

United States Senate

WASHINGTON, DC 20510

July 29, 2020

The Honorable Betsy DeVos
c/o Ms. 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 34 CFR Part 76 [Docket ID ED-2020-OESE-0091] RIN 1810-AB59

Dear Secretary DeVos:

As the novel coronavirus (Covid-19) pandemic continues to spread across our Nation, our education system is facing unprecedented disruption. During this time, it is critical that we provide school districts with resources as quickly as possible, and that we target these funds to districts with the highest need, which is what the Coronavirus Aid, Relief, and Economic Security (CARES) Act sought to do. Accordingly, we are writing to express our strong opposition to the interim final rule published in the federal register on July 1, 2020. This interim final rule contradicts the plain language of the CARES Act, contradicts congressional intent, and has caused unnecessary delays in getting emergency education funds to school districts. We respectfully urge you to withdraw this rule.

The CARES Act included \$30.750 billion for an Education Stabilization Fund for states, school districts, and institutions of higher education to address disruptions caused by the pandemic. Of this funding, approximately \$13.5 billion was allocated to states for coronavirus-response activities in elementary and secondary schools. Section 18005(a) of the CARES Act directs school districts to provide assistance to certain students attending non-public schools consistent with Title I of the Elementary and Secondary Education Act (ESEA). The Department suggests the interim final rule is needed to clarify ambiguity in Section 18005(a). However, Section 18005(a)'s plain meaning is clear and unambiguous.

Section 18005(a) states “a local educational agency receiving funds under sections 18002 or 18003 of this title 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...”¹ ESEA section 1117 states that “expenditures for educational services and other benefits to eligible private school children shall be 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” within the school district. A plain reading of the CARES Act in this matter could not be clearer—Congress directed school districts to calculate equitable services in the same manner as provided for under Section 1117—based on private schools’ enrollment of low-income students.

¹ Public Law No: 116-136

The interim final rule would result in allocations being based on the *total number of students* enrolled in non-public schools in the school district. This rule disregards Congress' clear mandate that allocations be based on the *number of low-income students* attending non-public schools in the school district. This is not the "same manner as" equitable services are provided under Section 1117 and therefore is inconsistent with the plain language of the CARES Act. Direction to provide funds according to section 1117 was intentional. Indeed, Congress had several models of equitable services to choose from when crafting the CARES Act. It could have directed school districts to provide equitable services consistent with Section 8501 of ESEA, which directs local educational agencies (LEAs) to reserve funds for equitable services based on the number of participating private school students. Instead, Congress deliberately and clearly directed that equitable services be provided in the same manner as under Section 1117, which is based on poverty. The interim final rule not only misinterprets the CARES Act language, but it also contradicts well-established interpretations of equitable services under section 1117 by the Department as recently as October 2019.²

The interim final rule suggests that the words "in the same manner" are facially ambiguous and therefore necessitate the Department's regulation. While we contend the ordinary meaning of this provision is clear, even if the Department's contention were true, it does not follow that the correct interpretation would be to simply omit certain procedural requirements.

The interim final rule provides that LEAs may choose to calculate the equitable services share based on poverty, but only if they limit CARES Act funds to public school students in Title I schools. This rule is not only contrary to Congressional intent, but is beyond the statutory authority that the law gives to the Secretary. The Department has justified this departure from the law using flawed reasoning suggesting that that because funds from the CARES Act can be *used* for all public school students regardless of need, equitable services funds should be *allocated* to private school students regardless of need. Though CARES Act funds can be used for all public school students, the bulk of funds are allocated based on the prior fiscal year Title I allocations, which directs money to school districts based on poverty. School districts that receive funds can use those funds to benefit any student, but this is not relevant in terms of how the funds are *allocated*. Just as funds for school districts are allocated based on poverty, funds to provide services for students in private schools should be allocated based on poverty. Equitable services is about how funds are generated, not how those funds are spent.

Though all communities are affected by Covid-19, they are not all affected equally. Low-income children have far more challenges accessing online education, nutrition, and health care. According to the Pew Research Center, about 29 percent of adults with household incomes below \$30,000 do not own a smartphone, more than 44 percent do not have broadband services, about 46 percent do not have a traditional computer, and a majority do not own a tablet, while nearly all adults in households earning \$100,000 or more have access to all of these technologies.³ While all schools have faced disruptions, school districts serving higher numbers of low-income students have had to not only transition academic services, but also ensure children have access to school meals and necessary technology. As federal funds are allocated, it is critical that they be targeted to school districts serving students and families with the greatest need.

² <https://www2.ed.gov/about/inits/ed/non-public-education/files/equitable-services-guidance-100419.pdf>

³ <https://www.pewresearch.org/fact-tank/2019/05/07/digital-divide-persists-even-as-lower-income-americans-make-gains-in-tech-adoption/>

Finally, the CARES Act sought to provide emergency federal appropriations to address immediate education needs. School districts throughout our Nation whose academic years were abruptly disrupted sought to quickly adjust in order to continue meeting the needs of students. This interim final rule is creating confusion and compounding uncertainty at a time when schools are making decisions about modes of instruction and reopening in the fall. Getting funds to school districts quickly and efficiently should be the priority.

As members of the United States Senate who helped to craft and voted for the CARES Act, we strongly oppose this interim final rule and urge you to rescind it.

Sincerely,



Robert P. Casey, Jr.
United States Senator



Jon Tester
United States Senator

/s/ Sherrod Brown

Sherrod Brown
United States Senator

/s/ Elizabeth Warren

Elizabeth Warren
United States Senator

/s/ Chris Van Hollen

Chris Van Hollen
United States Senator

/s/ Tina Smith

Tina Smith
United States Senator

/s/ Jack Reed

Jack Reed
United States Senator

/s/ Mark R. Warner

Mark R. Warner
United States Senator

/s/ Tim Kaine

Tim Kaine
United States Senator

/s/ Angus S. King, Jr.

Angus S. King, Jr.
United States Senator

/s/ Jacky Rosen

Jacky Rosen
United States Senator

/s/ Benjamin L. Cardin

Benjamin L. Cardin
United States Senator

/s/ Debbie Stabenow

Debbie Stabenow
United States Senator

/s/ Jeanne Shaheen

Jeanne Shaheen
United States Senator

/s/ Mazie K. Hirono

Mazie K. Hirono
United States Senator

/s/ Cory A. Booker

Cory A. Booker
United States Senator

/s/ Amy Klobuchar

Amy Klobuchar
United States Senator

/s/ Robert Menendez

Robert Menendez
United States Senator