



AMERICAN ATHEISTS

July 28, 2020

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

Re: American Atheists Comments on Interim Final Rule: 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:

American Atheists strongly opposes the Department of Education's plan to require school districts to divert desperately needed Coronavirus Aid, Relief, and Economic Security (CARES) Act¹ funds away from public schools towards private and religious schools. We write in response to the Interim Final Rule (IFR) pertaining to equitable services to students and teachers in nonpublic schools,² and we urge the Department not to fund private and religious schools at the expense of public-school students. The Department's Rule for allocating CARES Act funds violates the plain language of the CARES Act and conflicts with Congress' intent for allocating those funds. The Department's Rule will deprive public schools of hundreds of millions of dollars needed to combat the effects of COVID-19 on the public education system. Therefore, we urge the Department to withdraw the IFR and to allow public school districts to distribute the funding in compliance with the CARES Act.

American Atheists is a national civil rights organization that works to achieve religious equality for all Americans by protecting what Thomas Jefferson called the "wall of separation" between government and religion created by the First Amendment. We strive to create an environment where atheism and atheists are accepted as members of our nation's communities and where casual bigotry against our community is seen as abhorrent and unacceptable. We promote understanding of atheists through education, outreach, and community-building and work to end the stigma associated with being an atheist in America. As advocates for religious equality and public education, American Atheists opposes efforts to divert taxpayer funding to support religious education.

As part of the CARES Act, Congress allocated \$30.75 billion for K-12 schools and higher education "to prevent, prepare for, and respond to coronavirus."³ The CARES Act directs states to distribute funds to

¹ Public Law 116-136, 134 Stat. 28 (Mar. 27, 2020) ["CARES Act"].

² U.S. Department of Education, CARES Act Programs; Equitable Services to Students and Teachers in Non-Public Schools, 85 Fed. Reg. 39479 (RIN 1810-AB59, Docket ID ED-2020-OESE-0091) (published July 1, 2020), available at <https://www.federalregister.gov/documents/2020/07/01/2020-14224/cares-act-programs-equitable-services-to-students-and-teachers-in-non-public-schools> [hereinafter, "IFR" or "Rule"].

³ Education Stabilization Fund, CARES Act § 18001.

local education agencies (LEAs) in proportion to their allocation under part A of Title I of the Elementary and Secondary Education Act of 1965 (ESEA) in the previous fiscal year.⁴ LEAs receiving CARES Act funds must then provide “equitable services” to students and teachers in non-public schools “in the same manner as provided under section 1117 [of Title I] of the ESEA.”⁵ On April 30, 2020, the Department issued guidance for how LEAs should provide these equitable services.⁶ Contrary to Title I’s formula allocating funds on the basis of *low-income* students in private schools, the Department said that equitable services provided to private schools must be allocated on the basis of *all* students enrolled in private schools. Thus, the Guidance would provide benefits to private schools regardless of whether the students are low-income or at risk of failing to meet academic standards.

The Guidance sparked criticism from various education groups and Congressional leaders. On May 5, 2020, the Council of Chief State School Officers (CCSSO) wrote to Secretary DeVos, criticizing the Guidance as an attempt to channel “an inequitable amount of funding” to private schools in violation of the CARES Act.⁷ Various Congressional leaders also wrote to Secretary DeVos, urging the Department to revise the Guidance and comply with the CARES Act.⁸ Senator Lamar Alexander, Chair of the Senate Committee on Health, Education, Labor, and Pensions, separately voiced his concerns that the Guidance violated the CARES Act, saying “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.”⁹ Then on June 4, 2020, 50 national education organizations wrote Congressional leaders, asking Congress to pass legislation rescinding the Guidance.¹⁰

Despite the widespread opposition to the Guidance and clear indication regarding the intent of Congress, the Department published this Rule on July 1, 2020, unlawfully requiring LEAs to provide equitable services to private schools in a manner that contradicts the CARES Act. According to the Department’s Rule, LEAs have two options for how to allocate funds. Under the first option (Option 1), LEAs may apportion funds based on the number of low-income public and private school children. However, under Option 1, school districts can only use funds for school which received Title I funds during the 2019-2020 school year. Option 1 also contains a restriction that LEAs may not spend funds to “supplant,” as to opposed to “supplement,” programs supported by traditional state and local funding. This restriction prevents LEAs from using CARES Act funds to cover budget shortfalls due to COVID-19.

