Comments on
U.S. Department of Education
Draft Guidance on Title I Supplement Not Supplant (1/25/19)

TABLE OF CONTENTS

Introduction ............................................................................................................................................. 1

Note on scope and focus of comments .................................................................................................. 1

Highlights of our comments .................................................................................................................. 2

Section IV. Demonstrating LEA Compliance – Examples #1 and #2 ..................................................... 3

Section V. Frequently Asked Questions .................................................................................................. 4

5. LEA discretion as to which State and local funds it allocates to schools ........................................... 4

10. Specialized programming ..................................................................................................................... 4

12. Allowing LEA to use different methodologies for charter and non-charter schools ....................... 4

17. Posting LEA’s allocation methodology [and engagement of families and others] ......................... 5

22. Must an SEA approve an LEA’s methodology for allocating State and local funds .................... 6

24. Are there LEAs that, in whole or part, do not need to comply with ESEA section 1118(b)(2)? .... 6

Section VI. Resources Not Allocated to Schools .................................................................................... 12

Omissions from the Guidance: 2 Major Components of the SNS General Rule ................................... 12

A. State Education Agency Funding Actions for Which SNS Requirements Are Applicable ........... 13

B. Funds Available for the Education of Participating Students (Targeted Assistance Schools) ....... 14

VII. Excluding Supplemental State and Local Funds from a Determination of Supplanting ............ 16-32
Introduction

The Center for Law an Education (CLE) welcomes this opportunity to comment on the Department’s draft Title I Supplement Not Supplant guidance.

CLE’s mission is to help make the right of every child to a high-quality education a reality and to help enable communities to address their own education problems effectively, with an emphasis on assistance to low-income students. Over the course of its 50 years, CLE, in representing the interests of low-income children and their families, has worked extensively on Title I – from a focus on implementation problems with the Act in the early years, to a consistent emphasis on including and strengthening program quality provisions and family engagement provisions in the Act beginning in the 1980s, providing training on those provisions, developing and carrying out collaborative programs with schools and families to implement those provisions effectively, and providing detailed and extensive comments on NPRMs, as well as serving as the “elbow advisor” to the parent members of negotiated rulemaking after prior reauthorizations.

Note on scope and focus of these comments

As you will see, we are not seeking through these comments to revisit (directly or indirectly) the dispute over the regulations that were adopted in 2016 and then withdrawn. At the same time, it is important to recognize that:

(a) The supplement not supplant (SNS) and comparability concepts and provisions were intended to work hand-in-hand so that (i) Title I schools, which have higher concentrations of low-income students than the non-Title I schools of a district, start out with at least comparable levels of State and local resources to the non-Title I schools serving a population of relatively higher-income (and typically higher-wealth) families and their children, and (ii) the Title I funds would be used to truly supplement that even base;

(b) Schools with substantially unequal budgets for instructional personnel, who are surely their key educational asset (whether it allows some schools to provide more staff per students and/or to hire and retain more highly paid teachers) are just as surely not substantially comparable, yet the interpretation of the comparability requirement has long allowed LEAs to draw the opposite conclusion.

Thus, beyond the parameters of these comments, we believe it is important for the Department to exercise leadership in addressing that central issue – through some mix of proactive non-regulatory guidance, revision of the comparability regulations, seeking legislative amendment to the comparability provision, using discretionary funds for activities that provide more relevant data and research, supporting the collaborative development of options for better ensuring comparability and incentivizing their voluntary adoption, working with state- and local-level policy makers, administrators, educators, and advocates to address the issue.

Further, the omission of comments here that revisit the principal issues addressed in the 2016 SNS regulations that were issued and later withdrawn is not intended as an implicit comment on them. Given the continued importance of the issue, the comments of others who may provide additional commentary here on the non-regulatory guidance, two years later, should be taken seriously on their merits, without being dismissed or disadvantaged as a result of those earlier events.
Those issues aside, we regard the draft as a good-faith effort to provide helpful guidance on the SNS requirement, and we provide these comments in that spirit, notwithstanding that we have identified, for example, some major omissions and in one case a major provision for which the guidance in our view needs to be entirely rethought and rewritten in order to comply with, rather than undermine, important requirements, principles, and purposes of the Act.

Some highlights of our comments

[Please note that while these brief highlights indicate some of the rationale for our comments and recommendations, that rationale can be assessed only by also reviewing the more detailed analysis in the comments that follow.]

- We applaud the recognition in the guidance that the general rule for supplement not supplant in section 1118(b)(1) of the Act extends beyond the requirement in section 1118(b)(2) for the LEA to develop a methodology for how it will allocate funds to schools in a manner that complies with SNS, and that under (b)(1), the LEA must also apply SNS to funds it retains at the LEA level to provide services and assistance to schools. [Section VI on resources not allocated to schools.] However, by the explicit terms of (b)(1), it also requires SNS to be applied to two other major areas that are entirely omitted from the guidance:
  - Because (b)(1) provides that “a State educational agency or local educational agency” shall use the Title I funds only to supplant and not supplant funds that would, in the absence of the Title funds, be available for the education of students participating in Title I programs, SNS must be applied to funds allocated by the SEA itself or retained by it to provide assistance or services to schools.
  - Because (b)(1) is stated in terms of the funds “available for the education of students participating in [Title I programs]” (rather than in terms of funds allocated to Title I schools), SNS applicability does not stop at the school door in the case of targeted assistance schools, where participating students are only a subset of the school’s students. It requires that the Title I funds used to serve those students supplement, rather than supplant, the state and local funds that would otherwise be spent on their education. Without that application, all the state and local funds that would otherwise go to the school might reach the school, but could then in significant part be diverted from the education of the participating students, allowing the Title I funds to supplant, rather than supplement, those funds. Nothing in ESSA’s new provision eliminating the need to identify that an individual cost or service supported by the Title I is supplemental bars or affects the implementation of this required application of SNS within targeted assistance schools. [Comments following Section VI]

- The inclusion of “specialized programming” as one of the factors that can result in unequal spending without running afoul of the SNS requirement is very problematic because a variety of such specialized programming found in non-Title I schools can often be the result of having substantial sums of State and local funds available that have been supplanted in Title I schools. The portion of the guidance citing that example needs to be significantly revised. [Frequently Asked Question (FAQ) #10]

- While we believe that transparency and the capacity of families and advocacy and community groups that represent them, as well as others, to be engaged in the process of developing State
and local policies and reviewing their implementation are always important, it is particularly important in this area given that SEAs and LEAs will be given enormous flexibility in selecting their own methodologies for implementing SNS. That need requires revision of the guidance. [FAQ #17 and #22]

- The draft’s exclusion from needing to comply with Sec. 1118(b)(2) in LEAs that have only one school or only Title I schools or a grade span served by only one school is not found in the Act. Nor, as our comments demonstrate, is their wholesale exclusion nevertheless necessitated by a lack of any means of applying SNS to the allocations the LEA makes to those schools. Equally important, the draft omits discussion of the application of the broader SNS requirement in Sec. 1118(b)(1) to each of these three situations, given (a) the Act’s requirement that the SEA must comply with SNS, with regard to the funds it allocates to schools (or retains in order to provide services and assistance to schools), and (b) the LEA capacity to apply SNS to a school that is the only school serving a grade span and other schools serving other grade bands, taking into account differences that are reasonably attributable to real differences between grade spans rather than between Title I and non-Title I schools. [FAQ #24]

- There are places where we believe the text itself is fine but additional clarification is needed to avoid misunderstanding. [For example FAQ #5]

- Last but far from least, the comments provide an extensive analysis of the issue addressed in the last section of the draft guidance [Section VII] – excluding supplemental state and local funds from a determination of supplanting (and comparability) under section 1118(d) of the Act – and call for major rethinking and rewriting of the entire guidance on this issue. The analysis describes how, because of otherwise positive trends, the current understanding of the provision that is reflected in the guidance (though has largely preceded it) allows much larger shares of State and local funds to actually be supplanted in Title I schools that would otherwise receive them, and how this undermines not only the SNS requirement and principle, but other central requirements, principles, and purposes that are central to the Act. It also provides a legal basis, as well as policy basis for allowing, and indeed requiring, revised guidance and interpretation that as much as possible supports those requirements, principles, and purposes of the Act. [Our comments on Section VII include their own summary of some of the key points made by the analysis.]

Section IV. Demonstrating LEA Compliance – Examples #1 and #2

We have no problems with the two examples. However, one clarification is needed. We agree that State and local funds distributed according to either example, as written, are not being supplanted. But by adopting either, the LEA has thereby has fully demonstrated compliance with SNS only if all State and local funds distributed to schools are distributed on that basis. Even when that formula is the main basis for allocating most of the funds distributed to schools, if there any additional funds distributed to schools outside of that basic allocation method, the LEA must separately demonstrate that they too are allocated in a way that meets the basic SNS requirement. While this is implicit [and see the response, in a different context, to Question 4, noting that “the supplement not supplant requirement applies to all State and local funds that an LEA uses for the education of students” (emphasis added)], it should be made explicit here to avoid confusion or belief that, having pointed to the main formula that fits the guidance, the job is done.
Section V. Frequently Asked Questions

Question 5. LEA discretion as to which State and local funds it allocates to schools

We have no issue with the substance of the response. However, in saying, “An LEA retains the discretion to determine which State and local funds it allocates to schools and which it does not,” the draft does not acknowledge that for many pots of State and local funds, the LEA may not have such discretion as a matter of State law and policy. Here and elsewhere, with similar statements about LEA discretion throughout the guidance, we suggest redrafting in a way that explicitly or implicitly makes such acknowledgement (while specifically indicating any instances where the discretion is truly the LEA’s, independent of any State direction).

Question 10. Specialized programming

The inclusion of “schools offering specialized programming” as an example of a feature of a school that would justify higher per-pupil funds, and thereby determine that the higher funds allocated to a non-Title I school on the basis of its having specialized programming which a Title I school lacks is not supplanting, is actually very problematic.

The causal relationship between the specialized programming and the additional funds can often (and perhaps more often) equally be seen in reverse: i.e., that the school is able to provide the specialized programming it now is putting those funds is because it received additional funding that the Title I schools did not. Funds that are received by a non-Title I school, but denied to a Title I school that would otherwise receive such funds as well, will allow the school to incur expenditures that the Title I school cannot afford. The fact that those additional funds are put into programming that isn’t found in the Title I school should not be the basis for immunizing the funds from SNS analysis. This is an impermissible loophole that undermines the rule – the use of extra State and local funds not allocated evenly for specialized programs and program features that Title I schools (for any of a variety of enrichment programs and add-ons, for example), by virtue of not having those additional funds, cannot afford to provide. (In addition, the ability of non-Title I schools to garner those can be related to the fact that it’s in a wealthier attendance area serving fewer low-income children and families, which can in turn give it an advantage in terms of more experienced staff with more skills in developing grants and securing funds, better and more developed relationships with key central office staff, and family members who may have both more skills and more time to apply to helping secure the funds.)

