



OFFICE OF ATTORNEY GENERAL
STATE OF OKLAHOMA

October 21, 2020

The Honorable Melissa Provenzano
Oklahoma State Representative, District 79
Chair, House Democrat Education Policy Team
2300 North Lincoln Boulevard, Room 601
Oklahoma City, OK 73105

Re: Attorney General Opinion Request No. W-22

Dear Representative Provenzano:

I am writing in response to your request for an official Attorney General Opinion that would analyze whether the State's use of CARES Act funding for educational purposes complies with federal law. I am responding to your request by letter rather than official Attorney General Opinion because while the legal framework relevant to your questions is relatively straightforward, the ultimate answers depend on factual investigation that cannot be conducted in the context of an Attorney General Opinion. By statute, opinions of the Attorney General may be furnished only as to "questions of law." 74 O.S.Supp.2019, § 18b(A)(5).

BACKGROUND

In response to the COVID-19 pandemic, Congress passed the Coronavirus Aid, Relief, and Economic Security ("CARES") Act, Pub. L. No. 116-136, 134 Stat. 281, in March of this year. Among other things, the CARES Act appropriated over \$30 billion to the federal Education Stabilization Fund, with such funding to be made available to states through September 30, 2021 via allocation from the U.S. Secretary of Education ("Secretary"). *See id.* §§ 18001 – 18008. In general, funding from Education Stabilization Fund is divided into three buckets:

- 9.8% in the Governor's Emergency Education Relief ("GEER") Fund,
- 43.9% in the Elementary and Secondary School Emergency Relief ("ESSER") Fund, and
- 46.3% in the Higher Education Emergency Relief Fund. *See id.* § 18001(b).

It is the expenditure of Oklahoma's GEER Fund allocation that gives rise to your questions.

Grants from the GEER Fund are made by the Secretary to “the Governor of each State with an approved application.” Pub. L. No. 116-136, § 18002(a). Once awarded, such grants may be used for the following purposes, as set forth in subparagraphs 1 – 3 of Section 18002(c):

- (1) [to] provide emergency support through grants *to local educational agencies* that the State educational agency deems have been most significantly impacted by coronavirus to support the ability of such local educational agencies to continue to provide educational services to their students and to support the on-going functionality of the local educational agency;
- (2) [to] provide emergency support through grants *to institutions of higher education* serving students within the State that the Governor determines have been most significantly impacted by coronavirus to support the ability of such institutions to continue to provide educational services and support the on-going functionality of the institution; and
- (3) [to] provide support to any other institution of higher education, local educational agency, *or education related entity* within the State that the Governor deems essential for carrying out emergency educational services to students for authorized activities described in section 18003(d)(1) of this title or the Higher Education Act, the provision of child care and early childhood education, social and emotional support, and the protection of education-related jobs.

Id. § 18002(c) (emphasis added). Of these provisions, only subparagraphs 1 and 3 are relevant to K-12 schools; subparagraph 2 applies only to higher education.

From this statutory language, we can tease out the prerequisites that grants from the GEER Fund must satisfy. For instance, a grant authorized under subparagraph 1 of Section 18002(c) must meet the following conditions:

- (a) the grant provides “emergency support,”
- (b) to a local educational agency (“LEA”)—typically, a local board of education,¹
- (c) that is deemed by the State educational agency² to have been “most significantly impacted by coronavirus,”
- (d) to enable the LEA to continue to educate its students and support its “ongoing functionality.”

¹ Under federal law, a “local educational agency” is defined to mean “a public board of education or other public authority constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary schools or secondary schools in a city, county, township, school district, or other political subdivision of a State, or for a combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary schools or secondary schools.” 34 C.F.R. §303.23.

² Federal regulations define “State educational agency” to “mean[] the State board of education or other agency or officer primarily responsible for the State supervision of public elementary schools and secondary schools, or, if there is no such officer or agency, an officer or agency designated by the Governor or by State law.” 34 C.F.R. § 303.36. In Oklahoma, the State educational agency is the State Board of Education. OKLA. CONST. art. XIII, § 5.

