WISCONSIN ASSOCIATION OF SCHOOL BOARDS

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JOHN H. ASHLEY, EXECUTIVE DIRECTOR

July 31, 2020

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 Ms. Huber,

On behalf of the Wisconsin Association of School Boards (WASB), which represents all 421 locally-elected public school boards in the state of Wisconsin and nearly 2,800 locally elected public school board members, I write in opposition to the interim final rule for the reasons set forth below and respectfully urge the Department to rescind or withdraw the interim final rule.

Introduction

In passing the CARES Act, Congress sought to quickly provide federal support to those sectors most affected by the coronavirus pandemic. With at least 124,000 public K-12 schools closed across the country, affecting more than 55 million students, America's schools are in a precarious position and in urgent need of federal support to prevent educational hardships of historic proportions that could affect our nation for decades to come. The Department of Education's interim final rule is ill-advised, and contrary to the expressed intent and will of Congress. It has created enormous confusion and caused unnecessary delays in getting emergency education funds to schools, both public and private.

This comment is in no way intended to suggest that the WASB or its members oppose the concept of "equitable services." For many years, Wisconsin public school districts have worked cooperatively and collaboratively with private schools located within their boundaries to provide equitable services to those private schools and private school students within a framework provided by the Elementary and Secondary Education Act (or ESEA). Wisconsin public schools will continue to do so. However, we object to the Department acting in an arbitrary and capricious manner to change the allocation of those services in a manner not intended by Congress that would divert resources meant to benefit Wisconsin's economically disadvantaged students to private schools that serve some of our state's wealthiest students. We object to the effort to deprive poor children of resources intended to benefit them.

Background

The CARES Act was enacted on March 27, 2020 to address the economic impacts on businesses, dislocated workers and schools of the unprecedented economic shutdown in response the COVID-19 pandemic. The CARES Act included approximately $13.23 billion for an Elementary and Secondary School Emergency Relief (ESSER) Fund, which is to be allocated to state and local education agencies (SEAs and LEAs) proportionate to their share of Title I, Part A funding in the prior fiscal year. Section 18005(a) of the CARES Act definitively states that an LEA (or local educational agency) receiving funds under ESSER, as well as under the Governor's Emergency Education Relief (GEER) Fund, must provide equitable services to students and teachers in non-public schools "*in the same manner as provided under section 1117 of the ESEA of 1965*."

Section 1117(a)(4)(A) of ESEA is similarly explicit: "*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*."

Although it should not be necessary, it bears noting that enactments of Congress are not simply a list of helpful suggestions; they are the law of this great land. It is the role of the Courts, not federal agencies, to adjudge their validity. Further, no matter how appealing it might be for federal agency heads to seek to rework the equity of laws Congress has passed to suit their own predilections, it is not the role of an unelected federal agency head to substitute his or her judgment for that of Congress. Rather, it is the role of federal agencies to implement federal legislation as enacted by Congress in the manner intended by Congress. The Department has either failed to grasp or willfully ignored this simple concept ever since the CARES Act was enacted. Rather than petition Congress to change the law, the Department has attempted, unilaterally, to rewrite the law through policy making and ultimately rulemaking.

The Department's first misinterpretation of how LEAs should apportion the CARES Act moneys and which private-school students were eligible for equitable services was unveiled on April 30, 2020, through a guidance document that was notable for being inconsistent with prior guidance issued by the Department. That guidance document provided that LEAs must apportion funds for equitable services using the *total* numbers of private and public school students rather than only *low-income* students. By insinuating that every LEA receiving CARES Act funds is required to apportion CARES Act funds in this manner, the guidance document would, in practical terms, have had the effect of directing or diverting millions of dollars in CARES Act funding from the public schools within public school districts to private schools within those districts. Furthermore, the guidance document directed LEAs to provide equitable services to *all* private school students, regardless of whether those students were *low-income*, were academically at-risk of failing, or resided in Title I school attendance areas. Neither of these directives is consistent with Section 1117.