It is not enough to simply delete the reference to specialized programming. Silence on the issue would lead some LEAs to conclude that, while not one of the non-exhaustive list of examples cited, it is nevertheless allowable. Instead, the reference to it needs to be replaced with language that fully addresses the extent to which such programming will properly be treated as subject to SNS analysis and also narrowly on that basis carves out exceptions where, for example, a non-Title I school was constituted as a CTE school program that is not found in some or all the Title I schools, while also making it clear that even when specialized programming such as that, where funds legitimately allotted only to schools that have such specialized programming which meets a more carefully analysis (e.g. that it isn’t the additional funding that then allows the school to offer programming that Title I schools cannot
because their share of that funding was supplanted), two aspects of SNS analysis still apply: (a) it would apply to comparison of State and local funds allocations between non-Title I and Title I schools that offer this programming; and (b) Title I schools need to have been given the same opportunity to adopt that programming as non-Title I schools.

Question 12. Allowing LEA to use different methodologies for charter and non-charter schools.

Keeping in mind that (1) the SNS requirement isn’t about comparing charter to non-charter schools, and is instead about whether each Title I school is getting the same State and local funds they would get if they weren’t getting federal Title I funds,\(^1\) and (2) there are, as noted, legitimate reasons for allocating funds to charter schools differently from non-charter schools, the statement makes sense on its face. At the same time, we think there are problems that still need to be addressed. For one, a district (even a large urban one) may not have any charter schools that are not receiving Title I funds. Under this interpretation there would be no basis at all for determining whether the Title I charter schools are receiving the same State and local funds they would have received if they were not Title I funds. But meanwhile low-income children are concentrated more heavily in those schools and may not be getting the same resources -- or vice-versa. It seems that there should be a way of comparing the charter schools to the non-charter schools while taking into account legitimate differences in funding allocations. And if there is a way of doing so, shouldn’t it be applied more broadly than only in the case where there are no non-Title I charter schools? For example, there might be one or two non-Title I charters along with many Title I charters, and money is distributed to the Title I charters on the same basis as to the non-Title I charters, but all the charters are getting less funding than the non-charter schools, including non-Title I non-charter schools (or again, vice-versa), for reasons that are not legitimate under that analysis.

Question 17. Posting the LEA’s methodology for allocating State and local funds [and engagement of families and others]

(1) The flexibility now provided to LEAs for determining the methodology calls for greater transparency. Congress’s providing that flexibility in no way diminishes the importance of ensuring that Title I funds truly supplement, rather than supplant, any or all the State and local funds a school would otherwise receive. Along with the advantages of that flexibility come challenges in ensuring that the core principle is being met. The easier the access to this information, the more likely that the families of Title I students, community and advocacy groups representing them, and the staffs of their schools will understand it and be in a position to identify and seek to correct problems resulting from the methodology or its implementation. Having to request that information, of which they may not even be aware, creates a barrier that is not in the interest of those students and of fulfilling the law’s promise. The information should be posted on the website, as a cost-efficient way of making it accessible to all. In addition, though, (a) information should go out to all stakeholders through a mechanism(s) well calculated to reach about the existence of the information on the web site -- without which they are unlikely to know of its existence; and (b) it needs to be on the web in a place and format that is readily accessible to all of them.

\(^1\) And similarly, comparability is about comparability between Title I and non-Title I schools, not between charter and non-charter schools.
(2) The Act does not simply require that the LEA have a methodology for allocating State and local funds that ensures that each Title I school receives all the State and local funds it would otherwise receive if it were not a Title I school. The Act requires that the LEA must “demonstrate” that the methodology actually ensures that result. In this respect, it is unlike many other requirements in the Act. Demonstration entails showing that this result is achieved to an audience beyond the LEA’s administration. (a) This mandate further strengthens the need for making it public. (b) In addition, as indicated, by the language of the Act, it is clear that what should be shared is not simply the methodology, but the demonstration that the methodology that each Title I receives all the State and local funds that it would otherwise receive. We also recommend that the heading be revised to reflect that.

(3) The methodology should include identification of any funds that the LEA will exclude from the calculation of supplement not supplant under Sec. 1118(d), and explanation of the rationale and how it conforms. [But see our comments to Section VII. on the need for changes. The extent to which this provision is used, which results in allowing funds which would otherwise be provided to the Title I schools to be denied to those schools is, as noted there, a major issue.]

(4) For the reasons noted above, LEAs should develop, with the full and informed participation of families, advocacy and community organizations representing students and their families, and school personnel, and then implement policies and procedures for fully engaging them in the informed development of the methodology and in reviewing its implementation.

Question 22. Must an SEA approve an LEA’s methodology for allocating State and local funds for schools?

(1) The text correctly notes that the SEA must ensure that the LEA has a methodology for allocating State and local funds that ensues compliance with the requirements of SNS – which obviously cannot be done without reviewing that methodology. Thus, the statement in the draft that the SEA “may” request to review the methodology rather than that it “must” review the methodology is, at best, misleading and should be replaced by the latter language.

(2) Consistent with our comments to Question 17, this review needs to include review of the methodology that was used to exclude any State or local funds from the application of SNS under 1118(d).

(3) The SEA review should include communication with the people identified above (families of participating children in the Title I schools, advocates and community groups who represent those children and their families, and staff of those Title I schools) in order to better understand the effects of that methodology in determining its compliance.

Question 24. Are there LEAs that, in whole or in part, do not need to comply with ESEA section 1118(b)(2)?

The draft guidance states that an LEA need not comply if it has—

a. One school;
b. A grade span with a single school; or
c. Only Title I schools.
We do not believe that this language comports with the Act. The Act carves out none of these exceptions to the basic requirement [in section 1118(b)(1)], applicable to every Title I school, that all Title I funds be used only to supplement, rather than supplant, the State and local funds that would otherwise be available for the education of participating Title I students. Nor does the Act carve out these exceptions from the requirement in section 1118(b)(2) for the LEA to have a methodology for its allocation of State and local funds to schools, the more specific topic of this question. We recognize that the situations cited raise questions about whether the application of (b)(2) to them is in any way meaningful or determinable, despite the absence of anything in the Act excluding them from (b)(2) requirements. But the analysis below shows two things that require revision of the guidance here:

- First, the analysis shows that the key question under (b)(2) -- whether the LEA’s methodology for allocating 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 the Title I, Part A funds -- is relevant to these three situations. The LEA in each case makes decisions about how much of various portions of State and local funds will be allocated to each school, its methodology for making those allocations can be described, the question of whether a Title I school is receiving the same State and local funds it would otherwise receive is subject to meaningful analysis, and the possibility of a Title I school not receiving State or local funds that it would otherwise receive is not meaningless or indeterminate. (The relevance to two of these three situations is more obvious, but even in the third, an LEA with a single school, we believe it be so.) Where this is so, and in the absence of anything in the Act stating that the LEA need not comply, the LEA must develop and use such methodology (and, in our view, share it with relevant stakeholders and their representatives).

- Second, in all three of these cases, there are also important compliance aspects of the general requirement in (b)(1) that are not based on the LEA’s method for allocating funds to schools -- as identified in Section VI of the guide and in our identification of other aspects in the comments following Section VI. The guide needs to highlight that here, both (i) to avoid confusion and erroneous assumptions that, to the extent any of these cases do make (b)(2) inapplicable, (b)(1) is itself also inapplicable; and (ii) to clarify which of those obligations under (b)(1) are applicable in each case. There are three areas to which the general rule of SNS applies but not the methodology requirement in (b)(2). The first is recognized and discussed the guidance in Section VI. The second and third, as discussed in the section of our comments after Section VI. are explicitly covered by the language of the general and also need to be addressed guidance. The three are:

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2 The differences in the Act between this supplement not supplant requirement and the comparability requirement are instructive in looking at these three situations. Comparability, as the term suggests and as the Act requires, is based on comparing an LEA’s Title I schools with its non-Title I schools. If there is only 1 school or there are only Title I schools in the LEA, the comparability requirement, on its face, becomes inapplicable. (See also the discussion, below, of the difference between the comparability provision and SNS provision of the Act in the case of an LEA in which one grade span is served by only school.)

The SNS requirement, in contrast, is not stated as a comparison between Title I schools and other schools but simply as whether each Title I school is getting all the State and local funds it would otherwise receive. This is certainly not to say that looking at how funds are distributed to other schools is irrelevant to the determination. But as will be seen in the analysis below, (a) in some these cases, there actually are relevant ways to look at LEA allocations across multiple schools, (b) even when not, there are other relevant bases for applying the concept to LEA’s allocations, and (c) there are other facets of the basic that are not about the LEAs’s distribution of funds to schools and whose application to these three situations needs attention.

3 See our comments to FAQ #17 and #22.
1. State and local funds retained by the LEA to provide districtwide services or assistance to schools;
2. State funds which the SEA either allocates to schools or LEAs or are retains at the SEA level to provide services or assistance to schools or LEAs;
3. State or local funds within a targeted assistance school, in terms of whether those funds are then used for the education of the subset of students who are participating in the Title I program to the same extent that they would be in the absence of the Title I resources.

NOTE: To fully understand the comments that follow concerning these three aspects of SNS, it is probably useful to first jump ahead and read Section VI of the guidance and, in particular, the section of our comments that follows Section VI, which together describe these 3 aspects and their role in SNS.

A grade span with a single school:

At the outset, we note that in section 1118(c)(4), Congress has explicitly made the comparability provisions of the law inapplicable to LEAs that do not have more than one building for each grade span, but has chosen not to include a similar exclusion from the SNS requirements. This is not an inconsistent oversight on Congress’s part. It is, rather, consistent with the difference in the two standards – comparability explicitly depends on the ability to compare Title I schools with non-Title I schools, and, while we believe that there would be a way to make comparability of services determinations between schools serving different grade spans while accounting for differences in those grade spans, Congress chose not to require it. As discussed here, SNS requires a different inquiry – is the school receiving all the resources that it would otherwise have receive in the absence of Title I.5

Applicability of 1118(b)(2) methodology requirements? Yes

The response to Question 8 states that, in developing a methodology, an LEA may (but is not required to) consider whether to use a single districtwide methodology or instead a variable methodology/multiple methodologies based on grade band or school type, and we have no problem with that guidance. Where a law gives an LEA more than one option for meeting a requirement, however, it does not permit the LEA to choose the one option that is inapplicable to that LEA and then say that since that option does not apply to the LEA’s situation, it is exempted from compliance. A single districtwide methodology would encompass a Title I school that is the only district school serving a particular grade span.6 At the same time, keeping in mind that the inquiry is ultimately about the State and local funds that would otherwise be received, not about comparing schools, a single methodology is not the only means of making that determination for a single school. Consistent with the rest of the text under Question 8, the LEA has significant flexibility in coming up with a methodology appropriate to

4 “(4) INAPPLICABILITY. —This subsection [subsection (c), on comparability] shall not apply to a local educational agency that does not have more than one building for each grade span.”

