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Every Dollar Counts: In Defense of the Obama Department of Education's "Supplement Not Supplant" Proposal

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EVERY DOLLAR COUNTS: IN DEFENSE OF THE OBAMA DEPARTMENT OF EDUCATION'S "SUPPLEMENT NOT SUPPLANT" PROPOSAL

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INTRODUCTION

Evidence compellingly demonstrates—as Congress famously recognized in Title I of the Elementary and Secondary Education Act of 1965 (ESEA)[1]—that children from economically disadvantaged backgrounds require more educational resources than other students.[2] Yet, a half century later, many school districts still spend less money on high-poverty schools than on more privileged schools.[3] In 2011, a study by the U.S. Department of Education discovered that nationwide, more than forty percent of schools eligible for Title I funding based on their high-poverty status receive *less* state and local funding for instructional and other personnel costs than non–Title I schools in the same districts at the same grade level.[4] A more recent study confirmed that more than 4.5 million low-income students attend Title I schools that on average receive about $1,200 less per student than non–Title I schools in the same district.[5]

In 1970, in an effort to prevent the availability of federal funding for high-poverty schools from diminishing state and local funding for those schools, Congress amended the ESEA to forbid districts to use Title I funds to "supplant," rather than to "supplement," the local funds they would otherwise have spent on Title I schools.[6] Notwithstanding this "supplement not supplant" requirement, districts often take two steps

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1. See Every Student Succeeds Act, Pub. L. No. 114-95, 129 Stat. 1802 (2015) (codified as amended in scattered sections of 20 U.S.C. (Supp. III)) (reauthorizing and amending the ESEA).

2. See infra notes 15–24 and accompanying text (introducing Title I's goal of compensatory education).

3. Ruth Heuer & Stephanie Stullich, U.S. Dep't of Educ., Comparability of State and Local Expenditures Among Schools Within Districts 29 (2011), http://www2.ed.gov/rschstat/eval/title-i/school-level-expenditures/school-level-expenditures.pdf [http://perma.cc/Y3Q3-2ZHY].

4. Id.

5. Robert Hanna et al., Ctr. for Am. Progress, Comparable but Unequal: School Funding Disparities 1 (2015), http://cdn.americanprogress.org/wp-content/uploads/2015/03/ESEAComparability-brief2.pdf [http://perma.cc/TGY5-36N8].

6. Elementary and Secondary Education Act Amendments of 1970, Pub. L. No. 91-230, § 109 (a), 84 Stat. 121 (codified as amended in scattered sections of 20 U.S.C. (2012)).

that result in the spending disparities described above: (1) letting their most experienced and highly salaried teachers opt into schools with more privileged students, leaving Title I schools with less experienced, lower-salaried teachers;[7] then (2) disguising how much less Title I schools spend on instruction than more advantaged schools by *omitting* teacher salaries from school-funding comparisons.[8]

To remedy this situation, President Barack Obama's Department of Education in 2016 proposed a regulation (hereinafter "the 2016 proposed regulation") that would have explicitly required districts to account for *all* aspects of local funding of schools in the course of demonstrating their compliance with the "supplement not supplant" requirement.[9] The civil rights community supported the proposal,[10] but teacher unions and congressional Republicans vehemently opposed it because it disrupts funding patterns favoring non–Title I schools that benefit their constituents.[11]

Soon after the Obama Administration announced the proposal, the nonpartisan Congressional Research Service (CRS) added its own seemingly show-stopping legal objection—that the proposed regulation is so clearly contrary to the ESEA that it may not deserve *Chevron* deference.[12] Indeed, the CRS contended that the proposed regulation contravened two ESEA provisions: one prohibiting the Department from forcing districts to equalize per-pupil spending across all schools and another exempting teacher salaries from a provision of the Act, separate from its "supplement not supplant" requirement, that requires

7. See Hanna et al., supra note 5, at 6 (noting that high-poverty schools "typically employ teachers with fewer years of experience and lower salaries").

8. See id. at 1 ("[D]istricts can compute comparability using average teacher salaries or teacher-to-student ratios instead of actual expenditures on teacher salaries.").

9. U.S. Dep't of Educ., Issue Paper: Supplement Not Supplant (Apr. 14, 2016), (on file with the *Columbia Law Review*) [hereinafter Dep't of Educ., Issue Paper].

10. See Andrew Ujifusa, Civil Rights Groups to Feds: Your ESSA Rules Must Push Equity, Disruptive or Not, Education Week (Apr. 28, 2016), http://blogs.edweek.org/edweek/campaign-k-12/2016/04/civil_rights_groups_essa_must_push_equity.html [http://perma.cc/P8LS-YE2H] ("30 civil rights groups . . . appear to see a lot to like in the administration's proposed regulations . . . .").

11. See, e.g., Jonathan Chait, Obama Wants to Give Poor Schools More Money. Guess Who's Blocking Him., N.Y. Mag. (May 19, 2016, 7:00 AM), http://nymag.com/daily/intelligencer/2016/05/whos-blocking-obama-from-helping-poor-schools.html [http://perma.cc/8VXF-GZBD] (discussing a "surprising . . . alliance between teachers unions and Republicans" opposing the regulation).

12. Memorandum from Jody Feder & Rebecca Skinner, Cong. Research Serv., on the Proposed Regulations on the Supplement, Not Supplant Provision that Applies to the Title I-A Program Authorized by the Elementary and Secondary Education Act 6–9 (May 5, 2016) [hereinafter Feder & Skinner, Proposed Regulations Memo], http://edworkforce.house.gov/uploadedfiles/sns_and_negotiated_rulemaking_5-5-16.pdf [http://perma.cc/G9NC-F5KQ]; see infra note 87 and accompanying text (discussing the deference courts must give to reasonable administrative regulations under Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984)).

comparability of services between schools receiving and those not receiving Title I funds.[13] The day before the Obama Administration turned over the reins to President Donald Trump, the Department of Education announced that it was dropping its proposed "supplement not supplant" regulation.[14] Although the Department of Education offered no explanation for doing so, legal objections by the respected CRS likely played a role in the decision.

