HH-1 Litigation Challenging U.S.
Department of Education Interim Final Rule,
Providing Equitable Services to Students
and Teachers in Non-public Schools
7/21/20 RSBM

CONTINUATION OF SUMMARY EXPLANATION AND BACKGROUND

Title VIII of the CARES Act established three emergency relief funds to be administered by the Secretary of education, two of which, the Governor's Emergency Education Relief ("GEER") Fund for almost $3 billion and the Elementary and Secondary Education Stabilization ("ESSER") for more than $13 billion. The funds are distributed as formula grants to the states and then as sub-grants to local educational agencies ("LEAs"). LEAs receive ESSER funds based on their proportion of Title I, Part A funding. They are required to provide equitable services to private schools out of their GEER and ESSER funds "in the same manner as under section 1117" of Title I of the Elementary and Secondary Education Act of 1965 ("ESEA").

Section 1117 of the ESEA expressly provides for apportionment of funds to private schools for equitable services based on the number of students in poverty within private schools, not the total private school population: "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." 20 U.S.C. 6320 § 1117(a)(4)(A)(i).

Nevertheless, the IFR provides LEAs with two options that conflict with Section 1117 of Title I for apportioning CARES Act funds to private schools. Under the first option, the LEA may follow the interpretation contained in the Department's April 30, 2020 Guidance Document by apportioning funds for private schools based on the *total* number of students attending private schools, rather than the number of low-income students attending private schools, dramatically reducing the funding available to public schools.

Alternatively, if the LEA wants to maintain the full set of funding provided by Congress, allocating funding to private schools based on the number of students in poverty, the LEA must agree to two limitations on the use of the CARES Act funding, these limitations are not included in the CARES Act and therefore not intended by Congress. First, an LEA that chooses this option may not spend any of the its CARE Act funds on *any non-Title I* schools. By way of background, the current threshold proportion of low-income students required for designation as a Title I school is 40 percent. Many public schools serve significant populations of low-income students, but are not designated as Title I schools. All those schools are excluded from receiving CARES Act funds under this option. The Title I-school restriction is plainly irreconcilable with the broad flexibility that Congress has afforded LEAs to use CARES Act funds to assist any schools within their districts, and it has no basis in statute, policy, or reason.

Second, an LEA that chooses this option may not spend any of its CARE Act funds such that the federal funds would "supplant," as opposed to "supplement," traditional state and local funding sources for the program or service. This restriction forbids LEAs from using CARES Act funds to pay for any preexisting expenditures in school budgets—an irrational result, considering that one of the CARES Act's key purposes is to make up for the shortcomings of evaporating state and local budgets in the midst of COVID-19. The "supplement, not supplant" restriction is nowhere in the CARES Act.

The Rule thus presents LEAs with a lose-lose decision: either (1) forfeit a substantial share of the CARES Act funds to private schools, but maintain the Congressionally granted discretion for spending the funds; or (2) maintain the full funding but give up the ability to serve all of your students for all of the expenditures so desperately needed. This is not a choice.

The challenge that the Department of Education's IFR is illegal is based on the following grounds:

Violation of the APA. The Department does not have the authority to promulgate administrative rules that interpret the CARES Act's unambiguous allocation requirements for funds provided to private schools. Nor does the Department's generic rulemaking authority enable it to promulgate the Rule. Congress unambiguously dictated the allocation of CARES Act funds in the statute.

In promulgating the Rule, the Department also ignored the procedural steps required by the APA specifically, by bypassing notice-and-comment proceedings, and despite lacking "good cause" to do so.

Agency Action in Violation of the Separation of Powers. The Department's Rule also violates separation-of-powers principles enshrined in the United States Constitution. In that an executive agency may not impose spending conditions on federal funds distributed to the states via legislative rulemaking without congressional authorization.

Spending Clause Violation. Finally, the Department's Rule violates the Spending Clause of the United States Constitution. First, Congress did not delegate rulemaking authority to the Secretary to impose spending conditions on CARES Act funds, and it explicitly authorized LEAs to spend those funds on a broad set of expenditures. Second, states applied for CARES Act funding before the Rule was promulgated, thereby entering into a "contract" with the federal government. The Department's retroactive imposition of spending conditions alters that contract in violation of the Spending Clause. Finally, the Rule coerces LEAs into compliance with the Secretary's own policy goal of increasing the share of CARES Act funds going to private schools, or else forgo all federal aid to non-Title I schools in their districts.

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