agency,” the Session Two Draft does not require the equalization of such funds within a district. The Session Two Draft does not require that any two schools, let alone all schools in a district, have equal per-pupil funding. Indeed, under the Draft, per-pupil funding may vary significantly among Title I schools as well as among non-Title I schools, so long as each Title I school’s funding exceeds the average for non-Title I schools. The only per-pupil funding amount the Draft even considers for SNS compliance purposes is the *average* of non-Title I schools, and it does not require that even one school in the district receive that specific amount of per-pupil funding. Moreover, were federal funds added to the calculation of “spending per pupil for a ... local educational agency,” this rule would not only allow, but require, that Title I schools receive more pupil funding than non-Title I schools, as Title I funds are added for schools that already receive at least the average per-pupil funding of non-Title I schools. Such an outcome—the outcome this rule requires—simply is not “equalized spending per pupil” in a district.

Finally, the Session Two Draft does not require “equalized spending per pupil for a ... school.” The draft concerns only the per-pupil funds received by each Title I school, and does not reach school-level decisions about the amount of funds to spend on particular students. *See* Session Two Draft, § 200.XX(b)(1)(ii).

The CRS Report argues that the Session Two Draft’s approach “appear[s] to directly conflict” with the interpretive rule against requiring equalized spending, but after acknowledging the lack of precedent, it offers no explanation as to where exactly this conflict is found. The report’s statement that the Session Two Draft’s approach “would require Title I-A per pupil expenditures to meet or exceed those of non-Title I-A schools” appears to suggest that the draft regulation requires equalization of state and local funds by a school district, but in the same breath the report concedes that the draft allows for the non-equalized outcome of having funds for Title I schools exceed those of non-Title I schools. *See* CRS Report at 8. The report ignores entirely the potential effect of federal funds on the equalization analysis. *See* CRS Report at 4, 8. The report does, however, concede the possibility that a court may conclude that this interpretive rule

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does not bar the Session Two Draft “on the grounds that the SNS provision in question discusses *average* per-pupil expenditures [in non–Title I schools] as opposed to per-pupil spending.” CRS Report at 8 n.43 (emphasis added).

Moreover, the Session Two Draft is not limited to the core test it establishes. The draft allows for several reasonable exceptions. Under the Session Two Draft, a district may exclude from its SNS assessment schools enrolling fewer than 100 students, and may further exclude supplemental state or local funds for programs that “meet the intent and purposes” of Title I. *See* Session Two Draft, § 200.XX(b)(3); *see also* § 1118(d).

### c) Interpretive Rule Regarding Non-Funded Mandates

The ESSA’s maintenance of a longstanding interpretive rule barring unfunded federal mandates does not foreclose the Session Two Draft. *See* § 8527(a).<sup>15</sup> The CRS Report notes that an “argument could be made” that the Session Two Draft’s approach violates this provision, though it concludes that “the legal effect of [§ 8527] is currently unclear.” CRS Report at 9 n.45. But whatever effect the courts ultimately give this provision as to unfunded federal mandates that require spending, this provision does not bar a regulation that does not require spending.

The Session Two Draft does not mandate that a state or subdivision “spend any funds or incur any costs not paid for under this Act.” § 8527(a). The draft’s relevant requirement concerns only the relative amounts of funds received by schools within a district, not total spending. *See* Session Two Draft, § 200.XX(b)(1)(i)(A). This reflects the statutory requirements: § 1118(b) is not directed at ensuring that the total amount of state and local funding is at any particular level. If a district is unable to make the demonstration required by the draft regulations, it must cease using a methodology for allocating state and local funds that provides less funding to schools receiving Title I funds. This is a requirement to cease supplanting, not a requirement to “spend any funds or incur any costs.” § 8527(a). Further, as discussed above in the context of the § 1118(b)(4) prohibition on prescribing a specific methodology for allocation, the Session Two Draft does not mandate an “allocation of State or local resources.” § 8527(a).<sup>16</sup> It concerns only a post-allocation assessment of whether individual spending decisions, considered cumulatively,

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<sup>15</sup> “Nothing in this Act shall be construed to authorize [a federal officer] to mandate, direct, or control a State, local educational agency, or school’s curriculum, program of instruction, or 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.” § 8527(a).

