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## Department of Education Issues Controversial Guidance on Distribution of Education Stabilization Funds

### Background

On March 27, 2020, Congress enacted the Coronavirus Aid, Relief, and Economic Security (“CARES”) Act in response to the Novel Coronavirus Disease 2019 (“COVID-19”). *See* H.R. 748. The CARES Act appropriated approximately \$30.75 billion to create an Education Stabilization Fund (“ESF”) to provide emergency funding for several education programs—including public K-12 schools, charter schools, and some private K-12 schools—in response to COVID-19. Allocation of ESF grants is statutorily tied to the allocation formulas established in Title I of the Elementary and Secondary Education Act (“ESEA”).

Using informal guidance, the U.S. Department of Education (“ED” or “the Department”) has indicated that local education agencies (“LEAs” or “school districts”) receiving federal emergency relief funds under the CARES Act must provide “equitable services” to private schools irrespective of the private school’s population of low-income or other at-risk student population. This differs from the equitable services statutory provision of the ESEA, which provides funding for low-income and other students at risk of not meeting state academic standards based on the relative proportion of eligible children residing in the district who are enrolled in the private school.

As discussed below, this guidance departs from both from the statutory text of CARES Act and previous Department guidance, resulting in confusion and uncertainty regarding the distribution of this much-needed emergency funding. Adding to the confusion, the Department provided in the guidance

document itself that its guidance does “not have the force and effect of law.” However, school districts and states seeking to take advantage of the much-needed funding and remain in compliance with the law generally rely on the Department’s interpretation of education-related statutes and regulations and are in a difficult position when such interpretation is in conflict with the statutory text.

### **The CARES Act Establishes Education Stabilization Fund**

As relevant to K-12 schools, the CARES Act authorized the Department to provide two categories of ESF “grants” administered through state education agencies: the Governor’s Emergency Education Relief (“GEER”) Fund (H.R. 748 § 18002) and the Elementary and Secondary School Emergency Relief (“ESSER”) Fund (*Id.* § 18003).

Generally, the GEER Fund may be used to provide broad emergency support to schools “most significantly impacted by coronavirus” to support continued educational services and “on-going functionality” of schools. *Id.* § 18002(c)(1). In addition, as deemed by the individual state governors as essential, funds may be used to carry out emergency educational services for students; provide childcare, early childhood education, and social and emotional support; and protect education-related jobs. *Id.* § 18002(c)(3). The Department views the GEER Fund as a “an extraordinarily flexible ‘emergency block grant’ designed to enable governors to decide how best to meet the needs of students” and schools. States can apply for GEER Funds using the Certification and Agreement form on the Department’s website.

In contrast, the ESSER Fund must be used for one or more statutorily-defined purposes, as outlined by the CARES Act’s twelve permitted uses:

Any activity authorized by the ESEA of 1965;

Coordination of preparedness and response efforts;

Providing principals and others school leaders with the resources necessary to address the needs of their individual schools;

Activities to address the unique needs of low-income children or students, children with disabilities, English learners, racial and ethnic minorities, students experiencing homelessness, and foster care youth;

Developing and implementing procedures and systems to improve the preparedness and response efforts of local educational agencies;

Training and professional development for staff of the local educational agency on sanitation and minimizing the spread of infectious diseases;

Purchasing supplies to sanitize and clean the facilities of a local educational agency;

Planning for and coordinating during long-term closures, including for how to provide meals to eligible students, how to provide technology for online learning to all students, and compliance with IDEA and other federal, state and local laws;

Purchasing educational technology for students;

Providing mental health services and supports;

Planning and implementing activities related to summer learning and supplemental after-school programs; or

Other activities that are necessary to maintain the operation of and continuity of services.

*Id.* § 18003(d).

### **Allocation of GEER and ESSER Funds**

Critically, however, with respect to K-12 schools, the allocation of both GEER and ESSER funds is statutorily tied to the formulas set forth in Title I of ESEA, which allocates Title I funding primarily based on the number of children living in poverty and other children at risk of failing to meet state academic standards. *See* 20 U.S.C. § 6333(c).