The CRS's legal analysis is wrong. Far from being unworthy of *Chevron* deference, the interpretation of the ESEA underlying the Department's 2016 proposed regulation is dictated by well-established canons of statutory interpretation and relies on the same objective approach to assessing the motives of local officials as a wealth of other federal laws and regulations. More broadly, that interpretation is appropriate—indeed imperative—to ensure high-poverty schools the funds to which the ESEA legally entitles them.

In support of reconsideration of the issue by the incoming Administration, this Piece is structured as follows. Part I discusses the compensatory purpose of Title I of the ESEA, explains the importance of the "supplement not supplant" requirement in preserving the compensatory ideal, acknowledges the difficulty the Department faces in ascertaining whether a school district intends to spend less local money on Title I schools in recognition of the federal dollars those schools can count on receiving, and concludes that the Department's 2016 proposed regulation provided a sensible and well-trod solution to that problem. Part II describes the two important objections leveled against the proposal by the CRS. Part III responds to those objections, concluding that both are unpersuasive.

I. TITLE I'S GOAL OF COMPENSATORY EDUCATION

In 1965, President Lyndon B. Johnson signed the ESEA into law as a key part of his War on Poverty.[15] The ESEA was the "most far-reaching

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13. Feder & Skinner, Proposed Regulations Memo, supra note 12, at 8–9.

14. See Nicole Gorman, Education Department Drops 'Supplement Not Supplant' Regulation, Educ. World (Jan. 19, 2017), http://www.educationworld.com/a_news/education-department-drops-controversial-'supplement-not-supplant'-regulation-1979012106 [http://perma.cc/KJK8-WRAP]; see also Title I—Improving the Academic Achievement of the Disadvantaged—Academic Assessments, 81 Fed. Reg. 88,886 (Dec. 8, 2016) (to be codified at 34 C.F.R. pt. 200) (finalizing new Title IA regulations and omitting previously proposed regulation on "supplement not supplant").

15. See Lyndon B. Johnson, President of the U.S., Remarks at the Dedication of the Gary Job Corps Center, San Marcos, Texas (Apr. 10, 1965), http://www.presidency.ucsb.edu/ws/index.php?pid=26884 [http://perma.cc/5XAH-8HTS] (praising the passage of "a comprehensive national education bill" as a central contribution to President Johnson's War on Poverty).

and significant education legislation in the history of this country."[16] Title I of the ESEA—the statute's "crown jewel"—gives school districts federal dollars to spend on large numbers of low-income students.[17] Congress based Title I on two insights: (1) schools with high concentrations of children in poverty need substantially *more* funding than other schools to compensate for the negative effects of economic deprivation on student learning and (2) the federal government has a key role to play in providing funds to even the playing field for those children.[18] For these reasons, the statute forbids districts to use Title I funds to improve schools generally and requires that they use the money as direct assistance to schools serving high concentrations of poor children.[19]

Subsequent research conclusively validates Title I's premise that low-income children concentrated in particular schools require *more* resources to achieve the same educational outcomes as their more privileged counterparts. The famous Coleman Report, published the year following the ESEA's adoption, persuasively linked family poverty and poor educational outcomes, particularly in the context of schools with concentrations of impoverished children,[20] and decades of subsequent research has confirmed the link.[21] Today, nearly all researchers and policymakers agree that the provision of *additional* resources to high-poverty schools and students is necessary, if insufficient, to bring their outcomes up to either the average or an objectively desirable level of educational attainment.[22] Indeed, the weighted funding mechanisms

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16. Wash. Research Project & NAACP Legal Def. & Educ. Fund, Title I of ESEA: Is it Helping Poor Children?, at i (1969).

17. See John F. (Jack) Jennings, Title I: Its Legislative History and Its Promise, 81 Phi Delta Kappan 516, 517 (2000) (describing funding structure of Title I and its central role in the ESEA).

18. See Wash. Research Project & NAACP Legal Def. & Educ. Fund, supra note 16, at iv.

19. See id.

20. See James S. Coleman et al., Nat'l Ctr. for Educ. Statistics, OE-38001, Equality of Educational Opportunity 21, 99, 502–04, 523 (1966) (examining and comparing differences in the educational outcomes of students in the United Sates as correlates of socioeconomic status and race).

21. See, e.g., Richard D. Kahlenberg, All Together Now: Creating Middle-Class Schools Through Public School Choice 25 (2003) (citing "fifty years of sociological data" to conclude that "being born into a poor family places students at risk, but to be assigned then to a school with a high concentration of poverty poses a second, independent disadvantage that poor children attending middle-class schools do not face"); George Farkas & L. Shane Hall, Can Title I Attain Its Goal?, Brookings Papers on Educ. Pol'y, 2000, at 59, 63 (estimating that American low-income children begin first grade a full instructional year behind middle-class children and finish twelfth grade with skills that, on average, are at an eighth-grade level); Sean F. Reardon, The Widening Academic Achievement Gap Between the Rich and the Poor: New Evidence and Possible Explanations, *in* Whither Opportunity? Rising Inequality, Schools, and Children's Life Chances 91, 94–95 (Greg J. Duncan & Richard J. Murnane eds., 2011).

