

## CENTER FOR LAW AND EDUCATION

### Notes on waiver provisions of the 3/25/20 revised version of Senate CARES Act bill

\* = changes that were made consistent with our analysis

1. In (a), seems to eliminate the original subsection (a), which gave Secretary authority to waive, independent of a State or local request for a waiver.
2. \*Perkins waivers – eliminates original bill’s Secretary authority to waive any provision, and substitutes that with no specific waivers at all, but instead puts Perkins into the same provision that was previously called the IDEA report – i.e., as with IDEA and Section 504, the Secretary is to report to Congress on any waivers the Secretary believes it is necessary for Congress to enact.
3. (\*) Higher Ed Act – also eliminates Secretary’s authority from original bill altogether. Doesn’t include HEA in the report to Congress for any additional waivers. There are a handful of specific HEA waivers. (There are a handful of HEA waivers, in Sec. 3504, 3505, and 3508. Haven’t checked whether they were in the original.)
4. \*ESEA waivers -- eliminates the original bill’s Secretary authority to waive any provision -- Instead requires Secretary to propose any additional ESEA waivers that it believes necessary for Congress to enact, while enacting the following specific ESEA (and GEPA) waivers:
  - a. Section 1111 – State plan waivers – [bill Section 3511(b)(1)
    - i. 1111(b)(2). State plan – assessments
    - ii. 1111(b)(3) Assessment exception for recently arrived English learners
    - iii. 1111(c)(4). Description of accountability system. Includes establishment of long-term goals, annual measurement of all students on indicators, establishment of system of meaningful differentiation of schools, identification of schools, annual measurement of achievement. [*But see the new provision below on dealing with accountability and improvement in the case of such waivers.*]
    - iv. 1111(d)(2) Targeted Support and Improvement – Allows waiver of (C) and (D) – Additional targeted support and special rule [but not (A) (general requirement for TSI) and (B) Targeted support and improvement plan) – why the distinction?]
    - v. [*But note 3511(b)(5) of the bill – “Accountability and Improvement”*]: Any school in a State that receives a waiver under 3511(b)(1) and is identified for comprehensive support and improvement, targeted support and improvement, or additional targeted support in the 2019-2020 school year under 1111(c)(4)(D) or 1111(d)(2) shall, for the 2020-2021 school year, maintain that identification status and continue to receive supports and interventions consistent with the school’s support and intervention plan.
    - vi. 1111(h) Reports – Allows waiver of:
      1. Certain parts of the State report cards under (1)(C):
        - a. (i) – description of State’s accountability system
        - b. (ii) – disaggregated reports of student performance on assessments,
        - c. (iii)(I) – disaggregated results of other academic indicator (for non-high-schools) [but NOT (iii)(II) high-school graduation rates [makes sense]

- d. (iv) -- # and % of ELs achieving EL proficiency [seems problematic, but if you get a waiver from assessment, it's a given, yes?]
  - e. (v) disaggregated info on other indicator(s) of school quality or student success
  - f. (vi) disaggregated progress of students toward meeting the long-term goals under (c)(4)(A)
  - g. (vii) % of students assessed and not assessed
  - h. (ix) # and % of students w most significant cognitive disability who take the alternative assessment
  - i. [Does not waive:
    - i. (viii) measures of school quality, climate and safety, including the discipline, law enforcement, absenteeism, violence, and bullying and harassment data; # & % of students in (aa) preschool programs, (bb) accelerated coursework to earn post sec credit and dual or concurrent enrollment programs
    - ii. (ix) professional qualifications data for teachers and, in the case of inexperience, school leaders
    - iii. (x) per-pupil expenditures of federal, state, and local funds]
    - iv. (xii) NAEP results
    - v. (xiii) where available, rates of enrollment of graduates in postsecondary ed
    - vi. (xiv) add'l info State believes will best provide parents, students, and other members of the public
2. (2)(C) Local report cards – Allows waiver of the comparable parts that are waived in the State report card, plus comparisons of LEA to SEA academic assessment data and school to LEA academic assessment data.
- vii. Section 421(b) of the General Education Provisions Act (20 U.S.C. 1225(b)), which allows federal funds subject to GEPA that are not obligated and expended by educational agencies and institutions in the fiscal year for which they are appropriated to be obligated and expended during the next year, provided that they are obligated and expended in accordance with the applicable federal statutory and regulatory provisions and any submitted program plans and applications in effect for that next fiscal year. [I'm not clear on whether waiving this would mean that the funds cannot be carried over or that, when carried over, they are no longer required to be spent in accordance with the applicable federal requirements and state and local program plans and applications. ??]
- b. State and local waivers permitted under bill subsection (b)(2):
- i. 1114(a)(1) – Schoolwide programs – the basic requirement that SWP school must have at least 40% of low-income kids in the school attendance area. But 1114(a)(1)(B) already allows the SEA to waive the 40% requirement “after taking into account how a schoolwide program will best serve the needs of the students in the school served under this part in improving academic achievement and other factors.” [I think the Title I exception itself is problematic – allowing dilution instead of targeted assistance in Title I schools

with relatively few poor kids. Not sure what this new waiver accomplishes beyond that, except that it allows LEA to override an SEA refusal to allow this. That doesn't seem like a good idea.]

