

July 31, 2020

Amy Huber  
U.S. Department of Education  
400 Maryland Avenue, SW, Room 3W219  
Washington, DC 20202

RE: CARES Act Programs; Equitable Services to Students and Teachers in Non-Public Schools RIN 1810-AB59 / Docket ID ED-2020-OESE-0091

Dear Ms. Huber:

We, the undersigned organizations, submit these comments in response to the Interim Final Rule regarding “Equitable Services to Students and Teachers in Non-Public Schools.” We recognize the hardship our schools, students, and families are currently facing as a result of the COVID-19 pandemic. Accordingly, we oppose this rule because it will coerce school districts to divert desperately-needed funds away from public schools to benefit private and religious schools.

This rule will cause real harm to public school students. The pandemic has led to an unprecedented interruption to our school systems, which has forced students and educators out of the classroom and left children and families without the same access to educational programs and services. It is during this challenging time that the federal government should focus on providing more, not fewer, resources to our public schools and public school educators, who are best equipped to serve all students. This rule, however, will require school districts to either limit their own use of funds or to divert their limited resources to private schools that are able to pick and choose which students they educate, are not accountable to the public for their use of federally funded services, and may not educate a single child in poverty.

Accordingly, we oppose this rule and ask the Department to rescind it.

### **Background on the Rule**

The Coronavirus Aid, Relief, and Economic Security Act (CARES Act) authorized \$13.2 billion in funding for K-12 schools and clearly stated that local education agencies (LEAs) must provide equitable services for students in nonpublic schools “in the same manner as provided under section 1117 of the ESEA of 1965.”<sup>1</sup> Section 1117 of ESEA, which is part of Title I of ESEA,

---

<sup>1</sup> Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, § 18005(a) (2020).

requires funds for equitable services in private schools to be based on the number of low-income students attending private schools.<sup>2</sup>

Yet, under guidance published on April 30,<sup>3</sup> the Department told school districts they must provide funding for equitable services to private schools on the basis of the total number of students enrolled in private schools rather than the number of low-income students. As a result, the guidance would require school districts to divert an additional \$1.35 billion out of public schools to private schools, based on the number of non-low-income students attending private schools.<sup>4</sup>

Now, the Department has issued this rule to give its nonregulatory guidance the force of law. The rule provides school districts two options for distributing these funds. Either school districts can follow the erroneous guidance,<sup>5</sup> or, if they want to target their equitable services to private schools based on their number of low-income students as the statute provides, they must limit all of their CARES Act funds only to public school students in Title I schools.<sup>6</sup> Both of these options contradict the plain language of the CARES Act and Congress' intent,<sup>7</sup> and both would have the effect of diverting dollars away from public schools.

### **This Rule Contradicts the Language in the CARES Act**

In an attempt to funnel more money to private schools, the Department wrongly claims the language in the CARES Act is ambiguous. The language in the CARES Act, however, is clear: it must be distributed "in the same manner as" Title I equitable services. Indeed, the Congressional Research Service issued a report finding that "a straightforward reading of section 18005(a) based on its text and context suggests that the CARES Act requires LEAs to follow section 1117's method for determining the proportional share, and thus to allocate funding for services for private school students and teachers based on the number of low-income children attending private schools."<sup>8</sup>

In order to follow the statute, therefore, LEAs must allocate the funds in accordance with Title I. This Department's own 2019 guidance on Title I equitable services states that an LEA must calculate the required equitable participation of nonpublic schools based on the number of low-income children in each participating nonpublic school in the LEA.<sup>9</sup>

---

<sup>2</sup> U.S. Dep't of Educ. [Title I, Part A of the Elementary and Secondary Education Act of 1965, as Amended by the Every Student Succeeds Act: Providing Equitable Services to Eligible Private School Children, Teachers, and Families](#) (Oct. 7, 2019) [hereinafter 2019 Guidance].

<sup>3</sup> U.S. Dep't of Educ., [Providing Equitable Services to Students and Teachers in Non-Public Schools under the CARES Act Programs](#) (Apr. 30, 2020).

<sup>4</sup> Michael Griffith, [COVID-19 and School Funding: What to Expect and What You Can Do](#), Learning Policy Inst. (June 10, 2020).

<sup>5</sup> CARES Act Programs; Equitable Services to Students and Teachers in Non-Public Schools, 85 Fed. Reg. 39,479, 39,488 (July 1, 2020) (to be codified at 34 CFR §76.665(c)(ii)).

<sup>6</sup> *Id.* (to be codified at 34 CFR §76.665(c)(i)).

<sup>7</sup> See Andrew Ujifusa, [Sen. Alexander Splits From Betsy DeVos on COVID-19 Aid to Help Private Schools](#), Educ. Week (May 21, 2020) (Senator Alexander stated "I thought, and I think most of Congress thought, that money from the CARES Act would be distributed in the same way that Title I is distributed.").