22. See, e.g., Saba Bireda, Ctr. for Am. Progress, Funding Education Equitably 1 (2011), http://cdn.americanprogress.org/wp-content/uploads/issues/2011/03/pdf/school_budget.pdf [http://perma.cc/K6Z9-HDMX] ("[S]tudents attending high-poverty

used in nearly all modern state and local formulas for distributing money to schools, which multiply a base per-student funding amount by a need-based weighting factor, recognize that to provide adequate funding to all, more needs to be spent on children living in poverty.[23] Title I's own formulae for determining the nature and size of federal grants and the schools eligible to receive them are aimed at precisely these same poverty-related obstacles.[24]

A. *The Requirement to Supplement, Not Supplant*

Soon after Congress adopted the ESEA, researchers discovered that Title I was not achieving its compensatory ambition because districts were using Title I funds *in place of*, and not *in addition to*, state and local funds.[25] Instead of providing resources for low-income students *beyond* those available to other students, districts were using the money to buy baseline books and supplies and pay everyday operating costs and salaries at Title I schools.[26] This enabled districts to divert the dollars previously spent on Title I schools' basic needs to more privileged schools.[27] In response to these findings, Congress amended the ESEA in 1970 to require districts to use Title I funds to "*supplement* and, to the extent practical, *increase* the level of funds that would, in the absence of such Federal funds, be made available [to low-income schools] from non-Federal sources . . . and . . . in no case, to *supplant* such funds from non-Federal sources."[28]

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schools actually need more funding to achieve at the level of their wealthier counterparts."); see also John Charles Boger, Education's "Perfect Storm"? Racial Resegregation, High Stakes Testing, and School Inequities: The Case of North Carolina, 81 N.C. L. Rev. 1375, 1440–41 (2003) (linking the resource needs and educational challenges of North Carolina students both to their individual economic status and to "the severe effects of poverty concentration" in particular schools).

23. See, e.g., Bruce D. Baker et al., Is School Funding Fair? A National Report Card 6 (4th ed. 2015) ("Student and school poverty correlates with, and is a proxy for, a multitude of factors that increase the costs of providing equal educational opportunity . . . ."); see also Kevin Carey, Ctr. on Budget & Pol'y Priorities, State Poverty-Based Education Funding: A Survey of Current Programs and Options for Improvement 2 (2002) (referring to recent studies suggesting "the actual additional cost of educating low-income children is between two and two-and-a-half times the cost of educating non-poor students").

24. The Department of Education uses four formulae, based on census poverty data and the estimated cost of education in each state, to allocate federal funds to districts under Title I. See Elementary and Secondary Education Act of 1965, Pub. L. No. 107-110, §§ 1122–1125A, 115 Stat. 1425, 1515–1524 (2002) (codified as amended at 20 U.S.C. §§ 6332–6337 (2012)).

25. See Wash. Research Project & NAACP LegalDef. & Educ. Fund, supra note 16, at 5.

26. Id.

27. Id.

28. Elementary and Secondary Education Act Amendments of 1970, Pub. L. No. 91-230, § 109(a), 84 Stat. 121, 124 (codified as amended in scattered sections of 20 U.S.C.) (emphasis added).

When Congress adopted these amendments, administrators had available a simple indicator of the amount of local dollars districts would have spent on Title I schools "in the absence of Federal funds": the amount of local funds spent on those schools as of 1964, just before the ESEA was passed. A sudden decrease in local dollars for Title I schools after federal funds became available would have strongly suggested that the district was unlawfully intending to supplant local with federal dollars.

Today, however, using historical baselines to estimate the amount of local funding that districts would provide to low-income schools absent federal funds is a bad idea. First, historical baselines tend to entrench the underfunding of public schools and especially high-poverty schools.[29] Second, historical baselines are no longer workable. For fifty years since the ESEA's adoption, states and districts have supported Title I schools with combinations of local, state, and federal dollars, to the point that it is impossible to look backward one, five, or any other number of years to decide what the pre–Title I historical baseline for local funding might be.

Not surprisingly, therefore, when Congress reauthorized the ESEA last year in the Every Student Succeeds Act (ESSA), it told the Department to stop using prior funding levels in deciding whether districts were "supplanting."[30] It also forbade the Department to assume that supplanting was taking place if districts used Title I funds to provide services for which local funds were used in other schools.[31] Doing so, Congress found, counterproductively encouraged districts to spend Title I funds on "pull-out" services provided exclusively and separately to disadvantaged children, depriving them of the benefits of "mainstreaming" with other children.[32] More generally, Congress rejected the various indirect tests the Department had long used to assess supplanting because they shed little light on whether districts were allocating funds in keeping with a forbidden motivation to supplant.

Although the ESSA bans the Department's prior method of determining whether a district's funding of Title I schools aims to supplant

29. Cf. Michael Heise, State Constitutions, School Finance Litigation, and the "Third Wave": From Equity to Adequacy, 68 Temp. L. Rev. 1151, 1163–66 (1995) (citing state court decisions finding historical funding levels insufficient to support an adequate education, especially for poor children).

30. Every Student Succeeds Act, Pub. L. No. 114-95, § 1118(b)(3), 129 Stat. 1802, 1875 (2015) (codified as amended in scattered sections of 20 U.S.C. (Supp. III)) (rejecting U.S. Dep't of Educ., Non-Regulatory Guidance, Title I Fiscal Issues 38–39 (rev. ed. Feb. 2008), http://www2.ed.gov/programs/titleiparta/fiscalguid.doc [http://perma.cc/P6EE-XD92]).

31. Id.

32. See, e.g., Michael J. Gaffney & Daniel M. Schember, U.S. Dep't of Educ., The Effects of The Title I Supplement-Not-Supplant and Excess Costs Provisions on Program Design Decisions, at xi (1982) (showing that ninety-two percent of districts surveyed used pull-out mechanisms in their Title I programs); Farkas et al., supra note 20, at 76–77 (noting persistence of pull-out designs triggered by Title I rules).

local with federal funding, the law retains and actually strengthens the "supplement not supplant" requirement. For the first time, the law explicitly requires districts themselves to "demonstrate compliance" with the nonsupplanting requirement.[33] The ESSA, however, does not say *how* districts must make that demonstration—leaving the Department to figure out anew how a district can "demonstrate" that its funding of Title I schools is not designed to use federal dollars to supplant local spending.

Whether Title I funds are used to supplant local funds is a motivational question; answering it requires an inquiry into *why* a particular school district has spent its local and federal funds as it has. As we explain below, in the absence of an express congressional stipulation as to how that question ought to be answered, the Department of Education's 2016 proposed regulation quite sensibly embraced the same objective approach as Congress and other agencies have used for decades to assess motivational questions in similar contexts.