5 As also noted, one aspect of this is that under SNS, for any funds for which the SEA itself controls the allocation to schools (either because it sends the funds directly to schools or tells LEAs specifically how they shall distribute the funds to schools) and for any funds it retains the funds at the State level in order to serve schools, the SEA must provide as much of those funds or services to Title I schools as they would receive if they were not Title I schools.

6 Note: The analysis here would also apply to an LEA in which a grade span is served by a single school that is not a Title I school, while another grade span is served only by Title I schools.
making the determination in this situation. And this can include factors relevant to different grade spans (including as the basis for a variable methodology) that would result in this school getting different allocations than the schools in other grade spans. But one of those factors cannot be (or be affected by) the resources the school is receiving from Title I. Consider an LEA faced with a cut in its State or local funding. Or an LEA that wants to increase funds retained in the central office for a new initiative. Under SNS, any reductions in funding for schools could not be based in part on the conclusion that Title I schools, because of their additional Title I funding, could absorb a disproportionate share of the State and local cuts in funds allocated to schools. Yet under the guidance a Title I school could be burdened with such disproportionate cuts simply because it is the only school serving a grade span. Thus, the methodology requirements of Sec. 1118(b)(2) remain applicable to the Title I school in this situation.

The guidance, instead, would expressly allow a district to supplant any State and local funds, up to the full amount of a school’s Title I allocation, thereby nullifying the supplementary impact of Title I funding. Further, in a high-poverty district with a single high school that, under the ranking criteria in Section 1113(a)(3), is required to be served by Title I, that requirement too could be nullified under the guidance by a decision to reduce the high school’s other funds.

Finally, exempting LEAs’ allocations to such schools from the requirements of SNS would also mean that the requirements of ESEA sections 1118(b)(1)-(2) and 1114(a)(2)(B) (as discussed in the draft’s response to Question 16) for ensuring that Title I funds are supplemental to, rather than supplanting, the State and local funds necessary to provide the services required by law for children with disabilities and English learners, thereby forcing the school to divert its Title I funds to achieve those requirements.

Applicability of other aspects of the general rule in Section 1118(b)(1) outside of the methodology requirement:

1. **SNS for funds retained by the LEA for districtwide services: Applicable.** While there may be some services that the district would not make available to a school serving this grade span that have nothing to do with its receipt of Title I funds, that would not be a departure from SNS. The general rule applies to this school for basically the same reasons and in the same way as the methodology requirement. The guidance properly notes (as discussed in Section VI and under Question 4) that SNS requires that LEA activities conducted with State and local funds retained at the LEA level must also be conducted in a manner that does not take into account a school’s Title I status. But it is important to clarify that this applies to the one Title I school serving all the district’s children in its grade span. Otherwise, the LEA could determine that this school’s “extra” resources as a result of its Title I funds make it unnecessary to provide the benefits of the LEA activity, in clear violation of the law.

2. **SNS for funds the SEA either allocates to schools and LEAs or retains for providing services to schools and LEAs: Applicable.** They are applicable to this school and its LEA for the same reasons, discussed above, that State and local funds the LEA either allocates to schools or retains to provide services to schools are applicable. But in addition, they are applicable because in looking at how the State either allocates funds to schools and LEAs or uses funds to provide services (or directs LEAs on how to allocate State funds to schools), there will be lots of non-Title I schools at this grade level in the

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7 While Section 1113, in requiring Title I schools to be selected in rank order of low-income students, gives LEAs the option to do the rank ordering by grade spans for schools with low-income populations below 75%, it requires all schools at or above 75% to be selected in rank order, regardless of grade span.
State to help illustrate the way that the State distributes funds or provide services in the absence of Title I funds.

3. **SNS for state and local funds that are made available for the education of the subset of students participating in the Title I program within a targeted assistance school:** Applicable only if the school in this case is a targeted assistance school. This aspect of SNS is always relevant and capable of being applied in a targeted assistance school, since it looks at allocation of funds within the school.

An LEA in which all schools are Title I schools:

*Applicability of 1118(b)(2) methodology requirements? Yes*

First, it is important to recognize that the SNS requirement applies to each Title I school, not to the aggregate or average amount of State and local funds allocated to the Title I schools as a whole. In the absence of SNS (as under this draft), it would be perfectly possible for some Title I schools but not others to receive less than the full amount of State and local funds (and LEA-provided services) they would have received in the absence of Title I -- for example, schoolwide program schools (or the highest poverty schools) getting less State and local funds and services than they would otherwise receive based in part on the “extra” things they can already afford as a result of their larger Title I grants.\(^8\) And the converse is also possible, with some targeted assistance or lower-poverty-concentration Title I schools getting less State and local funds than they would otherwise get.

Second, there are other possibilities, in the absence of SNS requirements, for some or all of the schools in such a district not to receive the funds that they would otherwise receive if they were not receiving Title I funds. For example, without the SNS requirements, total State and local fund allocations to the schools could be reduced below the levels necessary to (a) meet requirements of State or local law – in contravention of the SNS obligation discussed under Question 15, or (b) provide the services require by law for children with disabilities and English learners in contravention of the SNS obligation discussed under Question 16 -- and instead rely in part on the Title I funds to have programs and services in place that meet the requirements of State, local, or federal law. And the temptation to do so may be greater in a year in which Title I grants significantly increase or total State or local revenues decrease.

*Applicability of other aspects of the general rule in Section 1118(b)(1) outside of the methodology requirement to these schools:*

1. **SNS for funds retained by the LEA for districtwide services:** Applicable. For the same reasons and in the way as SNS is applicable to the LEA’s allocation of State and local funds to this school (above).

2. **SNS for funds the SEA either allocates to schools or LEAs or retains to provide services to schools or LEAs (including any State funds for which the SEA directs the LEA on how to allocate):** Applicable. For the same reasons above that SNS is applicable to State and local funds the LEA either provides to schools or retains funds to provide services to its schools. In addition, as with the prior case of the Title I school that is the only school serving a grade span in this LEA, in this case, while the LEA has only Title I schools, that’s obviously not true for the SEA.

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\(^8\) Not only do schoolwide program schools typically (and higher-poverty Title I schools within a district definitively) receive significantly larger aggregate amounts of Title I funds than targeted assistance schools (or Title I schools with lower concentrations of low-income students), they get a significantly higher per-pupil allocation – while allocations are equal per low-income student, the low-income students in these schools constitute a larger proportion of the total students.
3. **SNS for state and local funds that are made available for the education of the subset of students participating in the Title I program within a targeted assistance school:** Applicable to any of these Title I schools that are targeted assistance schools. This aspect of SNS is always relevant and capable of being applied in a targeted assistance school, since it looks at allocation of funds within the school.

**An LEA with only one school**

**Applicability of 1118(b)(2) methodology requirements?** Yes, even though the issues may be more limited.

The guidance makes the point elsewhere that SNS does not limit discretion that LEAs have to determine how much funds to distribute to schools or retain at the LEA level. So when there is only one school in the district and thus no decisions to be about how to allocate funds among schools, it might seem as though nothing is left of this provision. But there are some SNS requirements on the method the LEA used to determine how much of the LEA’s State and local funds will be allocated to this one school. First, as stated by the guidance in response to FAQ #16, a Title I school must receive the State and local funds necessary to provide services required by law for children with disabilities and English learners. Title I funds cannot be used to supplant those required State and local funds. (Additionally, as we read the guidance’s response to FAQ #15, for activities required by State or local law and for which the LEA has funds that were specifically earmarked by the State or by local law for schools to carry out those activities, it seems that an LEA must allocate those funds to the school.)

More broadly, the question of whether that one school is receiving all the State and local funds it would otherwise receive if it were not receiving Title I funds, is not entirely meaningless. For example, if an increase in federal Title I funding was the basis for the LEA’s deciding to reduce the State and local funds that it had been allocating to the school, that would certainly seem to bring the requirement in (b)(2) into play. In any event, to the degree that an LEA with a single school has discretion over the amount of funds allocated to the school, there is no good reason for not applying the requirement for the LEA to articulate the methodology for its allocation and sharing it with the relevant stakeholders and their representatives (see our comments to FAQs #17 and #22), rather creating an exception that is not found in the Act -- even if the range of SNS issues that may arise in this situation is more limited.

**Applicability of other aspects of the general rule in Section 1118(b)(1) outside of the methodology requirement to this single school?**

1. **SNS for funds retained by the LEA for districtwide services:** Applicable, but of more limited scope.

   Applicability here would seem to be limited to the parallel issues noted in the applicability of 1118(b)(2) regarding funds allocated to the school, namely: (a) services required by law for children with disabilities and English learners; (b) activities required by State or local law and for which the

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9 This is not based on a rebuttable presumption that there is supplanting whenever Title I funds are used to support activities that were previously supported by State or local funds – a presumption that no longer exists under SNS. We are not presuming in this example that a reduction in the LEA’s allocation to the school is because of the Title I funding the school receives, merely speaking to a case in which that actually is the reason.

It might also be argued that, with only one school in the district, State and local funds that are withdrawn from the school because of an increase in Title funds are instead being retained by the LEA to provide services to the school. But that may not be the case – if, for example, it simply results in reducing the LEA’s budget, or if it is used for things other than services to the school (for example, planning or building a second school).
LEA has funds that were specifically earmarked by the State or by local law to carry out those activities; and (c) reduction in State or local resources for LEA services provided to schools for the education of Title I participating students, if the reduction were made because of Title I funds.

2. **SNS for funds the SEA either allocates to schools and LEAs or retains to provide services to schools and LEAs:** Applicable. As with the other two situations discussed above, in this case of a single Title I school in an LEA, the relevant reference point for the SEA’s action is how the SEA allocates (or directs the allocation of) funds, or uses funds it retains at the SEA level to provide services, to schools and LEAs across the State as the basis for determining whether funds or services this school or LEA would otherwise receive are being supplanted by its Title I funds.

3. **SNS for state and local funds that are made available for the education of the subset of students participating in the Title I program within a targeted assistance school:** Applicable if this is a targeted assistance school. Again, this aspect of SNS is always relevant, required, and capable of being applied in a targeted assistance school, since it looks at allocation of funds within the school.