<sup>8</sup> Cong. Research Serv., [Analysis of the CARES Act's Equitable Services Provision](#) 17 (2020).

<sup>9</sup> 2019 Guidance, *supra* note 2.

The Department has ignored the plain language of the statute as well as its previous guidance.

### **The Department Fails to Adequately Account for the Harms to Public Schools**

This rule provides school districts with two harmful options. If a school district wishes to provide funding for equitable services in the same manner as Title I, it must also choose the option requiring allocation of the remainder of its CARES Act funding for only Title I schools. This option conflates the formula for allocating funds with the allowable uses of funds and severely limits how districts may use CARES Act funding in a way that is contrary to the statute. Congress made a reasoned decision to distribute CARES Act education funding based on the presence of low-income students in a district, while simultaneously choosing to allow school districts broad flexibility in how to use that funding. Yet, this option forces school districts to forego opportunities to provide funding for a greater share of students in its district, meaning that fewer public school students will receive services as a result. Furthermore, this option creates a new requirement for districts, forcing them to comply with a “supplement not supplant” requirement that would prevent districts from redirecting State and local funds from those schools to non-Title I schools.

Similarly, under this rule if the school district chooses to use its funding more broadly across the school district, as permitted by the CARES Act, it will be forced to divert funding for equitable services from low-income public school students to benefit private school students who would not be eligible under Title I. Allowing school districts to set aside funding to serve all students who attend a private school, regardless of those students’ need or financial situation clearly contradicts the intent behind Title I and the language in the CARES Act. And, this option could send over \$1 billion to private schools across the country.<sup>10</sup> The cost of this rule to our public schools is too great.

### **Public Money Should Fund Public Schools**

The federal government should focus on providing greater resources to our public schools, which educate 90% of our country’s students and are best equipped to serve all students—and which Congress clearly intended to do. The Department should not be manipulating the CARES Act in order to divert desperately needed resources away from the public school system to fund the education of a few, select students in private and religious schools.

Public schools are a unifying factor among the diverse range of communities in our society. In contrast, private schools can deny students admission or expel them for a number of reasons, including based on their religion, sexual orientation, gender identity, academic abilities, disciplinary history, disability, or ability to pay tuition. Private schools often do not provide the same federal civil rights protections to students as public schools, such as those in Titles IV and VI of the Civil Rights Act, Title IX of the Education Amendments Act of 1972, the Individuals with Disabilities Education Act, and Title II of the Americans with Disabilities Act. And students who attend private schools do not have the same First Amendment, due process, and other

---

<sup>10</sup> Griffith, *supra* note 4.

constitutional and statutory rights guaranteed to them as in public schools, nor do they have the same clear systems for oversight, reporting violations, or enforcing penalties for noncompliance as children and families attending public schools.

Moreover, it is especially harmful for the Department to use an equitable services provision as a vehicle for increased funding for private schools. Many private schools fail to provide adequate services for students most in need, including students with disabilities, low-income students, and students who are English learners. In particular, private schools often fail to provide students with disabilities the same quality and quantity of services available to students in public schools, including those mandated under each student's individualized education program. By draining funding from the public schools that disproportionately serve students in need and allowing for greater funding for private schools, regardless of the students the private schools educate, this Department flips the idea of equitable services on its head—creating more inequity instead of less. This effect is exacerbated when considering the disproportionate impact the ongoing COVID-19 pandemic has had on these underserved students and their ability to learn.

With this rule, the Department is facilitating a shift of resources away from the schools and students most in need to pay for services in private schools. The Department should focus on strengthening our public schools instead of directing increased funding to private and religious schools that often discriminate against students and teachers and do not necessarily provide the same supports and services for all students.

### **Conclusion**

We oppose the Department's rule because it would force school districts into options in violation of the CARES Act, and could provide increased funding for private schools at a cost to public education. Accordingly, we ask the Department to rescind this rule.

Sincerely,

AASA, The School Superintendents Association  
African American Ministers In Action  
American Atheists  
American Federation of Teachers  
American Humanist Association  
Americans United for Separation of Church and State  
The Arc of the United States  
Association of Educational Service Agencies  
Baptist Joint Committee for Religious Liberty (BJC)  
Clearinghouse on Women's Issues  
Council for Exceptional Children  
Council of Administrators of Special Education  
Council of the Great City Schools  
EDGE Consulting Partners

Feminist Majority Foundation  
GLSEN  
In the Public Interest  
National Association of Elementary School Principals  
National Association of Federally Impacted Schools  
National Association of Secondary School Principals  
National Association of School Psychologists  
National Center for Learning Disabilities  
National Disability Rights Network  
National Education Association  
National PTA  
National Rural Education Advocacy Collaborative  
National Rural Education Association  
National School Boards Association  
Network for Public Education  
Public Funds Public Schools  
School Social Work Association of America  
Secular Coalition for America  
Southern Education Foundation  
Union for Reform Judaism