Specifically, while 60% of the GEER Fund is allocated based on the state's relative population of school-aged (5–24) individuals, the remaining 40% must be allocated based on ESEA section 1124(c) allocations from the most recent fiscal year. H.R. 748 § 18002(b)(2); *see* 20 U.S.C. § 6333(c). The ESEA Basic Grant allocates Title I dollars to school districts based on the number of poor students they serve. A district qualifies for the funding if it has at least 10 poor children and 2% of its students live in poverty. Thus, virtually all school districts are eligible for GEER Funds—in amounts determined at the governor's discretion—based on this Title I formula.

Similarly, grants provided through the ESSER Fund are allocated to states based on the Title I – Part A allocations for the most recent fiscal year. H.R. 748 § 18003(b). Each state is then responsible for administering “subgrants” to schools “in proportion to the amount of funds” received under Title I in the most recent fiscal year. *Id.* § 18003(c).

Section 18005 of the CARES Act requires LEAs that receives GEER or ESSER funds to provide “equitable services” to students and teachers in non-public schools. *Id.* § 18005. Importantly, the text of the statute expressly states that such equitable services be provided “**in the same manner** as provided under section 1117 of the [ESEA]” (codified at 20 U.S.C. § 6320) (emphasis added). Section 1117 requires schools to provide such equitable services “[t]o the extent consistent with **the number of eligible children . . . in the school district . . .** who are enrolled in private” school. 20 U.S.C. § 6320(a)(1) (emphasis added). A child’s “eligibility” for equitable assistance is determined based on Title I’s “Targeted Assistance Schools” program, which defines “eligible children” as “children identified by the school as failing, or at most risk of failing, to meet the challenging State academic standards on the basis of multiple, educationally related, objective criteria established by the local educational agency and supplemented by the school . . .” 20 U.S.C. §§ 6320, 6315(c).

Thus, as recently as October 2019, the Department instructed school districts to “[e]nsure that its expenditures for equitable services are equal to the proportion of funds generated by *children from low-income families who reside in participating Title I public school attendance areas* and attend private schools” (emphasis added).

### Departmental Guidance on “Equitable Services” under the CARES Act

On April 30, 2020, the Department issued new guidance titled “Providing Equitable Services to Students and Teachers in Non-Public Schools Under the Cares Act Programs” (the “FAQ”). Instead of following the ESEA funding formulas incorporated by the CARES Act, the FAQ “interpret[s]” the CARES Act to require school districts to provide equitable services to “all non-public school students and teachers without regard to family income, residency, or eligibility based on low achievement” (FAQ at 3).

To accomplish this, the FAQ requires school districts to calculate the “proportional share” of a private school’s equitable services allotment “based on the number of children enrolled in each non-public school whose students or teachers participate in the CARES Act programs compared to the number of students enrolled in public schools in the LEA” (FAQ at 4). Therefore, in contravention of Title I, the FAQ states that a school district “need not collect poverty data from non-public schools” to calculate equitable services under the CARES Act (FAQ at 5), and “equitable services under the CARES Act programs are not based on residence in a participating Title I public school attendance area and are also not limited only to low-achieving students and their teachers.” In other words, the Department’s guidance calculates a private school’s proportional share based on total enrollments of private schools based on the location of a private school within a school district, without accounting in any way for poverty or other equity metrics.

The Department rationalized this by finding (1) “under the CARES Act programs, the LEA in which a non-public school is located is responsible for providing equitable services to students and teachers in

the school,” as opposed to Title I – Part A, where “[o]nly low-achieving students who live in a participating Title I public school attendance area are eligible for *services*” (FAQ at 1–2) (emphasis added); (2) “the services that an LEA may provide under the CARES Act programs are clearly available to *all* public school students and teachers, not only low-achieving students and their teachers as under Title I, Part A” (FAQ at 6); and thus, (3) “Although an LEA receives ESSER formula funds via the Title I, Part A formula, ESSER formula funds are not Title I, Part A funds and are not subject to Title I, Part A requirements” (Department of Education FAQ about the ESSER Fund at 5).