B. *Established Ways to Assess Motivation*

One way to assess an actor's motivation, such as a motivation to supplant local funding, is to inquire directly into the actor's *subjective* thoughts and beliefs—as often happens in criminal cases in court.[34] When, however, the task of assessing motive is assigned to a federal agency of limited jurisdiction, and the "actors" in question are local public servants, this "prosecutorial" sort of inquiry creates a serious risk of federal overreaching. Additionally, the Department of Education has over 13,000 school districts to oversee, so the cost of using the prosecutorial approach would be enormous.[35]

For similar reasons, Congress and federal agencies often take a different, more *objective*, approach to assessing motivation. That approach begins by asking what the result would be—what the relevant "actor" would do; what the objective facts would look like—if the actor were proceeding according to the unlawful motivation. If the actor acts in a way or achieves a result that is consistent with the forbidden motivation, the next step is to require the actor to come forward with a different,

33. § 1012(b)(2), 129 Stat. at 1875 (requiring districts to "demonstrate that the methodology used to allocate State and local funds to each [Title I] school . . . 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").

34. See Joel Samaha, Criminal Law 127–29 (11th ed. 2013) (describing fault in criminal law as generally requiring proof of a subjectively evil or "bad mind"); see also State v. Mitchell, 485 N.W.2d 807, 817 (Wis. 1992), rev'd on other grounds, 508 U.S. 47 (1993) (distinguishing a Wisconsin criminal statute requiring proof of the "subjective mental process of selecting a victim because of his protected status" from antidiscrimination laws, which prohibit "objective acts of discrimination").

35. See Fast Facts, Nat'l Ctr. for Educ. Statistics, http://nces.ed.gov/fastfacts/display.asp?id=372 [http://perma.cc/UDK5-U756] (last visited Oct. 22, 2016) ("In 2012–13, there were about 13,500 [U.S.] public school districts . . . .").

legitimate explanation for the steps it took and the results it caused. If it can do so, it avoids liability.[36]

Three motivation-dependent federal laws adopted contemporaneously with the 1965 ESEA are administered in exactly this way: Title VII of the Civil Rights Act of 1964,[37] the Age Discrimination in Employment Act of 1967,[38] and the Fair Housing Act of 1968.[39] Under these laws, if employers or housing officials take actions that result in fewer African Americans or elderly individuals being hired or promoted or result in the segregation of Latinos in housing projects different from where Anglo Americans live, the burden falls on those employers or officials to give a legitimate reason for their actions that overcomes the implication of racial, ethnic, or age-biased motivation.[40]

Consider, for example, a claim alleging that an unlawful motive to discriminate based on race led to the denial of an African American's job application. Recognizing that employers rarely expose direct evidence of bias, the U.S. Supreme Court and Equal Employment Opportunity Commission (EEOC) take the more objective approach. They allow the minority job applicant to show, for example, that she was qualified for the job but was rejected, after which the position remained open.[41]

36. See infra notes 37–47 and accompanying text (discussing the passage of three motivation-dependent federal laws).

37. Under Title VII, section 703(a)(1), it is an "unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual" because of his or her "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a) (2012). In administering this law, the U.S. Supreme Court and the federal Equal Employment Opportunity Commission (EEOC) have adopted the objective approach described in the text for assessing motivation. See Griggs v. Duke Power Co., 401 U.S. 424, 432 (1970); 29 C.F.R. § 1625.7(d) (2004).

38. The Age Discrimination in Employment Act of 1967 makes it "unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." Age Discrimination in Employment Act of 1967 § 4(a), 29 U.S.C. § 623(a) (2012). Deferring to an EEOC regulation, the Supreme Court adopted the objective approach for assessing motivation under this statute in Smith v. City of Jackson, 544 U.S. 228, 235 (2005) (plurality opinion); id. at 243–47 (Scalia, J., concurring in part and concurring in the judgment).

39. The Fair Housing Act of 1968 makes it unlawful to "refuse to sell or rent . . . a dwelling to any person because of race, color, religion, sex, familial status, or national origin." Fair Housing Act of 1968 § 804(a), 42 U.S.C. § 3604(a). In *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, the Supreme Court—following a Department of Housing and Urban Development regulation, see Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460 (Feb. 15, 2013) (codified at 24 C.F.R. pt. 100)—approved the objective approach to adjudicating this motivational standard. 135 S. Ct. 2507, 2516–22 (2015).

40. See supra notes 37–39 (quoting statutory provisions requiring actors responsible for disparities suggesting the possibility of a forbidden discriminatory motive to provide a nondiscriminatory explanation for their action and its results).

41. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (requiring applicants showing a prima facie case of discrimination to establish they (i) belong to a racial minority, (ii) applied and were qualified for a job for which the employer was

Although this result is not decisive, it is *consistent* with what would happen if discrimination had occurred. As such, the Court and the EEOC treat that behavior as establishing a sufficient reason to ask the employer to give a "legitimate, non-discriminatory reason" for what happened.[42] If the employer does so, the plaintiff loses unless she can show that the reason given was a "pretext" for racial bias.[43] Federal agencies and courts use similar approaches to adjudicate age and housing discrimination.[44]

Importantly, Congress did not itself articulate these objective frameworks in the underlying laws. Rather, the relevant statutes simply prohibit actions taken "because of" a prohibited motivation. They say nothing about *how* to determine when the relevant motive is present.[45] Congress thus left courts and administrative officials to decide how to answer precisely the kind of motivational question the Department of Education would face in adjudicating the "supplement not supplant" requirement.[46] And to do so, the courts and administrators in each of these cases crafted an objective framework for requiring the actor in question to provide a legitimate explanation for actions and results mirroring those the forbidden motive is likely to generate.

Suppose the Department wanted to apply this same objective approach in deciding whether local officials were allocating funds with the unlawful intention of supplanting local funding for Title I schools with federal dollars. To use that approach, the Department would first ask what school districts would do—what objective results they would trigger—if they intended to spend less money on Title I schools than otherwise because they knew federal Title I dollars would make up the difference.

