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Flawed Guidance on Equitable Services for Private School Students in the CARES Act[1]

We share in the widespread dismay with the interpretation of "equitable services" for private school students and teachers under the CARES Act that appears in the recently issued guidance. The substantial reductions in available funding to serve students in public schools is especially troubling at a time when the pandemic is about to take away a huge chunk of the tax revenues available to those schools. We write here, though, not just to express dismay but in hopes of bringing additional clarity to the issues of law, policy, and logic involved in this matter.

Section 18005(a) of the CARES Act states that a local educational agency (LEA) receiving funds under either the Elementary and Secondary School Emergency Relief (ESSER) Fund or the Governor's Emergency Education Relief (GEER) Fund "shall provide equitable services in the same manner as provided under section 1117 of [Title I of] the ESEA of 1965 to students and teachers in non-public schools." Section 1117(a)(4)(A) and (c) explicitly provide that the proportion of the federal funds to be allocated to serving private school children shall be equal to the proportion of low-income children who attend private schools.[2] Despite this clear language, incorporated into the requirements for the allocation of CARES funds by Section 18005(a), the guidance says the LEA should allocate funds to serve private school students based on the proportion of *all* students within the area served by the LEA who attend private schools (regardless of family income).

Even if it were shown that the application of the method for allocation set out in Title I Section 1117, and required here by Congress, were somehow problematic or illogical, or the Department were to believe that it is not the best-suited method for allocating the funds, it would not be proper for guidance to instruct LEAs to ignore the clear language of the Act. But as we will show, the guidance in any event is based on flawed logic and fails to make the case for why the allocation method in Section 1117 is inappropriate.

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[1] U.S. Department of Education, *Providing Equitable Services to Students and Teachers in Non-Public Schools under the CARES Act Programs* (April 30, 2020).

[2] Section 1117(a)(4)(A) provides:

> "(4) EXPENDITURES.—
>
> "(A) DETERMINATION.—
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> "(i) IN GENERAL.—Expenditures for educational services and other benefits to eligible private school children shall be equal to the proportion of funds allocated to participating school attendance areas based on the number of children from low-income families who attend private schools.
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> "(ii) PROPORTIONAL SHARE.—The proportional share of funds shall be determined based on the total amount of funds received by the local educational agency under this part prior to any allowable expenditures or transfers by the local educational agency."

Section 1117(c) sets forth measures for calculating these numbers of children from low-income families in private schools. [The relevance of the reference to "participating school attendance areas" is discussed later (in the paragraph of text accompanying footnote 8 on page 5).]

Summary/highlights of our analysis:

- The guidance is contrary to the express language of the Act and, if followed by LEAs, would result in their violating the Act.
- The reasoning behind the position in the guidance is not only insufficient to ignore the express language of the Act. It does not stand even on its own terms:
- It wrongly conflates the requirements for who is to be counted for purposes of allocating the funds with the requirements for use of funds (including which students will be served), and presumes that the two must be connected. No such match or connection whatsoever is found in the Title I provisions for serving public school students, in the Title I provisions for equitable services for private school students (which are supposed to be used here), or in the CARES Act provisions for the SEA's allocation of ESSER funds to LEAs. All have a definition of who is counted for allocation purposes (in each case tied to the numbers of low-income students) that is entirely different from their definition of who may be served (none of which specifically identify low-income students).
- There is nothing problematic, paradoxical, or novel in Congress's deciding to drive federal funds based on the incidence of poverty but then not limiting the use of the funds to serve low- income individuals.
- In attempting to distinguish Title I from the CARES Act, the guidance further mischaracterizes Title I, stating that Title I services are available only to low-achieving students while the CARES Act is designed serve all students. Even if this characterization of who is served were true, it would not dictate a different mechanism for allocating funds. But in fact, it is not true. The vast majority of students receiving Title I services are actually now in schoolwide programs that serve all the students in the school.
- If the reasoning in the guidance were to be accepted – that LEAs should ignore the requirement in Section 1117 of Title I (and incorporated into the CARES Act) for allocating funds based on numbers of low-income students because the CARES Act funds are used to serve all students – then the same argument could be made that SEAs should ignore the requirement to allocate ESSER funds to LEAs based on the Title I low-income formula because the LEAs will be using the funds to serve all students. This is obviously an absurd result, but one that directly flows from the logic of the guidance in asking LEAs to ignore the incorporated formula in Section 1117.
- Contrary to the distinction between Title I and the CARES Act that, according to the guidance, compels a difference in the way that funds are allocated, both Acts share the same structure: a formula for allocation based on low-income children, and then their own definitions, particular to the Acts, of how those allocated funds are to be used, in neither case limited to low-income students.
- The additional fact that Title I funds typically go to provide services only to public and private school students residing in the attendance zones covered by Title I schools provides no meaningful rationale, as the guidance claims, for abandoning the required allocation formula based on low-income children under the CARES Act. It simply means that, since the CARES Act does not dictate specific allocations to schools or school attendance areas, the formula is to be applied to all low-income children residing in the district served by the LEA.
- While unrelated to the issue of allocation of funds, we also provide a somewhat more nuanced perspective on the statement in the guidance that CARES Act funds are to serve all students, in light of the LEA's role in determining the uses of funds.

