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**MEMORANDUM** April 11, 2017

**To:**

**From:**

**Subject:** **Local Educational Agencies' Reservation of Funds Under the Title I-A Program Authorized by the Elementary and Secondary Education Act**

This memorandum has been prepared in response to your request for a legal analysis of the way in which a local educational agency (LEA) must reserve funds for homeless, neglected, and delinquent children, as well as for equitable services to private school students under Title I-A of the Elementary and Secondary Education Act (ESEA), most recently comprehensively authorized and amended by the Every Student Succeeds Act (ESSA; P.L. 114-95). Specifically, you requested clarification with respect to the order in which funds for the aforementioned purposes must be reserved under Title I-A, and whether the reservation of funds for one purpose would reduce the amount reserved for the other. This memorandum begins with a discussion of the ESEA statutory requirements related to the reservation of funds for these purposes both prior to and following the enactment of the ESSA in 2015. Next, this memorandum addresses the relationship between the provisions of Title I-A concerning funding for equitable services for private school students and for the education of homeless, neglected, and delinquent children. Per your request, limited background information on these programs and requirements has been provided. Given the general interest in this topic, CRS may provide some or all of the information contained in this memorandum to other congressional requesters. Your confidentiality as a requester will be preserved.

## Title I-A Funds for Homeless, Neglected, and Delinquent Children

Before the enactment of the ESSA in 2015, prior to distributing Title I-A funds to schools, an LEA was required to reserve "such funds as are necessary" under Title I-A to provide services comparable to those provided to students in Title I-A schools to serve homeless children and youth, children in local institutions for neglected children, and, if appropriate, children in local institutions for delinquent children and neglected and delinquent children in community day programs (these requirements are hereinafter collectively referred to as a reservation of funds for homeless children).[1] Statutory language prior to the enactment of the ESSA did not specify whether this reservation of funds was to be made based on the total Title I-A allocation of funds to the LEAs or after other reservations of funds had been made. For

[1] Elementary and Secondary Education Act (ESEA) § 1113(c)(3) (2014); 20 U.S.C. § 6313(c)(3) (2014). Unless otherwise specified, citations to the ESEA and corresponding provisions of the U.S. Code reflect current law as amended by the Every Student Succeeds Act (ESSA).

example, Title I-A regulations[2] also required LEAs to reserve funds to support school improvement activities, provide financial incentives and rewards to certain teachers, meet ESEA requirements related to parental involvement, and administer programs for public and private school students prior to distributing Title I-A funds to schools. Additionally, guidance issued by the Department of Education (ED) permitted an LEA to reserve funds for "other authorized activities," such as districtwide instructional programs prior to allocating funds to schools.[3]

The ESSA amended Section 1113 of ESEA to clarify that the reservation of funds for homeless children was to be made based on the total allocation of funds received by the LEA and prior to any "allowable expenditures or transfers" by the LEA.[4] Thus, current ESEA statutory language directs that the reservation of funds for homeless children be made based on the total amount of Title I-A funding provided to the LEA.

## Title I-A Funds for Equitable Participation

Under the ESEA, prior to and after the enactment of the ESSA, "equitable services" are provided to private school students according to the "child benefit" model. Accordingly, under these equitable participation requirements, children enrolled in private schools, their teachers, and their families may benefit from publicly funded services, yet funding for and the provision of these services remain under public control. That is, despite the equitable participation requirements, funds are not provided directly to private schools. Children enrolled in private elementary and secondary schools have been eligible for services under the ESEA in some capacity since its initial enactment in 1965.[5]

Prior to the enactment of the ESSA, LEAs were required to provide expenditures for educational services and other benefits to eligible private school students that were "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."[6] The statutory language did not specify whether the LEA was required to reserve the proportional share of funds to provide equitable services to private school students based on the LEA's total allocation of funds or after the LEA had reserved funds for various other authorized purposes.