<sup>16</sup> This conclusion is fortified by the context in which that term appears here: “curriculum, program of instruction, or allocation of State or local resources.” Under the “principle of *noscitur a sociis*[.] ... a word is known by the company it keeps.” *Yates v. United States*, 135 S. Ct. 1074, 1085 (2015). As the terms “curriculum” and “program of instruction” relate to individualized decisions about how money should be spent and how instructional programs should be implemented, so too does “allocation of State or local resources” refer to decisions to fund particular programs, and not an after-the-fact assessment of whether Title I funds are being used to supplant state and local funds.

reflect a pattern of supplanting. If they do, the district would be required to cease allocating funds in a way that provides fewer state and local per-pupil funds to Title I schools, but the regulation would not require that any individual allocation decisions be made in any particular way.

4. *ESSA's statement of purpose does not undermine the Session Two Draft approach.*

As a final note on the textual provisions of the law, the ESSA's statutory statement of purpose does not undermine the conclusion that § 1118(b)(2) is ambiguous and that other provisions of the law do not curb ED's authority to issue the Session Two Draft. "The purpose of this title is to provide all children significant opportunity to receive a fair, equitable, and high-quality education, and to close educational achievement gaps." § 1001. The statement's emphasis on "equit[y]" and "clos[ing] achievement gaps" provides important guidance for the implementation of § 1118(b), which grants the Secretary the authority to meaningfully enforce requirements related to ensuring that students in Title I schools are not being deprived of state and local funds.

B. Nothing in the legislative history of SNS suggests congressional intent to bar ED from adopting the Session Two Draft.

Legislative history may be used to interpret the meaning of ambiguous statutes during step one of the *Chevron* analysis. *See Catawba Cty., N.C. v. E.P.A.*, 571 F.3d 20, 35 (D.C. Cir. 2009). However, legislative history is not a substitute for textual analysis. Congress only votes on the text of the bill in front of it, and legislative history cannot limit what the language of a statute says. *See e.g., Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998) ("[I]t is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.").

There is almost no legislative history regarding the changes Congress made to SNS with the ESSA. For example, the ESSA was debated for seven days on the Senate floor without any mention of SNS. *See* 161 CONG. REC. S4661–S5153 (July 7, 2015–July 16, 2015). Legislative history cannot clarify an ambiguous statute when the legislative history itself is limited and ambiguous. *See Ass'n of Proprietary Colleges v. Duncan*, 107 F. Supp. 3d 332, 363 (S.D.N.Y. 2015).

1. *The statutory history suggests that Congress sought to avoid excessive limitations on ED's authority to enforce SNS.*

One form of legislative history is the consideration of changes to the text of a provision as the bill proceeds through Congress. This form of legislative history, called the "Statutory History," affords some basis for interpreting the meaning of a statute. *See Lamie v. U.S. Trustee*, 540 U.S.



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526, 541 (2004). From the time the ESSA was placed on the Senate calendar on April 30, 2015, to the time it was signed by the President on December 10, 2015, Congress made only one small textual change to SNS within the ESSA. The change does not show an intent to bar ED from adopting the Session Two Draft. Indeed, if the change means anything at all, it shows Congress intended to broaden ED's authority.

As first introduced, the ESSA contained a broader prohibition on ED's authority than was ultimately included by Congress in the ESSA. The initial bill's text prohibited ED from "establish[ing] any criterion that specifies, defines, or prescribes the specific methodology ...." *See Every Child Achieves Act of 2015*, S. 1177, Calendar No. 63, 114th Cong. § 1007(b)(4) (April 30, 2015). In the Conference Committee, much of this language was eliminated, so the resulting section prohibited ED from "prescrib[ing] the specific methodology...." *See H.R. REP. NO. 114-354*, at 472 (2015). The removal of "criterion" and "defines" from the SNS prohibition suggests that Congress did not intend to prohibit ED from establishing criteria for compliance with SNS, including post-allocation assessments such as the Session Two Draft. The Statutory History, in any event, does not suggest Congress sought to bar ED from adopting the Session Two Draft.