Details

The guidance rests on a claim that the Title I formula allocating funds to students in private schools (as well as to public schools) should not be used to determine the allocation of CARES Act funds for students in private schools because students eligible for assistance under the CARES Act are not limited by income or achievement and includes all students. It reaches that conclusion despite the CARES Act's mandate that equitable services to private school students and teachers be determined in the manner provided under Section 1117 of Title I, which specifically requires allocations for such students and teachers be based on numbers of low-income students, along with a different set of considerations for determining the services funded by that allocation.

The error in the guidance comes from confusing and conflating the formula for *allocating funds* with the requirements for *the use of funds* (including who is to be served) and assuming that there must be a particular relationship between the two. But that in fact is not the case, and indeed no such relationship is found in Title I itself. Under Section 1117 of Title I, the *allocation* of funds to serve students in private schools is based on the numbers of low-income students in those private schools (just as allocations to LEAs and public schools are). But there is simply *no* requirement that the Title I funds then be used to serve only low-income students in those private schools. Instead, the funds are to be used to serve those students who are failing, or are at most risk of failing, to meet the State's challenging academic standards,[3] in order to help them meet those standards. This is the exact same requirement that applies to use of Title I funds in public targeted assistance schools, which receive their allocations based on the number of low-income students, but then serve struggling and vulnerable students defined in exactly those same terms, regardless of family income.[4] Indeed, the Section 1117 provision on the private school students to be served directly incorporates the provision from the section on targeted assistance schools.

Equally telling, and completely contradicting the picture of Title I painted in the guidance: ***95 percent*** of students receiving Title I services are in schoolwide Title I programs that serve ***all*** students in the school.[5] In

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[3] Along with homeless children; children in local institutions or programs for neglected and delinquent children and youth; and children who participated in the previous two years in a Head Start, Title I preschool, Title I migrant, or Title II, Part B, Subpart 2 literacy program. In other words, Congress deemed students as also eligible for Title I services because they also tend to be at risk for falling behind academically.

[4] The Department's Title I guidance on providing equitable services to eligible private school children, teachers, and families recognizes this clear distinction between students counted for purposes of determining the allocation for private school students, devoting Part B of the guidance to the task of determining the number of students in poverty, and students eligible for services, addressed in Part C., "Delivery of Equitable Services." Under C-1., "What private school students are eligible for Title I services?", it flatly states: "Poverty is not a criterion for eligibility for services."

[5] As the National Center for Education Statistics explains: "*It is important to note that there is no direct link between the formula-eligible children upon whom the distribution of funds is based and the children who receive services from Title I. Today, 95 percent of children served by Title I receive services in schoolwide programs that serve all children in the school, regardless of whether they meet one of the specific criteria for eligibility determination*. (table I.A). Altogether, about 11.6 million children are counted as formula eligible, while about 25.0 million students in the United States receive Title I services." National Center for Education Statistics, *Study of the Title I, Part A Grant Program Mathematical Formulas* (2019), Executive Summary (emphases added). https://nces.ed.gov/pubs2019/titlei/summary.asp. ["Formula-eligible" and "eligibility determination" here refer to eligibility to be counted in the formulas for allocating Title I funds, not to the students eligible for Title I services, which, as indicated above, are *never* limited to low-income students (even in targeted assistance schools or in serving students in private schools).]

those schools, the Title I funds are available to improve the entire academic program for all students. Yet those schools too get their allocations solely on the basis of the numbers of low-income students enrolled. Those facts by themselves are enough to entirely melt away the distinction the guidance makes between Title I and the CARES Act, let alone any notion of a distinction so compelling that it requires LEAs to ignore the clear language of the CARES Act.