The answer is that the district would probably spend less local money on one or more Title I schools than it spends, on average, on its

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seeking applicants, (iii) were rejected despite being qualified, and (iv) the employer thereafter continued seeking applicants).

42. See Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981) (quoting *McDonnell Douglas Corp.*, 411 U.S. at 802).

43. Id. at 253.

44. See *Inclusive Cmtys. Project, Inc.*, 135 S. Ct at 2516–22 (describing the objective approach the Court uses to adjudicate discrimination under various statutes).

45. See, e.g., 29 U.S.C. § 623(a) (2012) (prohibiting conduct "*because of* such individual's age" (emphasis added)); 42 U.S.C. § 3604(a) (2012) (making it unlawful to refuse to sell or rent "*because of* race, color, religion, sex, familial status, or national origin" (emphasis added)).

46. See, e.g., *Inclusive Cmtys. Project, Inc.*, 135 S. Ct. at 2516–22 (acknowledging uncertainty about the appropriate application of the Fair Housing Act's provision barring discriminatory actions and following its precedent on parallel provisions in the Civil Rights Act of 1964 and the Age Discrimination in Employment Act of 1967 in rejecting a subjective test and adopting an objective inquiry); Griggs v. Duke Power Co., 401 U.S. 424, 428–34 (1970) (addressing as a "question of first impression" whether Title VII of the Civil Rights Act of 1964 imposed "a subjective test of the employer's intent" and concluding, based in part on the interpretation of the EEOC, that a more objective test should apply).

more privileged, non–Title I schools.[47] Doing so would enable it to divert local money from Title I schools to non–Title I schools and use federal dollars to make up the difference. The fact that one or more Title I schools receive less in total local funding than do the run of all non–Title I schools would suggest—not conclusively, but enough to warrant further inquiry—that the district gives Title I schools fewer local funds *because* they are Title I schools. Under the objective approach, the district would then have to demonstrate a legitimate reason for directing fewer local dollars, all told, to Title I than to other schools.

C. *The Reasonableness of the Department's 2016 Proposed Regulation*

In fact, the Department's 2016 proposed regulation would have operated in *exactly this way*. Instead of subjecting public officials to a searching prosecutorial examination of their innermost thoughts, the proposal asked whether a district was behaving consistently with a forbidden motive to supplant: whether it provided one or more Title I schools with less in the way of local funding, all told, than it provided on average to non–Title I schools.[48] If the district were acting in this manner, the proposed regulation recognized three common situations in which it would assume that the district nonetheless had a legitimate, nonsupplanting reason for giving more local funds to non–Title I schools than to Title I schools: when they had only one elementary, middle, or high school; when spending disparities between Title I and non–Title I schools disappeared if funding was considered by grade and not by school (because some grades cost more than others); or when disparities disappeared if spending on very small schools (less than 100 students) was omitted from the calculation.[49]

If none of these exceptions applied, the 2016 proposal would have required districts that spent fewer local dollars on Title I than on non–Title I schools to provide a nonsupplanting explanation for the disparity.[50] The Department's 2016 proposal, that is, invited districts to identify any "special circumstances related to a particular [non–Title I] school's population of disadvantaged students" that justified the district in spending heavily on that school.[51] Any such school would then be removed from the calculation of the district's overall funding on its non–Title I schools.[52] If doing so erased the funding disadvantage for Title I schools, the "supplement not supplant" requirement would be satisfied.[53]

47. As indeed many school districts do currently. See Heuer & Stullich, supra note 3.

48. Dep't of Educ., Issue Paper, supra note 9, at 5.

49. Id.

50. Id. at 6.

51. Id.

52. Id.

53. Id.

The Department thus proposed an entirely familiar and sensible approach to resolving the difficult motivational question posed by the "supplement not supplant" requirement—an approach that federal courts and agencies have used for decades in similar situations.

In fact, the ESSA—Congress's 2015 reauthorization of the ESEA—rather clearly *invites* the Department to use this objective approach. First, the ESSA for the first time requires districts to collect and publicly report on exactly how many local, state, and federal dollars—*including, explicitly, dollars devoted to teacher salaries*—they spend on each of their schools.[54] In addition, as mentioned earlier, the ESSA for the first time requires districts to "demonstrate" that their way of allocating local funds is not designed to use Title I funds to supplant local dollars.[55] The ESSA's first addition gives the Department everything it needs to take the initial step in the objective approach: comparing *all* of the local funding of Title I and non–Title I schools to see whether the former schools receive fewer local dollars than the latter ones. The second addition invites the Department to do exactly what the 2016 regulation proposed: require districts that act consistently with a motive to supplant by spending less on Title I schools than on other schools, to "demonstrate" a legitimate, educationally sound reason for spending local funds as they do.

To be sure, it is possible to improve upon the Department's 2016 proposal. First, exceptions should be added for other common, educationally sound reasons for directing fewer local dollars to Title I than to other schools—e.g., unpredictable emergencies associated with floods, fire, and the like. Additionally, the Department should broaden the definition of acceptable reasons for funding non–Title I schools more richly than Title I schools. The definition in the 2016 proposal encompassed any policy that serves the needs of *disadvantaged* students in non–Title I schools.[56] The Department might additionally have credited policies that equally serve important educational or learning needs of *all* of the district's school children in ways that cannot be accomplished as well or better without spending more money on non–Title I than on Title I schools.[57] If, for example, a non–Title I school is shown to be the least expensive location for equipment needed to expand internet access to all

54. Every Student Succeeds Act, Pub. L. No. 114-95, § 1111(h)(1)(C)(x), 129 Stat. 1802, 1849 (2015) (codified as amended in scattered sections of 20 U.S.C. (Supp. III) (requiring districts to report "per-pupil expenditures of Federal, State, and local funds, *including actual personnel expenditures* and actual nonpersonnel expenditures of Federal, State, and local funds, disaggregated by source of funds, for . . . each school . . . for the preceding fiscal year" (emphasis added)).