2. *Isolated Congressional statements do not indicate that the SNS statutory provisions bar the Session Two Draft compliance requirement.*

Consideration of congressional deliberations, such as committee reports, hearings, and floor debates to define an ambiguous term in a statute is a much more controversial exercise. *See* LARRY M. EIG, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS, CONG. RESEARCH SERV., 97-589 at 44 (2011). The only congressional commentary on SNS appears to be a one-paragraph explanation in the Committee Report for the ESSA from the U.S. Senate Committee on Health, Education, Labor, and Pensions that was published three months *after* the ESSA was enacted. *See S. REP. NO. 114-231*, at 31-32.

The Committee Report recognized the importance of SNS, but acknowledged that the previous regulations were too restrictive. The Report explained that the ESSA now allows local educational agencies to comply with SNS if they show that how "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." *Id.* The report further states that a local educational agency's method of allocating state and local funds "must be examined as a whole" to ensure compliance with SNS. *Id.*

The Committee Report cannot be read to bar ED's Session Two Draft. It simply recognized that the old ED regulations were too restrictive and were to be replaced with an examination that focuses on state and local funds as a whole—precisely what the Session Two Draft does. The Report states that a local educational agency must show its allocation of state and local funds is

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“Title I neutral,” but does not otherwise explain how to ensure an allocation method is neutral. The Session Two Draft would ensure that an allocation method truly does not account for Title I funds because Title I schools would receive state and local funding on par with the average non-Title I school.

Even if the Committee Report specified certain criteria for compliance, a court should not grant those criteria much weight. Courts are “more willing to consult committee reports and the like for insight into the particular problem Congress sought to address than they are to consult language that purports to direct certain interpretations or outcomes.” Eig at 44. The Committee Report cannot trump the statutory text, especially where, as here, the Committee Report was published after Congress voted. As some judges and justices have recognized, committee reports are not representative of the intent of Congress as a whole. *See Intel Corp. vs. Advanced Micro Devices, Inc.*, 542 U.S. 241, 267 (Scalia, J., concurring) (“[I]t is not only (as I think) improper but also quite unnecessary to seek repeated support in the words of a Senate Committee Report—which, as far as we know, not even the full committee, much less the full Senate, much much less the House, and much much much less the President who signed the bill, agreed with.”).

The Conference Committee amendment and the Senate Committee report appear to be the only legislative history regarding ESSA’s change to SNS. These two statements, taken as a whole, do not foreclose what the text of SNS itself creates, namely significant leeway for ED to determine what constitutes compliance with SNS.

3. *The legislative history of other ESSA provisions is not relevant.*

Some opponents of the Session Two Draft have argued that SNS should be interpreted narrowly because of the legislative history of the separate § 1118(b)(3) comparability requirements. *See e.g.*, 162 Cong. Rec. S2692 (daily ed. May 11, 2016) (statement of Sen. Alexander). Indeed, the CRS Report spends most of its *Chevron* analysis on an amendment proposed by Senator Bennet to the ESEA comparability provisions. CRS Report at 8–9. The use of this legislative history to interpret SNS, however, is highly dubious.

If legislative history is helpful to interpret the language at SNS at all, it should at the very least relate to the provision and ambiguity at issue. The Bennet amendment sought to amend the comparability requirements, not SNS. It would have required comparability determinations of services to be based on actual personnel expenditures. It said nothing about the criteria for ensuring Title I funds do not supplant state and local funds. Moreover, the amendment was *withdrawn*, and never voted on or rejected by Congress. Underscoring the futility of analyzing the meaning of a withdrawn amendment, it is equally plausible that Senator Bennet withdrew his amendment after concluding that his policy goals had been, or would be, achieved by the SNS amendments.

Even had Congress rejected the amendment, the Supreme Court has never uniformly agreed on a “rejected proposal rule” whereby a court should attach significance to an amendment that was proposed and voted down. *See* Eig at 47 (citing *Rapanos v. United States*, 547 U.S. 715 (2006)). The CRS Report’s heavy reliance on a withdrawn amendment unrelated to SNS is a blatant example of what the Supreme Court has repeatedly cautioned against. Legislative history cannot become an exercise in “looking over a crowd and picking your friends.” *See Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) (quoting Judge Harold Leventhal).

