

# CENTER FOR LAW AND EDUCATION

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## **Problems with the Waiver Provisions of the CARES Act**

We write this fully mindful of the crisis we are in, of the paramount importance of addressing the threats to people’s health, and of the critical need to support educators, schools, and school systems as they face the challenge of educating our children and youth.

At the same time, we are concerned about the open-ended provisions of the Coronavirus Aid, Relief, and Economic Security (CARES) Act (as originally drafted) providing the Secretary of Education with nearly unlimited unilateral authority to waive almost any of the provisions of three major laws – the Elementary and Secondary Education Act, the Carl D. Perkins Career and Technical Education Act, and the Higher Education Act -- that Congress intentionally enacted through deliberative democratic processes. We believe that a more carefully crafted approach is needed and that as written some waivers could exacerbate rather than resolve problems in ensuring the education our children and youth deserve during this crisis.

Below we draw attention to a few key examples of important provisions that could be subject to waiver under the draft and should not be, but this is not intended to be exhaustive. We also discuss some concerns and thoughts about the waiver process itself.

### **Vulnerable populations recognized under Perkins and ESEA**

The prohibition on waiving “any statutory or regulatory requirements relating to applicable civil rights laws” is too narrow. In addition to what are typically considered applicable civil rights laws – e.g. Title VI, Title IX, Section 504 -- there are provisions within ESEA and Perkins themselves that should not be waived. They are very important both because: (1) they *cover vulnerable population groups that are not addressed by the civil rights laws, including students from economically disadvantaged families*, as well as those that are; and (2) for both special populations that are covered and are not covered by the civil rights acts, they provide for needed additional protections, services, and attention particular to the statutory program.

Under Perkins, the relevant designation is “special populations,” defined as: “(A) individuals with disabilities; (B) individuals from economically disadvantaged families, including low-income youth and adults; (C) individuals preparing for non-traditional fields; (D) single parents, including single pregnant women; (E) out-of-workforce individuals; (F) English learners; (G) homeless individuals described in section 725 of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11434a); (H) youth who are in, or have aged out of, the foster care system; and (I) youth with a parent who—(i) is a member of the armed forces (as such term is defined in section 101(a)(4) of title 10, United States Code); and (ii) is on active duty (as such term is defined in section 101(d)(1) of such title).”

Various important Perkins provisions then apply to those special populations. For example, Sec. 122(d)(9) addresses how the State will ensure that special populations will be protected from discrimination on the basis of special population status and will be provided with: equal access to CTE activities assisted under the Act; programs designed to enable them to meet performance standards and prepare for further learning and high-skill, high-wage, in demand industry sectors or occupations; appropriate accommodations; and instruction and work-based learning opportunities in integrated settings. There are similar local provisions, for example, in Section 134(b)(5), (c)(2)(A) and (c)(2)(E), including strategies to overcome barriers resulting in lower rates of access or performance for special populations.

Under ESEA, there are also provisions for ensuring that the educational needs of students from various groups are addressed – for example, children with disabilities, English learners, migrant children, homeless children, and children in foster care – along with obligations to address the needs of all low-achieving students in high-poverty schools that have schoolwide programs and in targeted assistance programs. The necessary closure of schools puts these groups at even greater educational risk than usual, and protections required under ESEA should remain in place.

### **Family Engagement and Student Engagement Provisions**

Under the Secretary's existing waiver authority in ESEA, the Secretary is barred from waiving any requirements relating to parental participation and involvement. ESEA Section 8401(e)(6). This exception should be written into the bill's waiver provisions as well.

Provision in ESEA and Perkins for family engagement should not be waived. This is particularly important now, with families having to take on a bigger role in ensuring their children's learning and the greater need for school-family coordination and real partnership. The provisions that require that the school's and district's family engagement policies, spelling out how various family engagement requirements will be carried out, be jointly developed with and approved by the parents of the school and district respectively (when fully implemented, which is often not the case) are the key to making sure that those policies actually work and meet the needs of families for effective engagement. Other provisions throughout the Acts provide for their informed engagement at State, district, and school levels. It should be made clear that this bar against waiving those provisions applies to information that either Act requires to be provided to families.