After the Department's received widespread pushback regarding its incorrect and unlawful guidance, the Department is widely acknowledged to have "doubled-down" on its erroneous interpretation of the CARES Act with the publication of an interim final rule entitled *Providing Equitable Services to Students and Teachers in Non-public Schools*, 85 Fed. Reg. 39,479 (July 1, 2020). That interim final rule, which is the subject of this commentary, became effective upon publication.

The interim final rule disregards Congress' clear mandate in Section 1117 that the *number of low-income students* attending non-public schools in the LEA should serve as the basis for how equitable services are allocated to non-public schools. Instead, the rule introduces two alternative approaches, neither of which was contemplated by Congress, including the idea that the apportionment could or should be based on the *total number of students* enrolled in non-public schools in the LEA.

This not only misinterprets the CARES Act statute, it contradicts well-established interpretations by the Department, including as recently as October 2019, that equitable services allocations should be based on the number of *low-income* students in non-public schools from a particular LEA under section 1117(a)(4)(A)(i) and (c)(1).

Over many decades, USED's rationale for its interpretation of the equitable services allocation for students and teachers in non-public schools has been straightforward: because an LEA's Title I allotment is based on the total number of *low-income* students whether attending public or non-public schools, the equitable services allocation should *also* be based on the number of *low-income* students attending non-public schools from the particular LEA. In effect, the share of *low-income* students attending non-public schools is used to generate an LEA's overall Title I allocation; accordingly, that *same metric* should be used to calculate equitable services under the CARES Act.

Title I equitable services was designed to benefit eligible students in need of greater resources, and the CARES Act explicitly provided additional resources to these students. The department's final interim rule, however, could require public school districts to set aside funding to serve all students who attend a private school, regardless of those students' need or financial situation—in effect diverting CARES Act funding from low-income public school students to wealthy private school students—or that public school districts must restrict the use of CARES Act funding for only their Title I eligible students.

The Department's interpretation flips the idea of equitable services on its head—creating more inequity instead of less. The interim final rule also directly contradicts the language in the CARES Act that says that equitable services must be provided "in the same manner as" Title I equitable services, which clearly intends that services should be provided based on the number of *low-income* students living in the LEA who attend non-public schools.

If Congress' intent were to provide funding for services for *all* private school students, the CARES Act would have said so and included language indicating it intended divergence from Title I requirement; however, it did not do so. What the Department—an unelected and unrepresentative branch of government—has done is to invent—out of thin air and upon the thinnest of premises—two alternative approaches, neither of which was contemplated by Congress or supported in the language Congress used when it enacted the CARES Act. The Department has apparently done so under the pretext that "emergency legislation" is not subject to the customary rules of statutory interpretation, common sense or deference to duly-elected members of Congress that apply to all other legislation.

The CARES Act did not expressly delegate to the Department the authority to promulgate administrative rules that interpret, let alone completely re-write, the Act's allocation requirements for moneys provided to private-school students. Rather than petition Congress to make a change in the statute the Department has attempted to make the change on its own, a clear overreach of its authority.

Because it would be difficult for me to phrase our concerns about the effect of the Department's overreach more succinctly than they have been outlined in a federal lawsuit filed in the Northern District of California by the attorneys general of five states and the District of Columbia (*State of Michigan, et al., v. Elisabeth D. DeVos, et al.*), I quote here from the complaint in that case:

> "…[T]he Department's [interim final r]ule requires LEAs to make an untenable choice about how to apportion the CARES Act funds for private-school students, a choice unsupported by the relevant statutes: (1) follow the same interpretation contained in the Guidance Document by apportioning funds for equitable services based on the number of *all* private school children enrolled, rather than *low-income* private school children as required by Section 1117; or (2) apportion funds for equitable services based on the number of *low-income* non-public school children, as required under Section 1117, but then incur strict, poison-pill requirements found nowhere in the CARES Act on how the public-school share of the funds can be used. Under either option, all private-school students would still be eligible to receive equitable services, which negates the eligibility requirements for services in Section 1117.
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> "The first poison-pill "option" for LEAs prohibits them from using the public-school share of the funds for any non-Title I schools. As a result, depending on the district, numerous schools—which, despite not being designated as Title I schools, serve many low-income and at risk students—are excluded from receiving any funds. This restriction cannot square with the flexibility Congress provided to LEAs to use the funds for all schools in their districts, not only Title I schools. The second requirement cautions the LEAs from using the funds in a way that would result in other federal funds "supplant[ing]," rather than "supplement[ing]," traditional school funding from state and local sources. In effect, this second requirement prohibits many LEAs from using CARES Act funds for existing expenditures, which is nonsensical since filling the gap created by reduced state and local funding is a key purpose of the CARES Act funding.
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> "These two poison pill restrictions on the use of the CARES Act funds penalize LEAs for following the proportional share calculation in Section 1117 (and required by the CARES Act), and push LEAs to apportion funds in accordance with the Department's Guidance Document—forcing LEAs to grant a higher proportion of funds to private schools, contrary to the CARES Act's clear mandate. They also undermine the flexibility that Congress intended to grant LEAs when it enacted a broad set of permitted uses for CARES Act funds, which expressly include maintaining continuity of services and continuing to employ existing staff of the local educational agency. See CARES Act §§ 18002(c)(1), 18003(d)(12).
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> "The Rule is thus inconsistent with and not in accordance with the law. The discrepancy between the plain language of the CARES Act and the Department's inaccurate interpretations has led to widespread confusion for State Education Agencies (SEAs), LEAs, and private schools across the Nation. The Rule strips funds Congress specifically directed to public schools to support their response to the COVID-19 pandemic and requires that those funds be reallocated, including to affluent private schools, with consideration neither of the private schools' needs or available resources nor the harms these reallocations cause to public schools. While Congress intended to provide some assistance to private-school students and teachers through the inclusion of

equitable services, it intended that assistance go to vulnerable students and used the Title I-A formula and equitable services requirement applicable to those funds to that end."

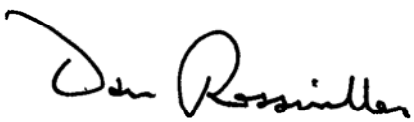
The Department's attempt, through this interim final rule, to funnel more money to private schools in the face of a pandemic was, no doubt, well-intended by its proponents. However, that ***does not*** make it lawful. It is for Congress to make that determination not the Department.

There will be little argument from the WASB that both public and private schools face daunting financial challenges in the coming months and years. We note that many private schools in Wisconsin (and no doubt throughout the nation) have already received federal assistance for COVID-19 relief under CARES Act through the Payroll Protection Program (PPP)—a program that was not available to public schools. Congress separately authorized funding through the PPP to assist nonprofit organizations, including private schools, who need financial assistance as a result of the COVID-19 pandemic. Under the PPP, nonprofits, including private schools, are able to receive loans up to $10 million to cover payroll and other operational expenses. As long as the nonprofit employer can demonstrate that it used the loan for certain authorized uses, those loans can then be forgiven. Many private and religious schools have utilized this program and accepted the government funding.

The final interim rule is akin to allowing private schools to "double dip" by allowing private schools to participate in a funding relief plan denied to public schools and then requiring public schools to divert funds above the levels Congress authorized or intended to be diverted from public schools serving *low income* students to private schools, including many private schools that serve *high-income* students. This unprecedented pandemic should not be exploited to divert public funding for private schools in this way.

The Department's interpretation in the interim final rule flies in the face of both the statutory language and intent AND its own previous interpretations. It has created confusion and stalled the release of CARES Act funding at a time when this emergency assistance is most urgently needed by the public schools that were intended to be its primary recipients and the private schools seeking equitable services. And it has made more difficult the collaboration and cooperation across educational sectors that the concept of "equitable services" was intended to foster. It should be rescinded and withdrawn.

Respectfully submitted,



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Wisconsin Association of School Boards (WASB)