### Section VI. Resources Not Allocated to Schools

We fully support the overall analysis and conclusions in this section, namely that while the specific requirement in section 1118(b)(2) -- for LEAs to demonstrate compliance with the supplement not supplant requirement in their allocations of State and local funds to schools by having a methodology which ensures that Title I funds are supplementing rather than supplanting the State and local funds that Title I schools would otherwise receive -- does not apply to State and local funds retained by the LEA for purposes of providing districtwide services to multiple or all schools, the general requirement for supplement not supplant in section 1118(b)(1) applies on its face to all State and local funds, and thus does require the LEA to provide those districtwide activities supported by State or local in a manner that is Title I neutral in ensuring that the Title I funds supplement rather than supplant any of those State or local funds.

For clarity, in the last sentence of the 3rd paragraph (on the example of the social worker who is supported by State and local funds retained at the district level) – stating that since the funding or the position is allocated to a school, it “therefore is not subject to the compliance demonstration” – we recommend that “after compliance demonstration” the words “under section 1118(b)(2)” be inserted.

### [After Section VI]

#### Omissions from the Guidance: 2 Major Components of the SNS General Rule

As noted in our comments on Section VI above, we are pleased that the guidance recognizes, in the case of funds retained at the LEA level for districtwide services, that there are components of the overall requirement for supplement not supplant under section 1118(b)(1) which apply even though they are not addressed by the methodology under 11118(b)(2) for an LEA’s allocation of State and local funds. There are two other major aspects of State and local funding that are also covered under the language of 1118(b)(1) while outside of the required methodology for LEA distribution of funds to schools under 1118(b)(2). Those two aspects are important but have not been identified and addressed anywhere in the draft. In order to provide accurate guidance on SNS, they must be.
A. State Education Agency Funding Actions for Which Supplement Not Supplant Requirements Are Applicable

On its face, the general provision in Section 1111(b)(1) imposes the exact same SNS requirement on the SEA as it does on the LEA: “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.” This in turn results in the following conclusions, which should be highlighted and explained in the guidance:

- As with the LEA provision, this applies both to funds that the agency allocates and funds the agency retains to provide services.
- For the SEA, this applies not only to any funds or services it provides directly to schools but also to funds and services it provides to LEAs – i.e., under the terms of the Act, it must provide the same funds and services to LEAs that the LEAs would receive in the absence of Title I funds. Otherwise, LEAs in turn could receive less funds or services available for the education of students participating in Title I programs. This is most obvious in the case of an LEA that has only one school or only Title I schools (as well as in the case of an LEA that has a single Title I school for a grade span, if there are funds or services that the SEA directs to that grade span). But it also applies to other LEAs -- reducing SEA allocations or services to LEAs based on their level of Title I allocations would in turn reduce the LEA’s allocations to its Title I schools.
- In the case of the SEA, it would also apply to allocations of any SEA decisions that direct the allocation of State or local funds or services by LEAs.
- As discussed in Section VI. of the guide, the LEA’s allocations to schools, but not its use of funds it retains to provide services to schools, are also subject to the methodology requirement in 1118(b)(2). In the case of SEAs, neither type of use is subject to the methodology requirement, which only applies to LEAs’ allocations of funds.
- In applying this requirement, the scope of analysis is obviously different – for the LEA, the schools funded by or provided services by the LEA, i.e., the district schools; for the SEA, the entire set of LEAs and schools in the State.

10 See also our analysis on FAQ #24, above, concerning the need to address the applicability of Sec. 1118(b)(1) to precisely these three situations.

11 The loss of funds to Title I schools in the LEA would inevitably occur in any case where the LEA is bound to distribute funds or services to schools on a uniform basis, and beyond that would be highly likely to produce that same result even without a requirement for uniform distribution, since it would be very unpalatable for an LEA to target the reduction in funds to the non-LEA schools, and the SEA (which is responsible for ensuring compliance with SNS), after reducing funds or services to LEAs based on their level of Title I funding, will hardly be in a position to tell the LEA not to do the same.

12 This aspect of the SEA requirement also is relevant to the guidance on FAQ #24.
B. Funds Made Available for the Education of Participating Title I Students (Targeted Assistance Schools)

Just as clearly as the application of the general rule to the SEA’s use of funds, above, the general rule’s requirement applies as stated to funds made available for the education of students participating in Title I programs, rather than to Title I schools: “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.”

In schoolwide program schools, this distinction is not meaningful – all students in such schools are participating in Title I programs, and so all State and local funds allocated to those schools are by definition funds made available for the education of students participating in Title I program, and the SNS question under paragraph (b)(1) becomes simply whether the Title I school is receiving the State and local funds it would otherwise receive. But in targeted schools, the distinction is highly significant – only a portion of the State and local funds allocated to the targeted assistance school for the education of all students is for the education of the students participating in Title I. And the question of whether the Title I funds are supplementing rather than supplanting State and local funds that would otherwise be made available for the education of the participating students [i.e., the question that must be answered under paragraph (b)(1)] cannot be answered in targeted assistance schools solely by looking at the methodology for allocating all State and local funds to the school under (b)(2). The State and local funds that would otherwise be available for those participating students cannot be diminished.

The possibility for supplanting those funds for those students would be quite palpable in the absence of that requirement. At one end, the Title I funds could be used in place of other funds that had been and would, in the absence of Title I, be spent on the education of those children, and those funds could then be spent on a program within the school in which few or none of those children (i.e., those who are failing, or most at risk of failing, to meet the State’s academic standards) are currently participating (e.g., the institution of advanced placement classes or the development and institution of enriched curricula or programs specifically targeted at students who are meeting the state standards so that they continue to be challenged and deepen their understanding). In that case, while the school is getting all the State and local funds it would otherwise get, and the Title I funds are being used solely for the education of participating students, those funds would not supplement the State and local funding for those students at all – the effect of Title I funding would be to provide 0 increase in the net funding available to serve Title I students, and instead only an increase in funding for non-Title I students. At the other end, the State and local funds that would otherwise be spent on these students and are supplanted by the Title I funds could, in the absence of the SNS requirements as articulated in 1118(b)(1), be used for more general purposes that arguably or clearly benefit all students in the school. In that case, while not all of that State and local funding otherwise available for the education of the Title I students would cease to be spent on them, most of it would be. Assume, for example, that in a targeted assistance school, 20% of the students are identified for participation in the Title I program. Then something on the order of one of every five dollars (obviously the precise proportion of funds might vary some from the percentage of participating students) that would have gone to their education would still typically go to their education, while 4 of the 5 would go to the education other students not in the program, including those in different grades and classes from themselves. In other words, in either case we needn’t go back to the bad old early days of Title, before there were any SNS requirements and Title I funds were found to have been spent in some schools on band uniforms or a swimming pool, in order to see that without this internal school requirement for SNS in targeted schools, necessitated by the terms of Section 1118(b)(1), the very purpose of Title I in targeted
assistance schools (and what distinguishes them from schoolwide program schools) -- providing additional resources, beyond what State and local funds would otherwise provide, for the education of the participating, low-achieving students -- would be subverted, even if the Title I funds are specifically targeted to those children and even if the State and local funds that get freed up and diverted are used for what would otherwise be a legitimate educational purpose but in large part or in whole not for the education of these children.\footnote{Responsibility under the Act for ensuring that there is no action such as this, which would clearly supplant State or local funds that would otherwise be available for the education of the participating Title I students in a targeted assistance school, cannot be avoided by pointing to the opening language of Section 1111(b), which states that “[a] State educational agency or local educational agency shall use Federal received under this part only to supplement the funds . . . .” and saying that it wasn’t the action of the SEA or LEA, but of a school, which isn’t encompassed in the provision. For legal purposes, the LEA includes the schools that are part of, and run under the auspices of, the LEA. Actions by school officials in their official capacity are actions of the LEA.}

Finally, nothing in the changes ESSA made to SNS for targeted assistance schools bars or lessens the requirement in Section 1118(b)(1) to ensure that the Title I funds supplement rather than supplant any the State and local funds that would otherwise be available for the education of the participating students. In particular, nothing in this requirement contravenes or is inconsistent with the new provision in Section 1118(b)(3) that no LEA may be required to identify that an individual cost or service supported by the Title I funds is supplemental. The inquiry required here has nothing to do with identifying individual costs or services supported by Title I funds. Instead the inquiry here is whether the availability of the Title I funds, completely regardless of whatever particular allowable costs or services they support, has supplemented or supplanted any State or local funds that would otherwise be available for the education of these children – i.e., not what’s happened to the Title I dollars in those specific terms, but what’s happened to the State and local dollars that would otherwise be available for the education of the identified students. [As a separate matter, the guidance (under Question 26) properly notes that the bar in Section 1118(b)(3) does not eliminate the separate requirement that all Title I funds must be used only for allowable costs, and that in targeted assistance programs the Title I funds may be used only to serve students who are failing, or most at risk of failing, to meet the State’s challenging academic standards. And nothing in the required aspect of SNS that we have identified here for targeted assistance schools reduces or weakens the bar established under Section 1118(b)(3) or adds anything to the requirements or limitations for allowable Title I-supported costs.]

[Comments continue on next page]
VII. Excluding Supplemental State and Local Funds from a Determination of Supplanting

All of the efforts that are going into drafting guidance about the meaning and implementation of SNS and into submitting comments on how to improve it lose much of their significance if the provision on excluding state and local funds from the requirements of SNS is allowed to swallow up larger and larger parts of the rule, in ways that undermine it, other key requirements in the Act, and core principles and purposes of the Act, a danger which the draft guidance fails to reduce.

Summary of this issue

The analysis below demonstrates the following:

A. In the absence of clearer, revised guidance, two long-term trends since the initial enactment of the SNS requirement and the exclusion provision -- (1) the overall standards-based, mission-focused educational reforms that have become central to, and at the core of, both (a) much of SEA/LEA policies and funding and (b) Title I requirements; and (2) an overall change in the way allowable costs are defined in many federal education program laws, including Title I Part A -- are being permitted to vastly increase the scope of the exclusion provision. The problem is not these important trends in themselves, which we believe are largely positive. Rather, the problem lies in the way they are improperly and unnecessarily being allowed to undermine the SNS requirement:

   (1) The positive convergence, resulting from education reform, between the mission and requirements of Title I and those at the core of State and local education systems is being permitted to mean that the alignment of State and local budgets to achieve that shared core mission and function (e.g. providing a high-quality educational system that enables all children to meet high standards, including attention to those who are not) is allowed to become the basis for determining that this very large share of State and local budgets can fall under the exception.

   (2) The positive change in Title I “allowable uses of funds” -- from a narrow focus on specific requirements that have to be documented for the spending of the Title I funds, to what is largely a single, very open-ended yet important requirement, that the Title funds can only be spent in the educational programs, serving Title I students, that meet certain programmatic requirements designed to advance that same mission, and the Title I funds, supplementing the State and local funds needed to provide that program, can then be used for virtually any activities or program components within that program -- similarly, in the absence of adequate and narrowly targeted guidance, becomes the basis for permitting that same State and local funding, when spent in non-Title I programs to be basis for eliminating the need to provide it to Title I schools.