ED guidance provided some additional information regarding the equitable participation requirement when certain reservations were made at the LEA level. For example, if an LEA reserved funds for districtwide instructional programs, the LEA was supposed to use a portion of the reserved funds to provide equitable services to eligible private school children.[7] Eligible private school students did not, however, receive a proportional share of, or benefit from, funds reserved by the LEA specifically for school improvement activities in public schools.[8]

The ESSA amended Section 1117 of the ESEA[9] to clarify that the proportional share of Title I-A funds for equitable participation is to be determined based on the total amount of Title I-A funds received by the

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[2] 34 C.F.R. § 200.77 (2014).

[3] U.S. Dep't. of Ed., *Title I Service to Eligible Private School Children, Non-Regulatory Guidance*, Oct.17, 2003, https://www2.ed.gov/programs/titleiparta/legislation.html.

[4] ESEA § 1113(c)(3)(B); 20 U.S.C. § 6313(c)(3)(B).

[5] P.L. 89-10, § 205(a)(2) (1965).

[6] ESEA § 1117(a)(4) (2014); 20 U.S.C. § 6320(a)(4) (2014).

[7] Dep't of Ed. Guidance, *supra* note 3.

[8] *Id.*; U.S. Dep't of Ed., *Ensuring Equitable Services to Private School Children: A Title I Resource Tool Kit*, Sept. 2006, at57-58, *available at* https://www2.ed.gov/programs/titleiparta/ps/titleitoolkit.pdf.

[9] Prior to the enactment of the ESSA, the equitable participation requirements were included in Section 1120 (20 U.S.C. § 6320) of the ESEA. The provisions were moved to Section 1117(20 U.S.C. § 6320) of the ESEA by the ESSA.

LEA and prior to any "allowable expenditures or transfers" by the LEA.[10] Thus, current statutory language directs that the proportional share calculation for the provision of equitable services to eligible private school students be based on the total amount of Title I-A funding provided to the LEA. This could result in a greater share of Title I-A funds being used to provide equitable services than were used prior to the enactment of the ESSA.

## Interaction Between Reservations of Title I-A Funds for Homeless Children and Equitable Participation

The current statutory language at issue requires that both the reservation for homeless children and for equitable participation be based on the total allocation of Title I-A funds provided to the LEA. Specifically, the statutory language of the reservation of funds for homeless children directs that the reservation should be "(i) based on the total allocation received by the local educational agency; and (ii) prior to any allowable expenditures or transfers by the local educational agency."[11] Similar language is used for the reservation of funds for equitable participation, stating that such amounts should be 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."[12] One question which may arise is whether either reservation affects the amount received or allocated to an LEA when calculating the other reservation.

In addressing this question, it may be observed at the outset that the construction of a particular statute, and specifically the discretion afforded to an agency when interpreting and administering its statutory requirements, can be analyzed using the Supreme Court's decision in *Chevron USA, Inc. v. Natural Resources Defense Council*, which sets forth a widely accepted two-part test.[13] First, if Congress has spoken directly on the issue, then that edict must control. However, "if ... Congress has not directly addressed the precise question at issue," the implementing agency's interpretation will stand so long as it is a reasonable one.[14] As discussed in more detail below, the ordinary meaning of the words in the statute, together with the available legislative history of ESSA, would seem to support the view that Congress had unambiguously directed that both reservations should be calculated independently based on the entire amount allocated to an LEA.

The ordinary meaning of the word "total,"[15] used in both provisions, would suggest that either of the respective reservations should be calculated without deducting any amounts reserved under the other provision. For example, if $100,000 were allocated to an LEA under Title I-A of the ESEA, then both the reservation of funds for homeless children under Section 1113 and the reservation of funds for equitable participation under Section 1117 would be based on that $100,000 total. This is because if either of the reservations were deducted before calculating the amount available for use under the other reservation, then the latter reservation would arguably *not* be based upon the "*total*" amount or allocation of funds received by the LEA.[16] Nor would such a deduction appear to be consistent with the statutory requirement

[10] ESEA § 1117(a)(4)(A)(ii); 20 U.S.C. § 6320(a)(4)(A)(ii).