**V. *Chevron* Step Two: The Session Two Draft is a reasonable interpretation of the ESSA’s ambiguous SNS compliance provision.**

ED’s Session Two Draft is a reasonable and effective interpretation of SNS that must receive significant deference from the courts. As explained above, the plain meaning and legislative history of the statute do not unambiguously preclude compliance with the Session Two Draft of SNS. As a result, a court reviewing the Session Two Draft would proceed to step two of the *Chevron* analysis. At step two, a court upholds the agency’s interpretation so long as the interpretation is reasonable.

A critic arguing that ED’s Session Two Draft is unreasonable or an impermissible interpretation of SNS would face an uphill battle. An agency can fill an ambiguity in a statute by choosing among a number of different permissible policy choices. Courts grant deference to the agency exactly because the agency is making a policy choice, and “it is incumbent upon the agency not to rest simply on its parsing of the statutory language. It must bring its experience and expertise to bear in light of competing interests at stake.” *PDK Labs. Inc. v. U.S. D.E.A.*, 362 F.3d 786, 797–98 (D.C. Cir. 2004).

**A. ED’s Session Two Draft is a reasonable interpretation of SNS.**

ED’s Session Two Draft boils down to this: Title I funds provided by the ESEA can only be truly supplemental if each Title I school is receiving at least as much state and local funding per-pupil as the average non–Title I school. The Session Two Draft is not only a reasonable interpretation of the statutory language, it is strong policy supported by empirical data and reflecting ED’s expertise of over forty years enforcing SNS. The Session Two Draft clearly is consistent with the ESEA’s promise to eliminate educational inequities for low-income students and students of color.

The ESEA recognized that schools that serve high populations of low-income students need more supplemental funding than the traditional school. However, in the early years of the ESEA, providing supplemental funds proved impossible. A 1969 report from the NAACP Legal Defense and Education Fund showed that it was nearly impossible for the federal government to provide supplemental funding since schools serving low-income students received substantially

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less state and local funding. *See* NAACP Legal Def. & Educ. Fund, *Is It Helping Poor Children? Title I of ESEA* (1969). One Mississippi superintendent admitted that the highest state and local per-pupil expenditure for schools serving black students in his district was half of the lowest per-pupil expenditure for schools serving white students. *Id.* In 1970, Congress amended the ESEA to include SNS so that Title I funds were not simply filling historical gaps in funding to schools serving low-income students. *See* H.R. 514, § 109, Pub. L. No. 91-230, 84 Stat. 121 (1970).

However, recent research suggests that SNS has not been enforced in a way that ensures Title I funds provide more funding to schools who serve low-income students. A 2011 ED report revealed that in school districts with both Title I and non–Title I schools, over half of Title I schools received less per-pupil personnel expenditures than the average for non–Title I schools. *See* Heuer & Stullich at 18.

ED’s Session Two Draft would be an effective measure to ensure once and for all that local schools comply with SNS. By tying receipt of Title I funds to a showing that each Title I school is receiving at least as much per-pupil state and local funding as the average for non–Title I schools, ED has created a rule that will ensure schools that serve low-income students are receiving *more* funding than non–Title I schools once Title I funds are received.

Moreover, the Session Two Draft reasonably and faithfully incorporates the new provisions Congress included in the ESSA. The language of SNS now prevents ED from requiring a district to identify that an individual cost or service is supplemental. *See* § 1118(b)(3)(A). Instead, compliance with SNS must be shifted away from a focus on whether individual costs or services are supplemental, to whether the way a school district allocates state and local funds before it receives Title I funds ensures Title I funds are supplemental. *See* § 1118(b)(2). The Session Two Draft accomplishes this shift. It provides a less confusing “single calculation” method for SNS based clearly on the allocation of state and local funds.

B. ED’s Session Two Draft avoids the pitfalls that lead courts to declare an agency’s interpretation unreasonable at step two of *Chevron*.

Opponents of ED’s Session Two Draft appear to not seriously challenge that the rule would ensure that Title I funds are truly supplemental. Instead, critics have argued that the rule goes too far to ensure Title I funding is supplemental, and as a result has exceeded ED’s statutory authority. That argument is wrong because it overlooks the flexibility that the Session Two Draft would provide, and it ignores that Congress has not wavered from its clear forty-five-year statutory direction that Title I funds must supplement, and not supplant, state and local funds.