- ii. 1118(a) and 8521 – Maintenance of effort (for LEAs). Waiver is already permitted under 8521(c) “if the Secretary determines that a waiver would be equitable due to—
  - “(1) exceptional or uncontrollable circumstances, such as a natural disaster or a change in the organizational structure of the local educational agency; or
  - “(2) a precipitous decline in the financial resources of the local educational agency.” So not sure why this new waiver provision is needed. Maybe this new provision allows wholesale waiver for all the LEAs in a State, or in the nation, rather than LEA by LEA? Are we o.k. with that?
- iii. 1127 – Carryover and waiver. This section allows LEA carryover of up to 15%, with SEA allowed to waive the % limit once every 3 years if SEA determines the request is reasonable and necessary or if Title I-A supplemental appropriations become available. (The % limit doesn't apply to LEAs receiving less than \$50k under Title I-A.) Not sure why add'l waiver authority is needed in the bill.
- iv. 4106. 21<sup>st</sup> Century Schools – Student Support and Academic Enrichment Grants.
  1. 4106(d). this is the required needs assessment as part of the LEA application.:
    - (1) IN GENERAL.—Except as provided in paragraph (2) and prior to receiving an allocation under this subpart, a local educational agency or consortium of such agencies shall conduct a comprehensive needs assessment of the local educational agency or agencies proposed to be served under this subpart in order to examine needs for improvement of— (A) access to, and opportunities for, a well-rounded education for all students; (B) school conditions for student learning in order to create a healthy and safe school environment; and (C) access to personalized learning experiences supported by technology and professional development for the effective use of data and technology.
    - (2) EXCEPTION.—A local educational agency receiving an allocation under section 4105(a) in an amount that is less than \$30,000 shall not be required to conduct a comprehensive needs assessment under paragraph (1).[Without closer examination of the rest of this Part, it seems that removing the needs assessment probably won't remove the focus on (A)-(C), but I'm not at all sure of that. (See assurance waivers below Not sure of the rationale here (might it be a mistake, thinking that this was calling for student assessment of the kind being waived under Title I?).
2. 4106(e)(2 and 4109(b) Assurances. Waives:
  - a. (C) Required use of at least 20% for 4107 (activities to support well-rounded educational opportunities)
  - b. (C) Required use of at least 20% for 4108 (activities to support safe and healthy students).
  - c. (D) Required use of a portion for one or more activities under 4109(a), including compliance with 4109(b) (activities to support effective use of technology; bars spending more than 15% on purchasing technology infrastructure; 4109 focus

on other things is mainly on improving instruction, etc. including, for example personalized learning.)

d. 4109(b) itself can also be waived.

(Same question – Maybe overall rationale is to allow LEAs to use whole pot of \$ for distance learning. Maybe that makes sense, but (A) seems somewhat unfortunate to raid this particular pot; and (B) don't know grant sizes, and don't know how much of the new COVID-19 \$ is available and going to distance learning, but I suspect the former isn't nearly enough by itself anyway.)

v. 8101(42) – The definition of “professional development.” While the definition is nearly two pages long, the great bulk of it is a useful description of 18 kinds of activities that “may” be included. The required part of the definition is: “activities that: (A) are an integral part of school and local educational agency strategies for providing educators (including teachers, principals, other school leaders, specialized instructional support personnel, paraprofessionals, and, as applicable, early childhood educators) with the knowledge and skills necessary to enable students to succeed in a well- rounded education and to meet the challenging State academic standards; and (B) are sustained (not stand-alone, 1-day, or short term workshops), intensive, collaborative, job-embedded, data-driven, and classroom-focused.” Seems unfortunate to lose this for the entire Act.

5. Charter school applicability – (b)(3) of the bill. Any waivers issued shall be applicable “(A) for all public schools, including charter schools *within the boundaries* of the recipient of the waiver.” That would seem to mean that a waiver sought by an LEA would apply to charter schools that are not part of the LEA even though within its geographical boundaries – i.e. charters that are their own LEAs or part of an LEA that is a network of charters, crossing LEA boundaries. This doesn't seem consistent with the overall approach to LEAs in federal law, yes? [The remainder of this waiver provision on applicability to charter schools says that the waivers shall be implemented (B) in accordance with State charter school law; and (C) pursuant to ESEA Section 1111(c)(5), which provides that accountability provision under ESEA shall apply to charter schools in accordance with State charter school law. Is the provision in (A) in conflict with (B) and (C)?]
6. Waiver request – 3511(c)(2)(D) adds a new requirement to the request: an assurance that the SEA, LEA, or Indian tribe “will work to mitigate any negative effects, if any [sic], that may occur as a result of the requested waiver.”
7. Duration – 3511(c)(4) makes the duration more limited – not to exceed the 2019-2020 academic (versus “not to exceed 1 academic year”). It also eliminates the original bill's allowing the Secretary to extend the period if the waiver recipient demonstrates that it is necessary and appropriate. Instead it provides an exception to carry out full implementation of any maintenance of effort waivers.
8. \*Public Notice -- 3511(d)(1). A new provision that requires the entity requesting the waiver to provide the public an all LEAs in the State with notice and opportunity to comment, by posting information regarding the request and the process for commenting on the State website. [However, this does not provide any time line or provision of reasonable time to comment, and, if comments are to be made to the requesting agency, no requirement as in current law ESEA waivers to include those comments in the request to the Secretary.
9. Secretary's notifying Congress – 3511(d)(2). Still says 7 days *after* the Secretary has already approved waiver.

10. Publication in Federal Register and on Department website – 3511(d)(3). Same as in original bill: 30 days after Secretary’s decision. (But see requestor’s obligation for public notice above.)
11. \*Report to Congress on any additional waivers the Secretary believes necessary for *Congress to enact* to provide limited flexibility to States and LEAs to meet the needs of students during the emergency -- 3511(d)(4). Has now been expanded beyond IDEA and the Rehabilitation of 1973 to include Perkins CTE and ESEA (instead of the general authority the original bill would have given the *Secretary* to waive virtually any provision of those Acts.