55. Id. §§ 1012, 1118(b)(1), 129 Stat. at 1875.

56. Dep't of Educ., Issue Paper, supra note 9, at 6.

57. This "less restrictive means" approach mirrors established Title VII doctrine, under which an explanation proffered by a defendant for using an employment test with a disparate negative effect on racial minorities may be rejected if "other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest." Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975).

of a district's schools, that would legitimately explain the disproportionate funding to the district's non–Title I schools. On the other hand, a policy of retaining effective teachers by paying them extra or letting them opt to work in non–Title I rather than Title I schools should not suffice. The benefits of that policy would not be equally available to all students in the district, and the objective could as easily be accomplished by giving effective teachers extra compensation for working in schools that currently have no or few experienced or effective teachers.

There thus are three good reasons for the approach taken in the Department's 2016 proposed regulation: (1) application of a comparatively nonintrusive objective test that avoids the many problems with a prosecutorial inquiry into the subjective motivations of officials responsible for allocating funds in thousands of districts nationwide,[58] (2) the clear precedents for the objective approach in federal courts' and agencies' implementation of laws adopted at the same time as the ESEA,[59] and (3) the ESSA's invitation to adopt the objective approach.[60] Certainly, the contrary, prosecutorial approach is not obviously *more* reasonable or *unambiguously* required by the statute's plain meaning. Under these circumstances, there would be every reason to defer to the interpretation offered by the Department in 2016 of a statute the Department has been responsible for interpreting and administering for decades.[61]

II. CRS OBJECTIONS TO THE PROPOSED REGULATION

Without mentioning the longstanding precedents and statutory invitation for the Department's objective approach, a CRS Report offered two objections to the proposed 2016 regulation.[62] These objections deserve close consideration given the nonpartisan CRS's reputation for high-quality analysis and the objections' likely impact on the Obama Administration's decision not to finalize its proposed regulation.

The CRS, an arm of the Library of Congress, provides research and analysis on request by members of Congress in aid of the legislative process.[63] Bound by "requirements for confidentiality, timeliness, accu-

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58. See supra notes 34–35 and accompanying text (explaining why a subjective test for assessing the motivation for government action is undesirable).

59. See supra notes 36–46 and accompanying text (discussing the objective approach to assessing motivation adopted by analogous federal statutory schemes).

60. See supra notes 54–55 and accompanying text (arguing the ESSA invites an objective approach to assessing motivation).

61. Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984) (describing the circumstances in which Congress should defer to an agency's interpretation of an ambiguous statute).

62. See Feder & Skinner, Proposed Regulations Memo, supra note 12, at 8–9.

63. See About CRS, Library Cong., http://www.loc.gov/crsinfo/about/ [http://perma.cc/ZZR7-VURF] (last updated Feb. 19, 2016).

racy, objectivity, balance, and nonpartisanship,"[64] the CRS is respected on both sides of the aisle in both houses of Congress for providing members with rigorous analysis across the full spectrum of public policy questions.[65] On issues like the one under consideration here, on which most of the available policy analysis is generated by partisan interests,[66] the CRS often provides the only objective analysis of the issue at hand.

In addressing the Department's proposed "supplement not supplant" regulation, the CRS raised two objections—both matters of law as well as policy. First, the CRS suggested that the proposal ran afoul of a provision in the ESEA forbidding the Department to force districts to equalize per-pupil spending (the "equalization objection").[67] According to the CRS, a reviewing court would likely hold that the proposed regulation, which would "require Title I-A per-pupil expenditures to meet or exceed those of non–Title-I-A schools," exceeds the Department of Education's rulemaking authority.[68]

The CRS also contended that the proposal violated a caveat in the ESEA's longstanding "comparability of services" rule.[69] At the same time as Congress adopted the "supplement not supplant" rule governing the "level of [local] *funds*" districts provide to Title I schools, it also required school districts accepting federal support to provide comparable "*services*" to Title I and non–Title I schools.[70] To comply with this requirement, districts must show that they have a district-wide salary schedule and that their policies ensure equivalent per-pupil numbers of teachers, administrators, and supplies across schools.[71] The law then adds an important caveat: The fact that some teachers make more than others based on seniority may not be considered in deciding whether there is per-pupil equivalence of services across schools.[72] In other words, if one

64. Ida A. Brudnick, Cong. Research Serv., RL33471, The Congressional Research Service and the American Legislative Process 2 (Apr. 12, 2011), http://fas.org/sgp/crs/misc/RL33471.pdf [http://perma.cc/29NU-AE2C] (describing the CRS's functions).

65. See 160 Cong. Rec. E1192 (daily ed. July 17, 2014) (extension of remarks of Hon. Larson) (honoring the CRS on its hundredth anniversary). But cf. Matthew R. Auer & Michael Cox, Appraising Climate Change Information Reported to Congress, 2 Int'l J. Climate Change Strategies & Mgmt. 118, 118 (2010) (noting the CRS "cites its own past publications more often than it cites peer-reviewed scholarship").

66. See, e.g., Ujifusa, supra note 10 (describing research recently presented by civil rights advocacy groups on the "supplement not supplant" issue).

67. See 20 U.S.C. § 6576 (2012) ("Nothing in this subchapter shall be construed to mandate equalized spending per pupil for a State, [district], or school.").

68. Feder & Skinner, Proposed Regulations Memo, supra note 12, at 8.

69. See id. at 4–5.

70. Elementary and Secondary Education Act Amendments of 1970, Pub. L. No. 91-230, § 109(a), 84 Stat. 121, 124 (codified as amended in scattered sections of 20 U.S.C.) (emphasis added).