B. It is important to recognize that when State and local funds are determined to fall under the exclusion exception, they are, in real terms with real impact, being supplanted rather than supplemented by federal funds. When State and local funds which would otherwise be allocated to Title I schools are denied to them on that basis, the reality is that Title I funds are supplanting, rather than supplementing, those State and local funds under the terms of the Act, and the Title I schools are receiving fewer overall funds than they otherwise would -- just as much as funds that are not provided to Title I schools without meeting the terms of the exception. This fact heavily argues for interpreting the exclusion provision in a way, that while consistent with the provision, does the least damage to the important principle and
requirement of supplementing rather than supplanting State and local funds that would otherwise go to Title I schools (with their higher concentrations of children from low-income families than the LEA’s other schools).

C. The potential for serious damage inconsistent with the Act’s purpose and intent from this supplanting grows to the extent that the exclusion is applied to a larger portion of State and local funds, and that damage is very substantial to a range of central requirements and principles of the Act:

- First, the application of the SNS principle and provision itself shrinks, and with it the State and local funds that would otherwise go to the education of Title I children.

- Second, the result of that exclusion is exactly the same as if the Title I schools instead received that State and local money but the LEA distributed Title I funds in the same amount as those State and local funds to non-Title I schools -- an obvious violation of the most basic requirement of the Act.

- Third, depending on the particular funds be excluded, the loss of those funds in Title I schools will in some cases greatly exceed the funds allocated to non-Title I schools -- for example, when those funds are allocated on a per-pupil basis for students having characteristics such as being from low-income families, failing or more at risk of failing to meet State standards, or any educational need or other characteristic present at higher rates among children from low-income families.

- And fourth, to the extent that the excluded funds rise to a significant portion of the total State and local funds that Title I schools would otherwise receive, one or both of two things happen. The schools are at increasing risk of no longer having the resources needed to meet the substantive programmatic requirements of the Act (as well as those of State local law and policy) related to providing all their participating students with a high-quality educational that meets their educational needs and enables them to achieve at the high-levels called for — thereby jeopardizing the fulfillment of the core educational requirements of the Act. Alternatively, in order to avoid that outcome, the LEA could concentrate the Title I funds in a smaller number of schools by increasing allocations to each school by the same amount lost in State and local funds, but thereby having to significantly reduce the number of schools and students that can be served by Title I, as a result of the supplanting. 14

All of these factors further counsel heavily toward not applying or interpreting the exclusion provision any further than is absolutely legally necessary.

D. There are a number of ways, some illustrated in the narrative below, that the draft guidance or omissions from it permit or foster these negative results, in part by failing to attend adequately to the trends discussed in A. above — for example, in dealing with (i) the question of what constitutes “supplemental” State and local funds, as distinguished from non-supplemental

14 Note that all these outcomes are not the result of SEAs or LEAs looking for a loophole from which to take unfair advantage (though they certainly would permit that), but rather from simply following the law as interpreted by this guidance.
funds, and (ii) what constitutes meeting the “intent and purposes” of Title I a coherent way that fosters rather than frustrates the Act’s purposes, in a context in which:

- attention to the mission of enabling all students to meet the State’s challenging academic standards (which most obviously includes seeking to enable all who are not meeting them or most at risk of not meeting them) through both a high-quality educational program and, as part of it, attention to individual learning needs, can be treated as “supplemental” (in the absence of a clear and adequate definition), despite having become a central, or even the central, core task to which State and local funds are now dedicated; and

- the allowable uses of federal funds in the Act, being no longer defined by a narrowly limited set of particular uses for the funds but instead can be used in a very open-ended way within the overall educational program of the participating students so long as that overall program (supported largely by State and local funds, supplemented by the Title I funds) meets the programmatic requirements of the Act, can become the basis for saying that spending funds on any activity that would be allowable in a Title I school meeting all those programmatic requirements can be detached from that context and full set of program requirements and provide the basis for saying that the activity, isolated from those full terms, meets the “intent and purposes of the Act” when provided in non-Title I, lower poverty schools, and then becomes part of the basis for denying the State and local funds to Title I schools.

Instead the meaning of the terms in the Act need to be carefully rethought so that these positive trends do not result in the various forms of damage to key provisions, principles, and purposes of the Act noted in C. above.

E. We do not claim any certainty about the best ways to revise the guidance in order to fully address these issues, which is a challenging but necessary task. However, we do believe it is useful to begin with looking at an example, which can be derived from the Act itself in section 1113, in which certain State and local funds are denied to any Title I school because it is a Title I school, and yet excluding those funds from supplement not supplant requirements would not only be permissible but would be essential, while at the same time, the exclusion has none of the problems identified above. The example has key properties that achieved that result, by being limited to State or local supplementary programs:

- That were provided only in schools that would otherwise be selected for Title I funding (or to extend the reach of schools that could be funded in rank order of poverty);

- That met the same terms as Title I programs;

- And as a result, while technically meeting or at least arguably meeting the definition of supplanting, in reality had no real supplanting effect on any Title I schools, and at the same time allowed the reach of Title I programs to be extended further down the rank order of highest poverty schools, so a clear exception to the SNS rule was needed to avoid what would be an absurd result.

F. The further the range of exclusions departs from the attributes of that ideal example – i.e., its necessity and its not doing damage to the requirements, principles, and purposes of the Act – the stronger the case for not permitting it. It is notable that this example derives from the time
before the trends discussed above were well under way (and when both Title I and state and local compensatory education programs were simpler), yet it still applies under current law.

G. Revisions of the guidance in order to bring the exception back to these core principles consistent with the overall Act could and should address (1) the definition of supplemental State and local funds, (2) programs that meet the intent and purposes of Title I, Part A, (3) other factors that are necessary to achieve this result, and (4) revision or deletion of all language in the current draft that are contrary to that revised interpretation of the provision, including all 3 of the examples of funds that can excluded.

Analysis

Positive trends resulting in convergence of federal, State, and local reforms

The problems arise in large part because of two major long-term trends in both federal and state and local policy since the SNS requirement was first enacted. From our point of view, these trends are very positive on the whole, and indeed CLE is proud of its part in fostering them. But they create a significant challenge in the interpretation of this particular provision, and that challenge has not been addressed, either in this guidance or prior to it.

- The first trend is the way in which federal policy and state and local policy have become more mission driven and have converged around the need, schoolwide and districtwide, to (a) provide high-quality education that enables all children to achieve and meet the challenging academic standards that all students are expected to attain and (b) address the needs of students failing or at risk of failing to meet those standards. (And cutting across both (a) and (b) is the systemwide need to attend to achievement gaps between particular populations – e.g., low-income students, students of different racial/ethnic groups, English learners, and students with disabilities – and other students.)

- The second, related trend is a change in the way that federal programs and their funding requirements are framed. Earlier, there were more federal grants that basically took the form of a distinct “program” with a pot of money attached and stated in terms of quite specific requirements for using the money to carry out the terms of the grant, and with obligations largely limited to what could be accomplished with that money, e.g., “the funds will be used to...” (much like many foundation grants). Over time, and in good part in response to valid criticism from States and localities related to having earmarked programs, separated from the major overall educational program, more federal programs have been constructed differently – with a set of requirements for what the school has to have or put in place (over the grant period) in its overall program in order to be eligible for the federal funds, which typically can be used quite flexibly to supplement the school’s other resources in that endeavor. The Title I school-level requirements in Sections 1114 and 1115 are examples of this, relating to core academic functions within the school – which could not be carried with Title I funds alone. The Title I funds are to assist the school in doing them, with relatively little restriction on how or where within that overall endeavor the Title I funds are used. In that important sense, there’s no distinct, separate federal “program” in the school.15

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15 The Perkins Career and Technical Education Act is another example of this trend. Note for instance the local “Requirements for Uses of Funds” [Sec. 135(b): The provisions for section on eligible local uses of funds, which
It would be wrong to assume that this trend applies to the schoolwide programs under Section 1114, but not the targeted assistance schools under Section 1115. They too have a set of requirements for what the school’s core educational program for participating students must provide (for example, – things that taken together could not be carried out with federal funds alone – and some of these requirements are identical or similar to those for schoolwide program schools (e.g. an accelerated, high-quality curriculum), while others are specific to targeted assistance schools. 16 The main difference structurally is that, because Title I participants in a targeted assistance school are only those the school has identified from among those who are failing, or most at risk of failing, to meet the State’s challenging academic standards (in contrast to schoolwide program schools, where all students are participating) these federal requirements extend only to the educational program of that subset of students (though of course it will in many or most ways be the same program provided to all students). And while, in targeted assistance schools, the federal funds must be targeted and limited to supporting the education of those participating students and the SNS requirement in section 1118(b)(1) explicitly requires that those federal only be used to supplement the funds that would otherwise be made available from State and local sources for the education of participating students,17 the change made by ESSA to not require LEAs to identify that a particular individual cost or service is supplemental is consistent with the overall trend we’ve described – here are the requirements for the school’s educational program being supported by the federal funds in addition to State and local funds, and there’s no concern for which of the components of that program are being directly supported by the federal, as distinct from State and local, funds.

Impact of those positive trends being misapplied in ways that allow much larger shares of State and local budgets to be denied to Title I programs as the exception to SNS swallows more of the rule

These two long-term trends – (1) the convergence of both federal policy and state and local policy around standards-based comprehensive school reform focused on the broad range of core elements of schools’ educational programs, including the specific educational needs of students not meeting or most at risk of not meeting those standards, and (2) the movement away from federal programs funding a distinct set of federal activities and toward flexi

used to be stated in terms of requirements for the particular uses of different pots of the federal funds, is now stated as “Funds made available to eligible recipients under this part shall be used to support career and technical education programs that . . . ,” with specific elements of what the CTE programs must have in order to get the federal funds, rather than specifics of what the federal funds must pay for – a change that began in the 1980s.

16 And conversely, among the section 1114 schoolwide program requirements are those that require that the comprehensive needs assessment of the entire to school and the schoolwide plan based on that assessment to particularly address the needs of those children not meeting or at risk of not meeting State standards.