However, the formulas in Title I – Part A do not control the use (i.e., “services”) of ESEA funding; rather, it is a formula for *allocating* funding to ensure that federal money is provided equitably to school and communities with the most need. Once the funds are appropriately allocated to school districts based on these equity metrics, schools are then free to *use* the funds to provide services in accordance with the GEER and ESSER guidelines, irrespective of student poverty or achievement status. The Department’s guidance essentially conflates these two principles to direct more funding to private schools.

Under this interpretation, high-poverty school districts stand to lose millions of dollars that instead must be shared with private schools, which disproportionately serve wealthy families and communities, regardless of the economic need of the school’s students and the community.

### **Next Steps: Legislation and Litigation**

Legislators, including the chairman of the Senate Education Committee, have stated that the Department’s interpretation is inconsistent with the text and purpose of the CARES Act statute. In addition, some legislators have proposed new legislation to amend the CARES Act to make clear that funds allocated for equitable services under the CARES Act must be provided “based on the number of nonpublic school students who were identified in the calculation under section 1117(c)(1) of the ESEA for purposes of Title I–A during the 2019–2020 school year relative to the sum of such students in public schools during the 2019–2020 school year.”

The Department stated in a recent letter responding to the Council of Chief State School Officers that it will be issuing a rule on the topic in the next few weeks and inviting public comments. The letter “disagrees” with any contention that the guidance does not comport with the CARES Act. The letter also states that if districts “insist on acting contrary to the Department’s stated position, they should, at minimum, put into an escrow account the difference between the amount generated by the proportional-student enrollment formula and the Title I, Part A formula.”

While many states are pushing back against the policy—including Republican-led states like Oklahoma, Mississippi and Indiana along with Maine, Washington, Pennsylvania, New Mexico and Wisconsin—others—including Texas and Tennessee—have said they will go along with the guidance.

Other states have reported that they are still evaluating next steps, and some are advising districts to temporarily set aside the money that would go to private schools if the guidance is enforced.

According to *Politico*, education departments in Missouri, Arizona, Connecticut, California, South Carolina, New York, Oregon and D.C. are still reviewing the guidance, and Colorado, Illinois and Ohio are advising districts to calculate the equitable share based on students in poverty, but to set aside the difference in funding.

As provided above, the Department has stated that its guidance does not have the force of law. Generally, only *final* agency action may be challenged. *See* 5 U.S.C. § 704. As such, agency action that does not impose rights, obligations, or legal consequences is, as a routine matter, not challengeable agency action. However, the Department's own assertions about whether its guidance imposes new rights or obligations, or carries the force of law, are not necessarily relied upon. In 2016, a federal district court in Texas ruled that the Department's guidance on transgender students—presented through a *Dear Colleague* letter—created legal consequences, and thus was final agency action, despite the Department's representations to the contrary. The court in *Texas v. U.S.* issued a nationwide preliminary injunction of the guidance, ruling that the Department's promulgation of the guidance was inconsistent with notice and comment rulemaking, and, as perhaps relevant here, the guidance itself was inconsistent with the text of the relevant statute, Title IX and its implementing regulations.

Any inconsistencies between the CARES Act guidance and ESEA, particularly related to equitable funding requirements, could thus result in litigation. The economic impact on high-poverty school districts, whether prospective or realized, could potentially result in the issuance of an injunction against this guidance. The threat of litigation with such aims could also spur the Department to revise its guidance.

The K-12 education attorneys at Husch Blackwell will continue to monitor and evaluate developing legal and practical considerations for educational institutions in response to COVID-19. Husch Blackwell's own guidance relating to a host of issues, including labor and employment, data security and privacy, and healthcare considerations are available in the firm's Coronavirus Toolkit, which is updated on an ongoing basis.

### Contact Us

Questions regarding this guidance or your institution's response to the COVID-19 outbreak can be directed to [COVID19response@huschblackwell.com](mailto:COVID19response@huschblackwell.com). Additionally, you can contact John Borkowski, Aleks Rushing, Mary Deweese, Paige Duggins-Clay or your Husch Blackwell education law contact.