Meanwhile, a grant under subparagraph 3 of Section 18002(c) must meet the following conditions:

- (a) the grant provides support,
- (b) to an LEA *or* an education-related entity in Oklahoma that the Governor deems essential for carrying out emergency educational services to students,
- (c) for one or more of the following purposes:
 - (i) activities authorized by the Elementary and Secondary Education Act of 1965 (“ESEA”) or the Higher Education Act,
 - (ii) provision of childcare or early childhood education,
 - (iii) social and emotional support, or
 - (iv) protecting education-related jobs.

Finally, if a grant is made to an LEA from *either* the GEER Fund *or* the ESSER Fund, the CARES Act requires the LEA to apportion resources between the district’s public and non-public schools. Specifically, the LEA “shall provide equitable services in the same manner as provided under Section 1117 of the ESEA of 1965 to students and teachers in non-public schools, as determined in consultation with representatives of non-public schools.” Pub. L. No. 116-136, § 18005(a).³ With one exception noted below, no GEER Fund expenditures in Oklahoma were directed to an LEA, so this provision is generally not material to our analysis.

ANALYSIS

You have asked this office to determine whether certain programs supported through GEER Fund grants approved by Governor Stitt comply with the CARES Act. You specifically mention three programs: (1) Learn Anywhere Oklahoma (\$12 million), (2) Bridge the Gap Digital Wallet (\$8

³ In short, Section 1117 of the ESEA “has consistently been interpreted to mean that LEAs are to share their Title I funding in proportion to the number of students from low-income families that reside in their attendance area but who attend private school.” *Washington v. DeVos*, ___ F.Supp.3d ___, 2020 WL 5079038, at *3 (W.D. Wash. Aug. 21, 2020); *Michigan, et al. v. DeVos*, ___ F.Supp.3d ___, 2020 WL 5074397, at *1 (N.D. Cal. Aug. 26, 2020) (“In effect, the share of Title I funds awarded to private schools is determined by the number of low-income children attending private schools in Title I-eligible areas.”).

In *Washington v. DeVos* and later cases, federal courts addressed an Interim Final Rule issued by the U.S. Department of Education that declared the CARES Act’s reference to Section 1117 of the ESEA ambiguous. *See* 85 Fed. Reg. 39479. As a result of this purported ambiguity, the Rule provided a mechanism for LEAs to use the “poverty-based formula” described above, subject to certain additional conditions, or an alternative “enrollment-based formula” that uses the proportion of *all* students residing in the LEA attendance area who attend private school. *See id.* at 39481-82. According to the plaintiffs, the effect of the Rule would be to increase the proportion of CARES Act funding directed to private schools, at the expense of public schools. *Washington v. DeVos*, 2020 WL 5079038, at *5. In each case, the courts held that the CARES Act unambiguously refers to the “poverty-based formula,” and that, in any event, the Department lacked rulemaking authority under the CARES Act. *NAACP, et al. v. DeVos*, ___ F.Supp.3d ___, 2020 WL 5291406, at *6 (Sept. 4, 2020); *Michigan v. DeVos*, 2020 WL 5074397, at *4-5, *Washington v. DeVos*, 2020 WL 5079038, at *6-7. The Department has elected not to appeal these rulings.

million), and (3) Stay in School Funds (\$10 million).⁴ As mentioned above, we cannot reach any definitive conclusions as to these questions in the context of an Attorney General Opinion. Accordingly, what follows is my own approximation as to each program, based on the statutory requirements described above and publicly-available information regarding these programs.

I. Learn Anywhere Oklahoma.

According to the Governor, the \$12 million put toward this program will “allow schools to access high quality digital content, including Advanced Placement courses across grades K-12.” The content will be purchased through the Oklahoma Supplemental Online Course Program (OCOSP)—an initiative of the State Department of Education, *see* OAC 210:15-34—which will also provide technical support to participating schools.

This program appears to be permissible under subparagraph 3 of Section 18002(c) of the CARES Act. Referencing the elements set forth above, the program (1) provides support, (2) to an education-related entity “that the Governor deems essential for carrying out emergency educational services to students.” Lastly, as it is described by the Governor, this initiative satisfies the third element as an “activit[y] authorized by the ESEA.” *See* Pub. L. No. 116-136, §§ 18002(b)(3), 18003(d)(1). Making digital coursework available to Oklahoma schools is consistent with any number of activities authorized by the ESEA. *See, e.g.*, 20 U.S.C. § 7114 (describing permissible uses of funds allotted to states under the ESEA).