The fact that the pots of funds can be used (a) for low-achieving students as in the case of (i) Title I targeted schools and (ii) for Title I services to private school students, or (b) for all the public school students as in the case of (i) Title I schoolwide programs and (ii) the LEAs' funds under the CARES Act, does not change the fact that in each of these four different cases, the amount of funds available to serve all the students eligible for services is limited based on the numbers of low-income students, even though *none* of these programs limits services to low-income students. And yet, despite the explicit directive from Congress to use *the same* approach for private school students under CARES, the guidance abandons it altogether.[6]

The rationale for allocating funds for public school students and private school students on the basis of the relative shares of low-income students (regardless of the fact that use of the funds will not be restricted to them) is further clarified in Department of Education Title I regulations on equitable participation: "Funds expended by an LEA . . . for services for eligible private school children in the aggregate must be equal to the amount of funds *generated by* private school children from low-income families."[7] In other words, the Title I allocation to the LEA was based on, and generated by, the total number of low-income children residing within the area served by the LEA, including those attending private schools as well as public schools, so the allocation of those funds to serve private school students versus public school students is tied to where the students who generated those funds are. The same rationale, of course, is applicable to the CARES Act, where ESSER funds are similarly driven to LEAs based on that same Title I formula. And this further highlights the irrationality, as well as illegality, of ignoring the requirements of section 1117 that the CARES Act says are applicable, and counting *all* private school students in the allocation formula instead of tying the allocation of funds for private school students to the number of low-income students in private schools that generated the LEA's allocation.

Thus, rather than the structure of the CARES Act being different from Title I, they are directly parallel: Both require that the determination of the amount of funds allocated be based on the number of low-income students, and each then has its own definition of how those allocated funds are to be used, appropriate to the specific nature of the program, and in neither case limited to low-income students. The guidance, as written, unfortunately and incorrectly introduces what purports to be a critical

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[6] It is also worth noting that, because of the difference in Title I between the basis for allocating funds and the number of children eligible for services, "equitable services" for private school students, teachers, and families, does not and cannot mean equal dollars per child served. Just as is true between different public schools within a district, the ratio of eligible children to low-income children will often be different between the public schools and the private schools attended by children in the same attendance area or district. Thus, for example, private schools may have fewer low-achieving students compared to its low-income students than the public schools comparable public school, in which case more Title I dollars will be spent per eligible private school child than on each eligible public school child, or vice-versa if the private school has a higher ratio of low-achieving children to low-income children. And thus, "applying" Title I provisions and principles to the CARES Act provides no foundation for departing from them in order to match the fund distribution with the eligible student population.

[7] 20 C.F.R. Section 200.64(a)(1) (emphasis added).

distinction where in fact none exists.

This proper understanding of the CARES Act provision incorporating Title I Section 1117 is also entirely consistent with the rest of the CARES Act. The Elementary and Secondary School Emergency Relief (ESSER) Fund dollars go to each State based on its share of Title I Part A funds (i.e. based on children from low-income families), as does each LEA's share of its State's ESSER funds – despite the fact that the funds (in the case of both Title I and ESSER) are not ultimately limited to serving low-income students. And in the case of Title I funds, the LEA's allocations to schools are also based on numbers of low-income students. There is nothing paradoxical, problematic, or novel about a structure that consistently channels federal funds based on low-income populations while then not limiting services based on individual family income – that is the core structure of both Title I and ESSER, as well as other federal programs in various fields. It reflects an overall policy of driving federal resources to areas of economic need. There is absolutely no basis for the guidance to state that a provision in the CARES Act that also explicitly relies on an allocation provision based on low-income student counts should depart from that structure. If, instead, the reasoning in the guidance were to hold sway, it would similarly argue that States should also ignore the CARES Act provision to use the poverty-based Title I formula in allocating ESSER funds to LEAs, since the ESSER funds will be used by LEAs to benefit all students.

Finally, the guidance also relies on the fact that Title I fund formula allocations carry down to the school level, with not all schools in an LEA receiving Title I funds, and thus private school students receive services only if they reside in an attendance area served by a Title I school, while CARES fund allocations are specified only down to the LEA level and can thus serve schools in all areas. But this difference requires simply applying the formula (along with the residency provision) set forth in Section 1117 at the district level, rather than at the school level.[8] Contrary to the guidance, it provides no basis for abandoning that core formula altogether.