17 See our discussion above (after Section VI) of the significance of the Act’s framing the SNS provision in terms of the funds available for the education of students participating in Title I, rather than funds available to Title I schools.
a. As a result of the State and local standards-based policy reforms noted above, a very large portion of State and local funds and resources are now, as part of the basic education structure in States and districts, going toward boosting achievement by providing and improving the components of the core education program provided to students (including curriculum, instruction, professional development, and more) and attending to the education and needs of students having difficulty mastering the attention to the educational needs of students challenged to master the State standards that are the focus of Title I.\(^\text{18}\) So, without some significant revision in the guidance and understanding of SNS and its exclusion provision, a vast portion of those State and local core budgets can now be said to be going to programs that meet the intent and purposes of Title I – and on that basis be withdrawn from the Title I schools that would otherwise receive them.

b. As a result of the changes over time in the federal policy approach to the uses of federal funds noted above – moving away from specific detailed restrictions on the particular uses of the federal funds, toward a very broad and open-ended provision for how the federal funds themselves are spent, so long as they are spent in by a set of requirements for what the overall educational program of participating students,\(^\text{19}\) funded largely with State and local resources but supplemented with federal funds, must provide. That’s what now counts, not which specific activities in that program the federal funds cover. And, again in the absence of significant revision of the guidance and understanding of SNS, any of that wide array of potential uses of federal funds each becomes the basis for declaring that State and local resources that are used for (and indeed are the primary sources for) supporting those activities are thereby meeting the intent and purposes of the Act – and on that basis be withdrawn from Title I schools.\(^\text{20}\)

**What flows from that are four essential points for dealing with SNS:**

- First, the allowable uses of federal funds are the very same wide-ranging set of uses within the overall educational program of participating students that are being paid for with State and local funds.

- Second, the bulk of those State and local funds are also distributed, through mechanisms that have become a basic part of the State and local budgeting, to all the other non-Title I schools (though sometimes in lesser amounts to some schools depending on the basis for particular pots of funds, such as assistance to help schools meet the needs of students with particular characteristics). And because of State and local reform, it is all the more likely that in those other schools, much of those State and local funds are also being used to support one or more elements of the overall program that are required in the educational programs of Title I students.

\(^\text{18}\) And as noted above, both types of components are called for in both schoolwide programs and targeted assistance programs, even though the lens for the latter is whether those components are provided in the overall educational programs of the participating students.

\(^\text{19}\) Again, this means the overall educational program for all students in schoolwide program schools and for the subset of participating students in a targeted assistance school.

\(^\text{20}\) As discussed below, these trends have also been allowed to undercut the limitation of the exclusion to “supplemental” State and local funds in terms of its having any clear meaning that would prevent the vast expansion of State and local funds that can be excluded.
• Third, and most crucially, if on that basis those State and local funds are deemed to meet the criteria for the exclusion provision and are then not distributed to the Title I schools that would otherwise receive them, the Title I program essentially falls apart – because as noted above, the overall educational program that is provided to Title I students and that must meet the Title I requirements is primarily funded from State and local funds while supplemented by the federal funds. Take away a significant portion of those State and local funds from Title I schools because they are used for things in non-Title I schools that are also allowable uses of federal funds in Title I schools, and you no longer have a program in the Title I schools that can meet those Title I requirements. And lest this seem like overstatement, keep in mind that there is nothing in this approach that would set any limit on the amount of State and local funds that could be excluded and denied to the Title I schools so long as they met the criteria as understood in this very open-ended way. Indeed, once deemed to be funds that are simply not subject to SNS requirements, the funds not provided to the school because of its Title I status could be as large as the school’s Title I grant, thereby entirely eliminating any supplemental impact of the Title I funds, or even larger than the Title I grant, leaving the school even worse off than if it had no Title I funds.

• In addition, as noted in the summary above, the impact of allowing State and local funds that would otherwise go to a Title I school to be supplanted and not be provided to that school – which is a real impact of applying the exception – has precisely the same effect21 as if those State and local funds were provided to the school but an equal amount of the Title I funding was instead diverted to non-Title I schools, which is of course impermissible under any reading of the Act – and which further puts in a stark light the need to limit this exception so that it doesn’t extend any further than is absolutely necessary.

So what is to be done?

Part of the rethinking and revision should aim at revisiting the interpretation of the Act’s requirement that the excluded funds are “expended in a school attendance area or school for programs that meet the intent and purposes of Title I.” The Act itself does not further define when a program meets those “intents and purposes.” The revisitation should consider both changes that can be made in the guidance to address the problems identified here without revising the regulation that defines the term22 and whether changes in interpretation necessary to avoid these problems also require either the drafting and promulgation of a revised regulation or withdrawal of the regulation in favor of guidance not constrained by the regulation and adequate to address the issues highlighted here.23

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21 The one difference between the two is the supplanting exception can potentially be even worse: Whereas the latter clearly illegal diversion of the Title I funds could go no further than the full amount of the Title I grant the school would otherwise receive, the supplanting of State and local funds that the school would otherwise receive, as noted elsewhere, can actually exceed the size of its Title I grant.

22 34 C.F.R. Sec. 200.79, which is included in this portion of the draft guidance.

23 The SNS regulations issued in 2016 and later withdrawn revised Sec 200.72 but not Sec 200.79. The revised and later withdrawn regulation for Sec. 200.72 did repeat the language in Section 1118(d) of the Act (though only with reference to SNS, since this regulation only addressed SNS, while subsection (d) of the Act provides for the same exclusion for purposes of comparability compliance), but did not go beyond the statutory language. The explanatory language accompanying the resolution, though, did provide an example of what the Secretary believed to be excludable under the provision: “(e.g., a State-funded program providing additional services only for
But it is at least as important also to **address the question of what State and local funds are “supplemental”** – a requirement in Section 1118(d) for any funds to be excluded, but a term that is not defined or otherwise discussed in the Act, the regulations, or the draft guidance. We assume that this is because the meaning of the term has been presumed to be clear and obvious. We now believe, however, that it is anything but clear and obvious, particularly in light of the developments over time in federal, State, and local policy and funding provisions that we’ve summarized above.

First, we believe that “supplemental State or local funds” are not the equivalent of, nor hinged on, the provision of supplementary services, and that the regulation in Sec. 200.79 seems to recognize that. It states that a program supported with supplemental State or local funds meets the intent and purposes of Title I, Part A if it meets either of two sets of criteria. In the second option, the program serves only who are failing or most at risk of failing to meet the State’s academic standards and provides supplementary services designed to meet their special educational needs. But the criteria for the first option, tied to some of the broad features of schoolwide reform and upgrading the school’s entire educational operation Title I programs, make no reference to supplementary services. Thus the Act’s requirement that the State and local funds to be excluded must be supplemental funds, which is distinct from the requirement that they serve the intent and purposes of Title I, Part A was not, in the eyes of those who drafted and approved the regulation, the same as requiring that they provide supplementary services to students, since this option allows for programs that do not provide such services to meet the standards for exclusion.

Instead, the only sensible reading is that the funds are supplemental to other funds. And indeed that is the sense in which Title I funds must also be supplemental under the basic supplement not supplant requirement. In the case of Title I funds, it is clear what they must be supplemental to – they must be supplemental to, rather than supplant, the funds that would, in the absence of the federal funds, be made available from State and local resources for the education of students participating in program assisted under Title I, Part A. But what funds are State and local programs supposed to be supplemental to in order to qualify for exclusion from SNS? The answer to that is far from clear. From one point of view, any pot of State or local funds is supplemental to any other pot of State or local funds, since it provides additional funds that are not provided by the other pot (except in any cases where the SEA or LEA reduces the funds otherwise available from one pot because of receipt of funds from the other). But adopting that point of view, however, makes all State and local funds supplemental (with that same very limited exception), thereby rendering the SNS requirement meaningless. Yet what other point of view, in which some State and local funds are supplemental and some are not, makes sense? Is there such a thing as a general basic allocation to schools that is regarded as not supplemental and everything else allocated to schools is supplemental (and therefore not subject to SNS)? Take, for example, the allocation formula provided in Example #1, which is put forward as a method that meets the SNS requirement, and with which we agree. However is the allocation per every student ($700/every child) “basic,” while all the additional allocations made on the basis of students with particular characteristics (presumably based on the LEA’s (or State’s) determination that on average there is an extra cost for students most at risk of not meeting State standards).” As our analysis indicates, however, this example is not immune from the problems we raise. In any event, neither the exclusion provision in the Act, the regulation in Sec. 200.79, nor the problems in applying them that are identified in our comments, was a subject of significant attention during the development, adoption, or withdrawal of the 2016 regulation.

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24 And perhaps the draft. But see our discussion of the examples below (under “Additional Comments”), including example #2, which may suggest otherwise.
providing an education sufficient to enable students to attain the skills and knowledge that, under the State’s all students are expected to achieve (or something along those lines) -- $250 more on average for students from low-income families, $500 more for an English learner, $1500/student with a disability, and $8500/pre-schooler thereby “supplemental”? Any decision to designate any portion of this formula as supplemental will mean that the formula used to exemplify the allocation of State and local funds in a way that is Title I neutral would not have to be carried out for Title I schools. If, contrary to most such formulas, the SEA or LEA required that one or more of these allocations were to be used only for the education of the students that generated that part of the allocation, or for some other specified purpose, would that somehow make the funds “supplemental,” and on that basis remove any obligation to make the allocation to Title I schools? Why? And doesn’t that become any easy way to evade the SNS requirements – easy because, assuming the average weightings the SEA or LEA has assigned for particular characteristics have some basis in reality, typically providing the students with that characteristic an education in an manner or at a qualitative level that meets State requirements is going to involve the school devoting extra resources to those students anyway, so it’s relatively easy to attribute those extra costs to this allocation rather than any other (as would also likely be the case with other mandates attached to the overall formula or particular components, and even though having to expend a precise amount of funds to each group or required task, which would be encouraged by this practice, may not be in the best educational interest of students). And could even that task be eliminated by simply asking the schools to indicate how much of the allocation will be devoted to things that meet either of the tests for purpose and effects? And in any event, what makes spending funds on these students or these particular activities “supplemental,” when deemed by the LEA or SEA to be necessary to accomplish the core goal of providing an education to all students that fulfills the terms and purposes established by the SEA or LEA?

If an LEA didn’t have a “single allocation” formula combining different factors such as this, but instead had “separate” pots for different factors, why would that result in a different analysis from the one above concerning the designation of some State or local funds as “supplemental”?

Surely the distinction cannot be based on whatever an LEA (or SEA) labels as “supplemental” -- thereby leaving it entirely up to the LEA (or State) to choose how much of State and local funds that would otherwise go to Title I schools can be diverted from those schools under this exception and without complying with some meaningful criteria that are in keeping with the overall requirements and purposes of the various provisions in the Act, including the potential for making the core SNS requirement in large part meaningless and in reality leaving Title I schools with far less State and local funds than they would otherwise receive. Keep in mind the recognition described above -- that (a) Title I funds, instead of being in a separate silo with precise requirements for what they can be spent on, are supplemental to the State and local funds in assisting schools to provide their core educational program to Title I students in a way that meets the educational program requirements found in Title I (and in many cases mirrored in the SEA’s or LEA’s education requirements), while (b) being largely indifferent as to how and where within that program the school chooses to spend those federal funds. When significant portions of the State and local funds that are the primary source for providing that program and would otherwise be allocated to that school if it were not a Title I school are denied, it is not only the supplement but not supplant requirement of Title I that is threatened by SEA or LEA determinations to designate those diverted State and local funds as “supplemental” in a manner that’s not narrowly tailored to the task so as not to undermine the basic SNS provision. It is a threat to the capacity of Title I schools to meet the core program requirements and the Act’s central purposes.