II. Bridge the Gap Digital Wallet.

According to the Governor, \$8 million will be used to “provide \$1,500 grants to more than 5,000 low income Oklahoma families to be used to purchase curriculum content, tutoring services and/or technology.” The grants will be awarded by Every Kid Counts Oklahoma (“EKCO”), a not-for-profit education reform organization.

This program also appears to be permissible under subparagraph 3 of Section 18002(c) of the CARES Act. As with Learn Anywhere Oklahoma, this program meets the first two elements by (1) providing support, (2) to “an education related entity that the Governor deems essential for carrying out emergency educational services to students.” As to the second element, the CARES Act does not limit such entities to only public bodies, and guidance from the U.S. Department of Education provides that education-related entities can include private non-profit organizations “that provide[] services that support preschool, elementary, secondary, or higher education.” *See* U.S. DEPT. OF ED., *Frequently Asked Questions about the Governor’s Emergency Education Relief*

⁴ Another \$9 million of the State’s GEER Fund allotment was previously distributed in two grants. In June, the Governor and the State Department of Education dedicated \$8 million each from the GEER Fund and the ESSER Fund to “give eligible Oklahoma school districts an opportunity to apply for \$16 million in emergency relief funds[.]” These grants are administered by the Department and must comply with the “equitable services” division of resources required by Section 18005(a) of the CARES Act, as described above. *See, e.g., Michigan v. DeVos*, 2020 WL 5074397. Then in July, Tri County Tech—a public technology center operated by the State Board of Career and Technology Education—received \$1 million to launch its Skills to Rebuild initiative, which “will provide accelerated programs to train 375 individuals to immediately enter well-paying jobs that are in high demand in the region.” These expenditures were not explicitly referenced in your letter, but on their face they appear to satisfy federal requirements for the use of monies from the GEER Fund. *See* Pub. L. No. 116-136, §§ 18002(c), 18003(d).

Fund (GEER Fund), at 2 (2020) (hereafter, “GEER Fund FAQ”).⁵ This description would seem to include EKCO, though we are not able to engage in fact-finding to make such a determination in the context of an Attorney General Opinion.

Finally, the third element is satisfied if this program is an “activit[y] authorized by the ESEA,” provides for “childcare or early childhood education” or “social and emotional support,” or “protect[s] education-related jobs.” *See* Pub. L. No. 116-136, §§ 18002(b)(3), 18003(d)(1). While direct grants for the purchase of education materials are not specifically mentioned, the U.S. Department of Education has indicated such programs would be permitted under certain conditions. Specifically, “[i]f Governors wish to provide scholarships, financial assistance or microgrants to students or teachers [using a GEER Fund grant], they must provide a subgrant to an eligible entity, which could, in turn, provide scholarships or microgrants consistent with the CARES Act.” *See* GEER Fund FAQ, at 3. Because EKCO is an “eligible entity,” this use of GEER Fund monies is likely permissible.

III. Stay in School Funds.

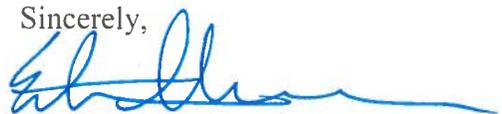
According to the Governor, \$10 million will be made available to “provid[e] temporary funds to students currently attending private schools whose continued attendance is threatened by the financial fallout of COVID-19.” Through this program, grants of up to \$6,500 per family will be available, with priority given “to low income families who have suffered COVID-19-related job loss or a demonstrated economic impact due to COVID-19-related factors.” The program is administered by the Oklahoma Private School Accrediting Commission, a private not-for-profit organization that oversees individual private school accrediting agencies.

For the same reasons that the Bridge the Gap Wallet program likely satisfies the GEER Fund requirements, this program likely does as well.

* * *

In closing, I would like to be clear that the legal analysis and conclusions reached in this letter are my own and not a formal opinion of the Attorney General. If you have any questions or concerns regarding the foregoing, please do not hesitate to contact me.

Sincerely,



ETHAN SHANER

DEPUTY GENERAL COUNSEL

cc: Rep. Kelly Albright, Dist. 95 (via e-mail)
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⁵ Available at <https://oese.ed.gov/files/2020/10/FAQs-GEER-Fund.pdf> (last visited October 20, 2020).