71. Elementary and Secondary Education Act § 1118(c)(2)(A), 20 U.S.C. § 6321(c)(2)(A).

72. Id. § 6321(c)(2)(B).

school has ten rookie teachers and 300 students, and another school has ten much higher-paid long-term veterans for 300 students, the two schools are deemed to have "comparable" instructional services. The CRS concluded that, because Congress intended to retain the experience-based staff salary exception from the comparability of services, omitting the same exception from the proposed regulation constituted an unlawful attempt to require districts to include actual teacher salaries in their "supplement not supplant" calculations.[73]

As we develop below, the CRS's analysis in regard to both objections is faulty as a matter of both law and policy. Neither objection engages effectively with the express requirements and purposes of Title I and its "supplement not supplant" and "comparability of services" provisions, with well-established approaches to the problem of assessing the motivations of state and local public officials, or with accepted rules of statutory construction.

III. Responses to the Objections

The CRS's equalization objection is particularly puzzling because the proposed regulation plainly does not require equalized funding. Consistent with Title I's fundamental premise, the regulation assumes that Title I schools typically should receive *more* local, state, and federal funding per pupil than the *average* received by non–Title I schools[74]—the opposite of requiring *equal* per-pupil expenditures for each school considered *separately*. Additionally, through its three exceptions and its catch-all invitation, the proposed regulation recognizes many educationally sound reasons why non–Title I schools may receive more funding per student than Title I schools—and why individual Title I and non–Title I schools will receive different amounts of per-pupil funding than other schools in their own category.[75] The proposed regulation thus is no more a requirement of "equalization" than the Civil Rights Act of 1964 or the Age Discrimination Act is a requirement that all employers have a race- or age-balanced workforce.[76] Like those precedents, the proposed regulation allows unequal outcomes whenever there is a legitimate reason for them.

The "comparability of services" objection is more serious but also fails. As the CRS acknowledged,[77] if the caveat excluding teacher salaries and seniority is applied not only to the distribution of "services" (the sole

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73. Feder & Skinner, Proposed Regulations Memo, supra note 12, at 9.

74. Dep't of Educ., Issue Paper, supra note 9, at 5.

75. Id. at 5–6.

76. See supra notes 37–39 and accompanying text.

77. See Feder & Skinner, Proposed Regulations Memo, supra note 12, at 5 (noting "disparities in personnel expenditures between Title I-A schools and non–Title I-A schools" that are obscured when teacher salaries are omitted from calculations of local spending on schools).

focus of the comparability rule), but also to the distribution of "funds" (the subject of the distinct, "supplement not supplant" rule), districts could systematically assign their most experienced, most expensive teachers to non–Title I Schools and thus spend far *less* on instruction at Title I than at non–Title I schools. Doing so would directly contradict Title I's recognition that low-income schools need *more* funds for instruction. Even so, the CRS suggested that, without ever saying so, Congress intended the treatment of teacher salaries it wrote into the "comparability" rule to apply as well to the "supplement not supplant" rule.[78]

This interpretation is flawed. The "comparability" and "supplement not supplant" provisions are distinct, and they must be interpreted as distinct. As their words plainly signify, comparability applies only to the distribution of "services";[79] "supplement not supplant" applies only to the expenditure of "funds."[80] That distinction must be given operative significance, or each provision would render the other superfluous—violating a well-established rule against interpreting statutes to contain redundancies or superfluous provisions.[81]

Congress itself has always treated the two rules distinctly. It limits the comparability rule to service differentials other than those tied to differences in teacher seniority but has never applied a parallel caveat to

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78. Id. at 9 (arguing "a reviewing court could view [the] legislative history" with respect to the comparability of services "as relevant evidence of congressional intent to maintain current statutory requirements related to comparability determinations," including "via other methods").

79. The Elementary and Secondary Education Act of 1965 provides:

> [A] local educational agency may receive funds under this part only if State and local funds will be used in schools served under this part to provide *services* that, taken as a whole, are at least comparable to *services* in schools that are not receiving funds under this part . . . .
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> . . . [I]n the determination of expenditures per pupil from State and local funds, or instructional salaries per pupil from State and local funds, staff salary differentials for years of employment shall not be included in such determinations.

§ 1118(c), 20 U.S.C. § 6321(c) (2012) (emphasis added).

80. The Elementary and Secondary Education Act of 1965 provides:

> 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*.

Id. § 1118(b)(1), 20 U.S.C. § 6321(b)(1) (emphasis added).

81. E.g., Hibbs v. Winn, 542 U.S. 88, 101 (2004) (requiring statutes to be construed "so that effect is given to all its provisions [and] no part will be inoperative or superfluous" (internal quotation marks omitted) (quoting 2A N. Singer, Statutes and Statutory Construction § 46.06, at 181–86 (rev. 6th ed. 2000))); see also Caleb Nelson, What Is Textualism?, 91 Va. L. Rev. 347, 355 (2005) (discussing the "presumption against surplusage").

the "supplement not supplant" rule.[82] By reading into the statute a requirement Congress added in one place but left out of another, the CRS violated another established rule of statutory interpretation: that Congress is assumed to have intended "the exclusion of language from one statutory provision that is included in other provisions of the same statute."[83]

Congress has perfectly sensible—indeed, compelling—reasons for treating the distribution of *services* and *funds* differently in regard to teacher seniority and salaries. Absent the "teacher seniority" caveat, the requirement of comparable teacher *services* might be thought to depend on the quality of each individual teacher providing services. If that were so, the comparability provision would require districts to rate each teacher to identify how much "value added" each provides and then use the aggregate of all teachers' "value added" to see if different schools get less or more. Under these circumstances, Congress had three good reasons not to use teacher seniority or salary as a proxy for teacher quality: Doing so is: *inaccurate*;[84] *administratively burdensome*, given the many millions of teachers nationwide whom districts would have to rate individually; and *demoralizing* to teachers, some of whom districts would have to declare less worthy than others. The simple solution is the one the ESEA's comparability provision has long used: Treat each teacher as equal to all others by defining comparability of services in terms of pupil–teacher ratios and district-wide salary schedules.