In summary, the task of identifying what makes some State and local funds supplemental, as well as the task of determining whether the programs supported by those State and local funds meet the intent and
purposes of Title I, in a way that’s consistent with and advances rather than undermines the other requirements and purposes of the Act, including SNS and school-level program requirements, is challenging and yet essential. But the challenges are thus greatly increased by the positive developments described earlier – and not simply because Title I funds can now be used for an enormous range of activities that are part of the core educational program provided to Title I students (whether they be all the students in a schoolwide program school, or the identified students in a targeted assistance school), but also because of State and local school reform policies that increasingly put many of the same or similar educational program elements and criteria found Title I (including particular attention to the learning needs of students who are struggling to meet the academic standards the State as set for all students) into the State and local systems’ core mission, core educational programs and initiatives, and in turn the State and local funding for that core. To call the increasingly large proportion of State and local funds that are designed to support that core effort “supplemental” because they increasingly serve the same purposes as the Title I funds is a misnomer and turns supplement not supplant on its head – Title I is supplementing the State and local systems’ core program educational mission and provisions but the State and local funding for that core thereby is treated as “supplemental,” which then eliminates the requirement for the federal funds to be supplemental. And it fails to provide an answer, in a way that is coherent and compatible with Title I and the reality of State and local funding, the question of what are these State and local funds supplemental to? In permitting the diversion of those funds that would otherwise support that core educational program in Title I schools and enable it meet the program requirements and goals, it undermines not just the principle of SNS; it undermines the very heart of the Act.

Going back to the roots for a key benchmark and approach for applying the exception

In trying to develop an approach to the determination of which State and local funds can be excluded from SNS in a way that furthers rather than undermines the Act’s requirements and goals, we believe it’s useful to start with an example of one context in which exclusion of certain State and local funds clearly does meet that test and indeed is necessary in order not to undermine the Act’s requirements and goals. The example has its roots in the period before most of the positive but complicating reforms in federal, State, and local policy, and closer to the enactment of the supplement not supplant requirement, so the issues were simpler, but the example still applies under current law and conditions.

At the time, schoolwide Title I programs were far from the norm, so a version of targeted assistance schools was the predominant framework, and Title I substantively consisted largely of a mechanism for getting additional dollars, from federal funds, into schools serving higher concentrations of students from low-income families, accompanied by three fiscal requirements – maintenance of effort, supplement not supplant, and comparability – designed to insure that the federal funds would be truly additional and to address the chronic state and local underfunding of higher-poverty schools within a district relative to the schools serving more higher-income families, so that the federal funds truly could go to providing additional funds on top of that base, in light of the greater educational needs in those higher-poverty Title I schools; and a requirement that the Title I funds be used solely to pay for additional, supplemental resources and educational activities only provided to the identified Title I students, beyond what was provided to all students. And there was little in the law, beyond these fiscal and supplementary service requirements, that focused on educational and instructional quality, let

25 They first became available as an option under the 1978 Act, but only for schools where 75% or more of the students were from low-income families.
alone (in this largely pre-standards-based reform era) a focus on comprehensive reform and improve
the quality of Title I schools. overall programs to enable Title I students to obtain the same basic and
advanced academic skills and knowledge expected for all students. Instead, as documented by
implementation research, most Title I-funded programs primarily consisted of very low-level and
unengaging remedial activity, in which, for example students were typically asked to read words and
sentences, but rarely asked to read whole paragraphs or whole stories and articles or to construe
meaning from the text they read out.

During this period, there were also State programs, sometimes called compensatory education
programs and/or referred to as State Title I programs, that were often shaped to be quite similar to the
Federal Title I program of that time in seeking to provide extra funding to serve low-income students. In
examining whether, or under what conditions considered to have met the requirements for exclusion
from supplement not supplant provisions, however, we specifically want to hone in on a related
provision of Title I under which the reverse was (and still is) permitted, namely skipping over a school for
Title I selection because of the funds available from such a State or local program. Under Section 1113
of the Act, the general rule for selecting school attendance areas (and thereby schools) within the
district to become Title I schools and to receive Title I funds, the LEA must start with the school
attendance area that has the highest proportion of its students coming from low-income families and
then proceed in rank order to each next-highest proportion attendance area.

Section 1113(b)(1)(D), however, allows the LEA to skip over a school or attendance that comes up as
having the next highest percentage of children from low-income (and move on to the next-highest
concentration school below that) if it meets certain conditions, the current law version of which is that:

(i) The school meets the comparability requirements of section 1118(c);

(ii) The school is receiving supplemental funds from other State or local sources that are spent
according to the requirements of section 1114 [schoolwide programs] or 1115 [targeted
assistance schools];

26 Language making that the required goal of the programs serving Title I students was added (at CLE’s instigation)
to the 1988 version of the Act, before the 1994 far-reaching, detailed overhaul of the Act in order to achieve that
end was enacted (and on which CLE’s co-director was an active member of the steering committee for the
commission that shaped much of the new Act).

27 Sec. 1113(a) and (4). More precisely, the LEA must start by selecting among all eligible attendances areas in the
district, regardless of grade span that have low-income concentrations above 75% (or, at the LEA’s discretion, 50%), and then if any Title I funds remain, continue selecting eligible school attendance areas in rank order until no
Title I funds are left, but for those remaining funds the LEA is free to continue rank and select either by grade span
or for the entire LEA. “Eligible attendance areas” are in general those whose poverty concentration is above the
district average (though there is an exception that allows the LEA to designate any attendance area or school as
eligible if at least 35% if the children are from low-income families). Being “eligible” for Title I designation funds
doesn’t mean the attendance/school will be designated and receive funds – that depends on how far down in the
ranking the Title I funds allow the LEA to go, which is in part at the discretion of the LEA as to the amount of funds
per school but is constrained by a formula that creates a minimum amount per Title I student.

28 Again, that the supplemental State or local funds “are spent according to the requirements of section 1114 or
1115” must be read to mean that the funds must be spent in a school that is meeting those requirements. That is
essentially the one requirement for uses of funds under those sections (along with the additional caveat that in
targeted assistance schools they be spent on the educational program of participating students), rather than any
more specific definition of allowable uses.
(iii) The funds expended from such other sources equal or exceed the amount that would be provided under Title I Part A.

Key features of this approach in relation the exclusion provision

These provisions originally were crafted with those State-created compensatory education programs, similar to Title I, in mind. At first blush this is not a school that, because of Title I, doesn’t receive State and local funds it would otherwise receive. It’s a school that, because of receiving certain state or local funds, doesn’t receive the Title I funds it would otherwise receive. But it also creates a SNS issue for which the exclusion standard becomes very relevant. This school is now receiving State and local funds that Title I schools are not receiving because of their Title I status – the basic SNS standard. On that basis, since meeting the definition of supplanting, could those other Title I schools (or even this school), say that denying it is not permissible and they should not be denied the same funds that they are being because of their Title I status? That may sound absurd – surely the supplement not supplant requirement should not lead to that result. But that is precisely what makes this the perfect example for the need for an exclusion provision – to create an exception to the SNS requirement where its application would produce absurd results. (And that is indeed the context in which the need for the provision arose and in which it was formulated and adopted.) So that is one important attribute, and arguably the most important, of this particular application.

Another critical feature lies in the requirements, quoted above, for a school to participate in and receive the funding from this State compensatory education program. Taken together, the three requirements -- that the services provided by the school’s other State and local funds are at least comparable to the services in other schools not receiving Title I funds; that the school, in receiving and using these supplemental funds, meets the programmatic requirements for either a schoolwide program or a targeted assistance schoolwide program; and that the supplementary State and local funds equal or exceed the Title I funds they would have received -- mean that these schools are fully functioning as if, and fully funded as if, they were Title I schools.

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29 One might ask whether Title I schools would have otherwise received the funds – but for purposes of discussion here, we can assume that under the terms of the State or local compensatory education program, the funds were available only to schools that were eligible for Title I and that would, applying the school ranking and selection criteria under Sec. 1113, be selected for Title I, but would get this State and local funding only if they were to forego their Title I funding. So any Title I school that would have been eligible for the State and local funds but either chose not to take them at the cost of giving up their Title I funds or was not given the option to do so fits. It is not particularly important for the points being made here which other Title I school or schools eligible to receive these ultimately would have actually been given the option to accept them. (Also, the school receiving the State compensatory education program funds, particularly if it has up to that point been a Title I school, could itself be viewed as a Title I school that was offered State and local funds but only on condition that it not be a Title I school.)

30 The clarification here that comparability means in terms of its “other” State and local funds is necessary in order to mean the same thing as it means in the comparability provision as it applies to Title I schools. The comparability provision here would not make sense, nor accomplish its goal, if it were not understood to apply to the State and local funds this school receives not including these supplemental State and local funds. As with Title I funds, the purpose of these funds is to provide additional services (and/or provide these services at a level) beyond what the other State and local funds it receives can provide. Including these funds in the comparability calculation would undermine its very purpose. And the provision in section 1113 allowing the LEA to skip a school that would otherwise get Title I funding would not make sense if it resulted in the school no longer being comparable in terms of its other State and local funds.
Regarding the condition that the State supplementary funds must be spent “according the requirements of either section 1114 or 1115,” under the structure of these school level sections, the basic requirement for uses of funds is that the funds can only be used in a school that meets the programmatic requirements of that section – comprehensive needs assessment, development and implementation of a comprehensive school that has various required program elements, etc. in section 1114 or the corresponding programmatic requirements in section 1115. Beyond that there is not a separate “uses of funds” provision in either of these sections. Thus, the school must actually meet the requirements of those two sections, not that the school simply uses the supplemental funds for any activity that would be permissible in a Title I school – which is the characterization in the guidance.

Another important feature of this program is that it operates only in a school:

- That is not merely Title I eligible but would otherwise have been selected as a Title I school, or,

- Alternatively, would have been the next highest poverty school(s) that would be served by Title I if there were more Title I fund. This latter situation was a common use of the State compensatory education programs – essentially expanding the number of schools that became Title I schools or their close equivalent. Thus, the State compensatory education programs that were essentially operating as the equivalent of a school’s Title I program in these ways extended beyond the skipping of a school under the section 1113 exception. They were also used to extend the number of Title I eligible schools that could be served: once the Title I funds for schools in a district were fully allocated to the highest poverty schools in rank order, the LEA could use these State funds to continue further down the list in rank order.