[11] ESEA § 1113(c)(3)(B); 20 U.S.C. § 6313(c)(3)(B).

[12] ESEA § 1117(a)(4)(A)(ii); 20 U.S.C. § 6320(a)(4)(A)(ii). In the context of this provision, "this part" refers to Part A of Title I of the ESEA.

[13] Chevron USA, Inc. v. Nat'l Resources Def. Council, 467 U.S. 837, 842-845 (1984).

[14] *Id.* at 843.

[15] *See* BLACK'S LAW DICTIONARY 1528 (8th ed. 2004) (defining "total" to mean "whole; not divided; full; [or] complete").

[16] ESEA §§ 1113(c)(3)(B)(i), 1117(a)(4)(A)(ii); 20 U.S.C. §§ 6313(c)(3)(B)(i), 6320(a)(4)(A)(ii) (emphasis added). Although Section 1117 of the ESEA references the "total *amount* of funds received" under Title I-A by the LEA and Section 1113 references the "total *allocation*" that the LEA receives, there does not appear to be a discernable difference between the two (continued...)

that such reservations occur "prior"[17] to other expenditures or transfers, as the latter reservation would have been calculated using the amount received by the LEA *after* taking into account the former reservation.

This interpretation is also consistent with the legislative history of the 2015 amendments in which both provisions arose. In a committee report from the Senate Committee on Health, Education, Labor, and Pensions accompanying the bill that was ultimately enacted into law, the following description of the reservation for equitable participation was included:

> [The bill] clarifies that allocations to provide services to private school students must be determined *before a LEA reserves any money "off the top" of its title I allocation*. This will help ensure that a LEA's total title I allocation is included in discussions when determining equitable services for private school children and prior to any allowable expenditures are reserved by the school districts.[18]

This suggests that, at least with respect to the reservation for equitable participation in private schools, Congress's use of the phrase "total amount of funds received by the local educational agency . . . prior to any allowable expenditures or transfers by the local educational agency" was likely intended to ensure that the reservation was calculated using the maximum amount available to the particular LEA. Although this report language does not address the reservation for homeless children under Section 1113 of the ESEA, where Congress uses identical language multiple times in statutory text, the Supreme Court has generally presumed that such terms should be read in a consistent manner.[19] Indeed, there are other ESEA formula grant programs where multiple reservations of funds are made based on the total allocation or appropriation of funds prior to the distribution of funds to another set of entities (e.g., states). For example, under the Student Success and Academic Enrichment Grants (SSAE; Title IV-A of the ESEA), prior to making formula grants to states, the Secretary of Education is required to reserve funds for the Outlying Areas of the United States, the Bureau of Indian Education, and technical assistance and capacity building "[f]rom the total amount appropriated" for the program.[20] Each of these reservations would appear to be calculated individually based on the total appropriation for the SSAE program.

Therefore, based on the relevant statutory text, legislative history, and comparisons with similar constructs elsewhere in the statute, it would appear that there may be a sufficient legal basis for a court to conclude that the statute unambiguously provides that the reservation of funds for homeless children should not diminish the "total" upon which funding for equitable participation is based and vice versa.

(...continued)

terms as the "allocation" referenced in Section 1113 is made from "funds received under" Title I-A. ESEA § 1113(c)(1), 20 U.S.C. § 6313(c)(1).

[17] ESEA §§ 1113(c)(3)(B)(ii), 1117(a)(4)(A)(ii); 20 U.S.C. §§ 6313(c)(3)(B)(ii), 6320(a)(4)(A)(ii).

[18] S. REPT. 114-231 at 31 (emphasis added).

[19] Sullivan v. Stroop, 496 U.S. 478, 484 (1990) (finding that the uses of the term "child support" in related statutes should be given the same meaning because the "substantial relation between the two programs presents a classic case for application of the normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning") (internal quotation marks omitted).

[20] ESEA § 4103(a); 20 U.S.C. § 7113(a).