1. *The Session Two Draft provides meaningful flexibility to districts.*

The Session Two Draft includes significant flexibility for schools to comply with the rule. Most notably, consistent with § 1118(b)(4) of SNS, the Session Two Draft does not require any specific methodology for allocating state and local funds. The rule does not specify how local school district must allocate funds. School districts can continue to allocate state and local funds as they see fit, so long as the outcome of that allocation results in funding Title I schools at least on par with the average non–Title I school. There is no requirement that a school district change the way it pays teachers or chooses curriculum. Nor does the rule require more state or local funds to be allocated.

The Session Two Draft also creates reasonable exceptions to the general rule it establishes. Schools enrolling fewer than 100 students are excluded from the SNS requirement. Schools may further exclude supplemental state or local funds for programs that “meet the intent and purposes” of Title I. *See* Session Two Draft, § 200.XX(b)(3); *see also* § 1118(d). The substantial flexibility in the Session Two Draft underscores that the rule is not an overhaul of state education, but a calculation method to determine compliance with a longstanding congressional requirement.

2. *The Session Two Draft is not an elephant in a mousehole.*

Although rare, courts have rejected agency interpretations at step two of *Chevron*, predominantly because the court concludes the agency’s interpretation would alter a regulatory scheme in a fundamental way not intended by Congress. ED’s Session Two Draft does not suffer from this problem, as it relies on clear statutory language.

In *Whitman v. American Trucking Ass’n Inc.*, 531 U.S. 457 (2001), the Supreme Court reasoned that Congress does not “hide elephants in mouseholes,” or in other words, Congress does not intend to delegate authority of deep economic and political significance to an agency via a cryptic or ambiguous text. *See also* *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000). In *Whitman*, the Supreme Court determined that the Clean Air Act’s instruction to create air quality standards with an “adequate margin of safety” was too tenuous of a phrase to support the EPA’s desire to use cost as a factor when setting air quality standards. *Whitman*, 531 U.S. at 465–69.

SNS is not a mousehole. SNS has been a fundamental requirement of Title I of the ESEA for over forty-five years. The provision makes clear Congress intended that Title I funds are “only” to be used to supplement state and local funds. *See* § 1118(b)(1). This clear instruction from Congress requires an effective and straightforward method of compliance. There is little doubt that SNS is a clear statement from Congress that ED is to protect the federal government’s investment in each state’s education system. *See Ass’n of Private Sector Colls. & Univs. vs.*

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*Duncan*, 681 F.3d 427, 458 (D.C. Cir. 2012) (holding that ED’s state authorization regulations under the Higher Education Act protect federal interests and are not in violation of *Gregory v. Ashcroft*, 501 U.S. 452 (1991)). The language the Session Two Draft invokes is not vague, ancillary, or obscure.

A court recently rejected a similar argument that private colleges had raised against ED’s regulations enforcing the gainful employment provision of the Higher Education Act. *See Ass’n of Private Colls. and Univs. v. Duncan*, 870 F. Supp. 2d 133, 148 (D.D.C. 2012). Although the court acknowledged that the new regulations interpreting the words “gainful employment” were a “significant regulatory intervention,” the court held the language was not too obscure to support the regulation. *Id.* Likewise, the Session Two Draft would not outpace the clear instruction from Congress that Title I funds must supplement, and not supplant, state and local funds.

## **VI. Conclusion**

Since 1970, the SNS requirement has provided that districts may not use Title I funds to supplant the state and local funds they provide their low-income schools. Unfortunately, enforcement of SNS proved to be burdensome and ineffective for many years. In 2015, Congress passed a statute requiring ED to change its approach to enforcing SNS, but provided little clarity as to how, beyond establishing a few clear limitations. In April 2016, ED proposed that districts demonstrate SNS compliance using a straightforward test that compares the per-pupil state and local funds provided to Title I schools with the funds provided to non–Title I schools. The rule establishes a clear way to determine whether Title I schools are not receiving their fair share of state and local funding because of their receipt of Title I funds. The rule represents a reasonable means to enforce an ambiguous statute, one informed by recent empirical research and by ED’s decades-long experience enforcing the SNS requirement. The Session Two Draft approach is fully consistent with the ESEA’s and ESSA’s clear purpose to promote educational equity, and ED has ample legal authority to adopt it.