Together, these two uses underlay the creation of the exception to the SNS rule. And they reveal two more, critical features:

1. The impact here is to increase the number of Title-I-eligible schools in the district that can become Title I schools (or their full equivalent, in terms of program and funding). This is true in both cases above – in the first case, skipping a school, because it is providing the same program with State compensatory education funding allows the LEA to then go further down the rankings with its Title I funding; in the second because it is the equivalent State program and funding that is made available to the school(s) immediately below what Title I alone can fund.

2. Despite the non-neutral denial of these State funds to Title I schools in literal terms, in reality they did not in any meaningful sense reduce the State and local funds made available to Title I schools in the slightest. This is in stark contrast to the broader use of the exception (described in these comments) into which we have drifted and which the current draft would further ratify and permit.

Thus the exception as applied to State (or local programs) which meet these various conditions has none of the negative impacts on Title I schools and participants, and actually has positive impact on them, and the exception is created only to avoid an application to something that in fact is not actually supplanting despite meeting the definition and that would only serve to make the beneficial program impossible.
We need to return to that early focus on creating narrow exception(s) that have those or comparable criteria and features that do not undermine the core rule by diverting real funds from Title I programs. The combination of the above factors is important in ensuring that result. For example, it would not be acceptable for an LEA or SEA to say that an exception is necessary in order to provide State or local funds for a service because it simply won’t have enough funds if it has to distribute them to Title I schools as well as non-Title I schools, particularly if the service is one that will cost more in Title I schools with their typically higher number of children needing the service. That reasoning would be a direct repudiation of SNS. But more generally, given that application of the exception to SNS more broadly involves real supplanting that does real damage to the resources available to the programs of education serving Title I students, the exception needs to be limited to only situations where it is truly necessary. Otherwise, the application of the exception to allow an LEA or SEA to provide funds to non-Title I schools (including non-Title-I eligible schools) and then deny them to Title I schools fails to meet, and indeed undermines, the intent and purposes of Title I.

The further we get away from the key features of the approach described above, the greater the problems and negative effects of excluding State and local funds from the SNS provisions that would otherwise apply to them. The conclusion drawn from this example – that it makes no sense to apply the SNS requirement to this situation, even though the terms of the SNS requirement do themselves should be the core standard for the exception. Given the importance, in achieving the goals of Title I, of SNS in ensuring that Title I funds truly are supplementary, exclusion of funds from that core requirement should not be any greater than necessary.

Additional comments on the guidance for excluding funds from SNS

Necessary caveats about the exception

The Act provides that SEA or LEA may exclude State or local funds that meet the terms of Section 1118(d) from the determination of compliance with the supplement not supplant and comparability requirements. The guidance should point out two things:

- Nothing in the Act or this guidance requires or encourages SEAs or LEAs to do so.
- Nothing in this provision gives a State or local education agency the authority to withhold from Title I schools any funds that a State or local law or regulation requires to be distributed to those schools. The federal authority to permit SEAs and LEAs to exclude certain State and local funds that properly meet the definition of the exception in no way allows the federal government to authorize or allow SEAs or LEAs to withhold funds from Title I schools that State or law local requires them to distribute to those schools. In this sense, the exemption from the federal SNS requirement is distinct from the actual allocation of those funds, including any State or local requirements regarding that allocation.

Application of this analysis to the examples

Examples #1 and #3 – These two examples are quite similar in terms of providing certain services to a certain set of students who are not proficient (differing in targeted subject and in one case a targeted grade). The main difference is that in one case State law requires the services. In both cases local funds for this are allocated only to the non-Title I schools, with Title I funds being used to pay for the services
in the Title I schools. Title I funds are clearly being supplanted but the guidance says that neither is a violation because they meet the terms of the exclusion from the SNS requirements in that (a) the programs are supplemental (again without any coherent definition, consistent with the Act and its purposes, in the guidance or elsewhere as to what makes a program supplemental and whether that’s different from what makes the funds supplemental, the operative term under the Act); and (b) the programs are deemed to meet the intent and purposes of Title I. The fact that State law in one case mandated the services, which under SNS means that State or local funds provided for that purpose would have to be provided to Title I schools on that same basis, is made irrelevant because the draft concludes that SNS requirements do not apply at all here.

The Title I schools in both cases are denied these funds that they would otherwise receive because the program is addressing something that is likely a core central aim of the State and district (getting students who are not proficient to become proficient) that is also central to the aims of Title I and the funds, and because the funds are deemed supplemental even though they are being spent to carry out that core function. Further this is an instance where the non-Title I schools (with their lower concentration of low-income children) are getting the funds that the higher Title I school with its higher poverty population is not. Moreover, the loss to the Title I schools of local funds they would otherwise receive will typically be magnified: They will not simply lose the same amount of local funds that are going to the non-Title I schools; they will typically lose much more. In the typical or average case, non-Title I schools, serving more children from higher-income families, tend to have higher proficiency rates than the Title schools, serving higher concentrations of children from lower-income families, so the total amount of local funds that the Title I schools would otherwise receive for every non-proficient student, but which will now be supplanted, is likely to be substantially higher than the local amounts being spent in the non-Title I schools. Each of the four evils described earlier\(^{31}\), in terms of real damage to core requirements, principles, and purposes of the Act are evident here, all flowing from what should be a very narrow exception to supplement not supplant becoming a very broad one because of the increasing congruence between federal and state policy, the very broad allowable uses of federal funds, and the exclusion criteria improperly using those things as the basis for defining the scope of the exception.

**Example #2**—in which an SEA has an “A-F” school grading system which identifies “F” school as comprehensive support and improvement schools, but the guidance allows the LEA to allocate the State and local intervention funding for the comprehensive support and improvement only to non-Title I schools – also exemplifies the problems with the guidance and then adds some others.

First of all, as written, this example does not even seem to comply with the guidance, or alternatively the guidance could this by being interpreted in even more troubling ways than we thought. It does not appear on its face to meet either of the alternative criteria for meeting the “intent and purposes” test.

- On the one hand, there is no indication in the example that the program is limited to schools in which at least 40% of the children are from low-income families, which is part of the first alternative, for programs designed to promote schoolwide reform and upgrade the entire operation, etc.\(^{32}\)

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31 Described in paragraph C. of the summary of the issue at the beginning of this section (page 18).

32 If, however, the guidance intends to read this requirement as meaning not that the program is only used in schools at or above that 40% threshold but rather it can cover any program that goes to any or all non-Title I F
• On the other hand, the comprehensive support and improvement program simply cannot meet the alternative criteria, since it does not serve only students who are failing, or most at risk of failing, to meet the State’s standards. Being an F school, in any SEA’s grading system surely does not depend on having no student in the entire school who is proficient. (While it is possible to be at risk of failing to meet the standards, a student who has already demonstrated s/he is proficient would presumably not meet that criteria, but in any event even F schools identified in State grading systems do have multiple students who achieve at their states’ proficient levels.)

But even if the example were revised to indicate that the State and local funds were provided only to schools meeting the 40% threshold (contrary to the typical reality of such systems), it would still have the same problems identified more generally here and as applied to the other examples. And those problems play out in a particularly devastating way here. An SEA sets up a comprehensive program to address its lowest achieving schools, which is clearly a central component of the State’s overall system of educational improvement and enabling all children to meet its standards, and then denies the program to the portion of those lowest achieving schools who have the highest poverty rates (i.e. the Title I schools) because they are Title I schools and thus have the highest poverty rates? And not only can they be denied the LEA’s allocation of State and local funds on that basis, these highest poverty and educationally neediest schools can also be denied (a) any LEA services the LEA itself (supported with funds retained at the district level) provides under the program to other, non-Title I F schools; (b) any SEA funds allocated by the State to other, lower poverty non-Title I F schools; and (c) any services the SEA (with funds retained at the State level) provides directly to those other schools – because the general rule for supplement not supplant in section 1118(b)(1), which is normally applicable to each of these three sources of support as well, also becomes inapplicable when the guidance? Last but not least, keep in mind that the Title I F schools are getting no additional Title I funds resulting from their high numbers of low-achieving students; i.e., they get the same amount of Title I basic grant federal funds for each low-income student as a Title I school that has a much lower proportion of low-achieving students, since Title I allocations are based on the number of low-income students. So the harms of the permitted supplanting would be most heavily visited on the lowest performing Title I schools. Surely an interpretation of the SNS and exclusion provision that produces this result, which flies in the face of goals of the Act, cannot be accepted unless that interpretation were truly dictated by the Act and no other reasonable interpretation, in which the exception did less to swallow the rule, were possible. That is hardly the case here.

33 It might be argued that Title I F schools are getting additional federal resources, beyond the basic grant, as a result of being identified for comprehensive support and improvement activities under sections 1003 and 1111(d), based on the low performance of their students, and the activities and terms of the State- and locally-supported intervention mirrors those of the federal one. But there is nothing in the example, and nothing in the federal law that presumes that all Title I F schools in an LEA are actually selected and provided with that federally supported intervention. (SEAs may allocate the federal funds under section 1003 on a formula or competitive basis. And for funds that do reach the LEA, there is no requirement or assumption that the federal funds are sufficient to reach all Title I schools.)
The draft guidance’s summing up the meaning of the existing regulation defining when a program supported with supplemental State or local funds meets the intent of Title I Part A.

That sentence in the draft – “Thus a program meets the intent and purposes of Title I, Part A if it would be an allowable use of Title I, Part A funds were it implemented in a Title I schoolwide program or targeted assistance school” – is particularly problematic, over and above the more pervasive problems either fostered by or ignored by the guidance discussed here. It can easily be read to mean what indeed it seems to say – if it would be an allowable use of the Title I funds were it implemented in a Title I schoolwide program or targeted assistance school, it meets the test when implemented in any non-Title I school. But as noted above, what makes a use of funds allowable in a Title school has shifted over time away from any set of particulars for the funds. Instead, what makes it allowable in a Title I school is that it is going toward a “program” which meets the programmatic requirements of whichever of the two school-level sections of the Act is applicable to that school. A “program” does not meet the intent and purposes of Title I simply because it involves one of a myriad of uses of funds that is allowable in a Title I school program, without actually having such a program, meeting those programmatic requirements, in place beyond that one use.

Additional impact of the exclusion beyond supplement not supplant

In interpreting the exclusion provision, it is also important to recognize that such interpretation is doubly weighty. Under the terms of section 1118(d), any State or local funds which are interpreted to fall under the exclusion need not be counted for purposes of comparability as well as for purposes of supplement not supplant. So any use of funds treated as an exception to the SNS and on that basis withheld from Title I schools that would otherwise receive them while provided to non-Title I schools with lower concentrations of poverty will then also not be counted in determining whether the services provided with State and local funds in Title I schools were comparable to those in non-Title I schools – further reason not to allow exceptions that do in fact contribute both to State and local funds being supplanted in Title I schools and to the services provided by State and local resources in those schools not being comparable, unless absolutely necessary in the terms discussed in these comments.