



**Memo to ACSI Member School Leaders  
ESSER/GEER Funding & Lawsuit Update  
September 4, 2020**

**Background:** The CARES Act became law March 27, 2020. It included emergency funds designed specifically for education, including specifically the Governor’s Emergency Education Relief (GEER) Fund and the Elementary and Secondary Education Relief (ESSER) Fund. Portions of those funds may be spent for private school students and teachers through equitable services. ACSI has pointed out that the CARES Act sets the amount or allocation of the funds (ESEA Title I or Title II) in one section and the method (equitable services) in another section. The US Department of Education concluded that the CARES Act is for all students, not just Title I students. So funding for equitable services ought to be based on all students at the service level once the allocations based on Title I or Title II are received by the Governor, State Education Agency (SEA) or Local Education Agency (LEA). Unfortunately, the poorly written CARES Act leaves enough open to interpretation that confusion reigns.

**Implementation.** The USDE issued Guidance on April 30, 2020 and then, in response to objections, attempted to clarify the guidance with an Interim Final Rule (IRF) issued July 1, 2020 with immediate effect. The IFR allows states to use a Title I formula for private school equitable services as long as they serve only Title I students themselves or they may base equitable services on the total student population. (This is a simplified summary for purposes of this memo).

**Objection/Lawsuits.** The response to this by public school advocates was to launch a series of four (so far) lawsuits designed to overturn the Guidance and the IFR. If successful, the funding formula would allow equitable services based only on Title I and thus result in sharply reduced funding available for equitable services to serve private school students.

(Example: a member school with a good relationship with its Local Education Agency (LEA) reports that its LEA allocated equitable services valued at nearly \$50,000 for the school based on the total student population. Later, the LEA revised the number: the SEA had rejected the LEA’s plan and required it to base its funding for equitable services on Title I students only. The school of 250 was now entitled to equitable services valued at only \$6,000).

**Current Status.** All four lawsuits are proceeding. ACSI has joined an amicus brief in the three earlier cases: [\*Michigan v. DeVos\*](#) (joined July 29), [\*Washington v. DeVos\*](#) (joined August 6), and [\*NAACP v. DeVos\*](#) (joined August 24). The most recent, the fourth, lawsuit (*Council of Parent Attorneys and Advocates v. DeVos*) was filed August 10, and, depending on the progress of the other cases, amicus briefs would be due September 17.

In the meantime, the court in the Washington State case issued a nationwide injunction against enforcement of the Guidance and IFR on August 21, 2020. The USDE asked for clarification as to its scope. Today, September 4, 2020, the court declined to clarify since the plaintiffs have requested

expedited consideration of a permanent injunction, which the court will brief by September 23 and decide shortly thereafter.

**What it Means.** States do have the authority to expend their GEER and ESSER monies which are not subject to the rule. The portion in question is the difference between the two formulas. However, there is enough confusion that some states may choose to wait or to slow down the process. The emergency, however, is incentive for them to go ahead with whatever is most appropriate. As a practical matter, the school in our example above can receive (and is receiving) its \$6,000 in equitable services, but does have to wait and see what the courts say about the \$44,000 additional funds which the LEA ought to have set aside.

**What Christian Schools Can Do.** Schools should be in contact with their LEAs to discuss how the very modest portion of the funding not in question can proceed. Schools should also request that the LEA set aside the portion of funding that *is* in question in the lawsuits until those lawsuits are resolved.

Following the above example: that school continues to work with its LEA to receive the \$6,000 in equitable services that are not in dispute. It is also urging the LEA to reserve the \$44,000 difference until the legal process is completed.