As a separate matter, we would like to provide some clarity on the *uses* of the funds to serve private school students. Once the allocation of the amount available to serve private school students is set (in both Title I and CARES based on the relative numbers of low-income students), then the uses of those funds are determined by reference to the particulars of the Act. In the case of ESSER funds[9], that means the local selection and mix from among the twelve different allowable uses of funds set out in Section 18003(d) of the CARES Act. From that perspective, it is somewhat misleading to say that the funds are to be used to serve all students. Some allowable uses would clearly benefit all students, while others – for example, activities to address the unique needs of children from particular populations under Section

[8] Moreover, there are LEAs in which *all* school attendance areas in the district are eligible for Title I funds – for example, when at least 35% of children are from low-income families in all attendance areas or schools. See ESEA Title I Section 1113(b)(1)(A). So even this is not something novel in the CARES Act.

[9] The GEER funds have a different structure in the CARES Act. It is left to the governor to determine how much of the GEER funds will be distributed to LEAs (versus institutions of higher education or other education-related entities). There is no allocation formula for the portion distributed to LEAs, only a determination by the State educational agency as to which LEAs have been most significant impacted by coronavirus. And the language on use of the GEER funds is very broad, though nothing bars governors from attaching conditions. One thing that is clear, however, is that the requirement for LEAs to provide equitable services to students and teachers in private schools in the same manner as provided under Title I Section 1117 (including its provisions for allocating funds for that purpose) applies to the GEER funds.

18003(d)(4) – clearly do not.[10] While, just as in Title I, the particular mix of services to be provided to private school students and teachers need not necessarily be identical to those in public schools in order to be equitable, it is clear that **it is *the LEA*** that plans for, determines, and oversees implementation of the use of the funds, in consultation with the private schools.[11] Again, this is, as mandated by the CARES Act, entirely consistent with provisions of Title I Section 1117.

In conclusion, the guidance, as currently written, is thoroughly inconsistent with the plain language of the Act, and its non-binding interpretation that instructs LEAs to violate the law. Its conclusions are erroneously arrived at by (a) conflating the *allocation* of funds with the *uses* of funds, when they are intentionally distinct, while at the same time (b) creating a distinction between Title I and CARES that, for purposes of the Act, does not exist. The result is not only contrary to the law. It runs contrary to the intentions and goals of the law in seeking to help address losses incurred by the pandemic. It has severe consequences for the funds that were expressly intended to be available to serve public school students, particularly those in districts that have high concentrations of low-income students in their public schools. And these districts are the ones that are most typically in jeopardy of severe loss of revenues, since they typically depend more on state tax revenues that the pandemic most threatens (e.g., income and sales taxes), unlike wealthier districts that are typically more reliant on local property taxes.[12]

For all these reasons, LEAs should not be instructed to allocate funds in a way that would violate the CARES Act, and the guidance accordingly needs simple, but very serious, revision.

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[10] Similarly, an LEA could use funds to purchase educational technology (such as Chromebooks and internet connectivity), under Section 18003(d)(9) for low-income students without providing it to students from higher-income families. In addition, the requirements under Section 427(b) of the General Education Provisions Act -- to describe and take steps "to ensure equitable access to, and equitable participation in, the project or activity to be conducted with such assistance, by addressing the special needs of students, teachers, and other program beneficiaries in order to overcome barriers to equitable participation, including barriers based on gender, race, color, national origin, disability, and age" – are applicable to GEER and ESSER funding , and may well lead to directing significant portions of the funds to those with such special needs and facing such barriers. For additional legal and policy considerations in use of the CARES Act education funds, see www.cleweb.org/news-article/cles-analysis-elementary-and-secondary-funding-cares-act.

[11] Note, however, that aside from the specific provisions, incorporated into CARES from Title I, for consultation with private schools concerning the services to private school students, Section 445(b)(5) of the General Education Provisions Act requires the LEA to provide reasonable opportunities for the participation by teachers, parents, and other interested agencies, organizations, and individuals in the overall planning for and operation of CARES Act education programs. *Ibid.*, pp. 3-4.

[12] See "Devastated Budgets and Widening Inequities: How the Coronavirus Collapse Will Impact Schools," *Education Week* (May 8, 2020), including the link to charts showing district-by-district risks. https://www.edweek.org/ew/articles/2020/05/09/devastated-budgets-and-widening-inequities-how-the.html.