In addition, the same protection against waivers should be applied to comparable existing provisions in both Acts for secondary student involvement, including information that must be provided to them. Student engagement becomes a greater need now in this crisis, not a lesser one.

### **Fiscal Equity Requirements**

There is an urgent need to recognize, and help States and localities deal with, the expected severe losses in state and local revenues for education. ESEA and Perkins already provide for waivers of maintenance of effort requirements in unforeseen disaster circumstances just such as this. However, they specifically do not permit waiver of the two key fiscal equity provisions – supplement not supplant and, in the case of Title I, comparability. (Comparability requirements are particular to Title I.) And they should not be permitted now. There is good reason for Congress having made this distinction in the Acts themselves.

The two provisions are designed to ensure that whatever State and local dollars are available are distributed equitably. Under Title I supplement not supplant provision, for example, the higher-poverty schools within a district that get the federal funds (or in the case of a targeted assistance school, the students in the targeted assistance program) must receive the same State and local funds they would get in the absence of the federal funds, rather than allowing those State and local funds to be diverted elsewhere, i.e., supplanted by the federal funds. And comparability is designed to ensure that State and local funds will be used in a district's higher poverty Title I schools served provide services that, taken as a whole, are at least comparable to services in schools the district's lower poverty non-Title I schools.

At a time when children from low-income families are at even greater educational risk than normal, now is not the time to deny the schools serving higher concentrations of those students their share of state and local resources, so that the Federal Title I funds result in additional resources needed to serve concentrations of low-income children.

It is also worth noting that the letter sent to Congress on March 21<sup>st</sup> from major education associations – AASA, the American Federation of Teachers, the Council of Great City Schools, the National Association of Elementary School Principals, the National Association of Secondary School principals, the National Education Association, and the National School Boards Association – in proposing emergency funding to States to support local education agencies, stated, “Any such funding must include strict protections related to ‘supplement, not supplant’.”

### **Higher Education Act**

While we don't purport to provide an analysis here of the application of the proposed waiver authority to provisions of the Higher Education Act, we urge Congress to consider exempting from waiver any similar provisions in that Act that (a) require attention to the needs of particular populations, and (b) provide for student and, where applicable, parent involvement and information, and (c) ensure that federal funds supplement rather than supplant available State and local funds.

### **Transparency and Participation -- Notice and Opportunity for Comment on Waivers**

Unlike the waiver authority in ESEA itself (Sec. 8401), there are no requirements on States to notify the public and affected local education agencies of the proposed waiver, to provide them a reasonable opportunity to comment, and to share those comments with the Secretary. Instead, the public is to be notified only within 30 days *after* the Secretary has already approved the waiver. This is a serious omission. Affected teachers and other education personnel, affected students, their families, and civil rights and other organizations that represent them should continue to be able to weigh in. Not only is that just. It should be recognized, under a democracy, as leading to better, more informed decision-making. Even on an expedited schedule, this is feasible, whether it's in the same fashion as existing law, with notice and comments before the waiver request is submitted, or time is provided upon submission for solicitation of comments directly to the Secretary as well as the State.

This problem is further exacerbated by the treatment of Congress. The relevant House and Senate Committees are also only required to be notified *after* the waiver has been approved. Keeping in mind that this is a decision that provisions of law that Congress carefully enacted no longer are operative,

surely it would be better to let Congress have some say in the matter before the deed is done and the State has already been permitted to waive the provisions.

We note that the bill has a very different approach to Congress concerning IDEA and the Rehabilitation Act of 1973, calling for a report with recommendations to the relevant Congressional Committees on any waivers the Secretary believes are necessary for Congress to enact under those laws to provide limited flexibility to State and local education agencies to meet the unique needs of students with disabilities during the emergency. Should not a similar approach (in terms of waiver process, not necessarily in terms of educational substance) be taken to the complex educational needs of students addressed under ESEA, Perkins, and HEA? Particularly since (a) many of the vulnerable populations targeted by these programs, particularly economically disadvantaged students often do not have the same level of organized voice and advocacy supports at the local level as students with disabilities, while (b) students with disabilities are themselves very much impacted by the provisions and implementation of ESEA, Perkins, and the Higher Education Act.