The "supplement not supplant" rule is very different. It applies to something classically and inherently fungible: money. Because each dollar actually spent is no different from or more administratively burdensome to track than any other dollar, no matter what the dollar pays for, there is no reason for districts not to count *every* dollar spent on each of its schools, including dollars spent on teachers—which is exactly what the new Act requires districts to do and to report publicly.[85] Indeed, it is the CRS proposal to treat money spent on teachers differently from

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82. See the differences in the wording of the rules as emphasized in supra notes 79–80 and accompanying text.

83. E.g., Hamdan v. Rumsfeld, 548 U.S. 557, 578 (2006); see Russello v. United States, 464 U.S. 16, 23 (1983) (reasoning Congress must be assumed to have acted "intentionally and purposely in the disparate inclusion or exclusion" (internal quotation marks omitted) (quoting United States v. Wong Kim Bo, 472 F.2d 720, 722 (5th Cir. 1972))).

84. See, e.g., Donald Boyd et al., The Narrowing Gap in New York City Teacher Qualifications and Its Implications for Student Achievement in High-Poverty Schools, 27 J. Pol'y Analysis Mgmt. 793, 808–10 (2008) (finding teacher experience levels are not well correlated with teacher effectiveness as measured by student learning); Steven G. Rivkin et al., Teachers, Schools, and Academic Achievement, 73 Econometrica 417, 419, 449 (2005) (noting "there is little evidence that improvements [in teacher effectiveness] continue after the first three years" and concluding "experience is not significantly related to achievement following the initial years in the profession").

85. See 20 U.S.C. § 6311(h)(1)(C)(x) (Supp. III 2015).

money spent on everything else that resurrects all the problems Congress aimed to avoid through the "comparability of services" caveat: Its proposal is inaccurate (treating schools that spend vastly different amounts as if they spend the same), administratively burdensome (requiring the Department to segregate and track different types of dollars), and demeaning (to disadvantaged children on whom the CRS interpretation lets districts spend less).

It is thus entirely consistent for Congress to treat each teacher the same when talking about *services* and each dollar the same when talking about *spending*. And it makes perfect sense for the Department to use the *spending* data that Congress now requires districts to make public—in reports that must treat dollars spent on teachers the *same* as dollars spent on everything else—when applying the "supplement not supplant" rule.

The most distressing aspect of the CRS's position is that it leaves the Department with no viable way to determine whether districts intend to supplant local with federal dollars. According to the CRS, the reauthorization law neither "establish[es]"—nor, in its analysis, does it *allow*—"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."[86] In other words, the CRS's untenable conclusion is that the law forbidding districts to supplant local funds with federal dollars is unenforceable—even though the reauthorization law both retains and strengthens the "supplement not supplant" rule.

The CRS's analysis falls short because it mistakes the statute's *silence* on the Department's proposed test for the test's *prohibition*. But as the Supreme Court has held in regard to the Education Secretary's rulemaking authority, "if Congress left a 'gap' for the agency to fill—then we must uphold the Secretary's interpretation as long as it is reasonable."[87] And as this Piece has shown, faced at once with congressional silence on the applicable "supplanting" standard and with the crippling intractability of possible alternatives, the objective approach taken by the Department's 2016 proposed regulation is both reasonable and consistent with respected judicial and administrative precedents.[88]

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86. Feder & Skinner, Proposed Regulations Memo, supra note 12, at 4. The CRS Report does not defend the only alternative to the Department's objective test, under which the Department would inquire into the subjective beliefs and bona fides of thousands of local officials.

87. Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 550 U.S. 81, 89 (2007); see Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984) ("[A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.").

88. Tellingly, the CRS Report omitted a third objection to the Department's proposed regulation: that the regulation violated the ESSA's prohibition on any prescription of a specific methodology for allocating funds among Title I and non–Title I schools. See Press Release, Senator Lamar Alexander, Administration's 'Supplement Not Supplant' Regulation

CONCLUSION

It is well established that children from low-income families need more funds to succeed in schools than their more privileged counterparts.[89] Working from this premise, Congress designed Title I to provide compensatory funds to poor children. Since then, in the face of various attempts to undermine this goal, amendments to Title I have stood by this core principle, including by insisting that districts use Title I funds to supplement, not supplant, local funds for disadvantaged children.

Today, poor children face yet another threat to Title I's compensatory purpose: efforts to read the caveat barring the counting of teacher salaries for purposes of "comparability of *services*" into the rule requiring districts to supplement not supplant local with federal *funds*"—even though Congress has *omitted* that caveat from the "supplement not supplant" requirement for fifty years. Relying on this unpersuasive interpretation, and exploiting the difficulty of proving a subjective motivation to underspend on Title I schools, some districts seek to exclude from "supplement not supplant" consideration the many millions of dollars they spend on the salaries of their most effective and experienced teachers, who are disproportionately deployed to economically privileged non–Title I schools. If allowed to persist, this stratagem will continue providing many fewer local dollars to Title I schools than to other schools, in direct violation of Title I's compensatory purpose.

To preserve Title I's compensatory purpose, the Department of Education in 2016 crafted a reasonable proposed regulation, which used a long-established and well-respected method of identifying actions taken pursuant to an unlawful motivation—in this case, a motivation to supplant local with federal funds. It is unsurprising that the regulation came under fire from partisan constituencies aiming to preserve the local funds districts have been diverting to economically advantaged schools by concentrating their most experienced and effective teachers there and not counting the extra dollars they spend on those teachers. It is surprising, however—and regrettable—that the nonpartisan CRS lent consequential aid and comfort to this effort through poor legal reasoning—reasoning the Obama administration likely considered when abandoning this important proposal.

"Raises Grave Questions About What to Expect from Future Regulations" (May 18, 2016), http://www.alexander.senate.gov/public/index.cfm/pressreleases?ID=44D1CEFF-06D9-40A6-8124-07275D8B319F [http://perma.cc/VAM5-HJD2]. As the CRS evidently concluded, steps by the Department to forbid a particular allocative methodology—one that uses federal dollars to supplant local funding—are precisely what the statute's "supplement not supplant" provision requires and are not the same thing as prescribing any other particular methodology.

89. See supra note 22 and accompanying text.