⁴ CARES Act § 18003(b).

⁵ CARES Act § 18005(a).

⁶ U.S. Department of Education, *Providing Equitable Services to Students and Teachers in Non-Public Schools under the CARES Act Programs* (April 30, 2020), available at <https://oese.ed.gov/files/2020/06/Providing-Equitable-Services-under-the-CARES-Act-Programs-Update-6-25-2020.pdf> [hereinafter, “Guidance”].

⁷ Letter from Carissa Moffat Miller, CCSSO, to Betsy DeVos, U.S. Sec’y of Educ. (May 5, 2020), available at <https://ccsso.org/sites/default/files/2020-05/DeVosESLetter050520.pdf>.

⁸ Letter from Robert C. Scott, Chair, Committee on Education and Labor, U.S. House of Representatives, et al. to Betsy DeVos, U.S. Sec’y of Educ. (May 20, 2020), available at <https://edlabor.house.gov/imo/media/doc/2020-5-20%20ltr%20to%20DeVos%20re%20Equitable%20Services.pdf>.

⁹ Andrew Ujlfusa, *Sen. Alexander Splits From Betsy DeVos on COVID-19 Aid to Help Private Schools*, Education Week (May 21, 2020), available at <https://blogs.edweek.org/edweek/campaign-k-12/2020/05/alexander-devos-COVID-aid-private-schools-CDC-reopening.html>.

¹⁰ Letter from National Education Organizations to Congressional Leaders (June 4, 2020), available at <https://ccsso.org/sites/default/files/2020-06/Equitable%20Services%20Funding%20Letter%20-%20FINAL.pdf>.

The obvious intent of these rigid restrictions under Option 1 is to push LEAs to use the second option. Under the second option (Option 2), LEAs must apportion funds for equitable services based on the number of *all* private school students enrolled in the district, instead of the number of *low-income* private school students as Title I requires. Option 2 will therefore divert hundreds of millions of dollars from public to private schools.

The Department's Rule sparked even further opposition. In an effort to prevent the harm the Rule will have on public education, five states and the District of Columbia filed a lawsuit against the Department on July 7, 2020, seeking to stop implementation of the Rule.¹¹ On July 22, 2020, the NAACP also filed suit against the Department on behalf of the organization, as well as several public school parents and school districts.¹² The vast opposition and efforts to stop implementation of the Department's Rule demonstrate just how harmful the Rule will be to public schools systems across the nation. The Department must rescind the Rule not only to stop this harm, but also because the Rule is legally flawed.

The IFR violates the Administrative Procedures Act because it fails to comply with the CARES Act regarding the distribution of funds.

The Department's Rule violates the Administrative Procedures Act (APA) because the Rule contradicts the plain language of the CARES Act. The APA prevents agencies from reaching any action, findings, or conclusions that are in excess of statutory authority or not in accordance with law.¹³ Congress did not authorize the Department to interpret or make rules regarding Section 18005 of the CARES Act. Neither of the Department's restrictive options for allocating funds are anywhere to be found in the CARES Act. Moreover, the Department's Rule is in direct contradiction with the plain language of Section 18005 of the CARES Act. Section 18005 explicitly states that LEAs "shall provide equitable services in the same manner as provided under Section 1117 of [Title I of] the ESEA of 1965 to students and teachers in non-public schools."¹⁴

Under Title I, federal funds are targeted toward public schools serving low-income students, with a portion of funds going to private schools based on the number of *low-income* students they enroll. Title I funds are not allocated based on the number of *all* students enrolled in private schools. Despite this clear language, incorporated into the requirements for the allocation of CARES Act funds by Section 18005(a), the Department's Rule mandates that LEAs must allocate funds to serve private school students based on the proportion of *all* students within the district who attend private schools, regardless of family income. Section 1117(a)(3) of the ESEA requires equity in services. However, the Department's Rule will result in benefits to wealthy private school students at the expense of low-income public-school students. This result runs completely counter to the purpose of Title I and the CARES Act, creating more inequity instead of less.

¹¹ Complaint, *Michigan v. DeVos*, No. 3:20-cv-04478 (N.D. Cal. filed July 7, 2020), available at <https://oag.ca.gov/system/files/attachments/press-docs/CARES%20Act%20K-12%20Funds%20Complaint.pdf>.

¹² Complaint, *NAACP v. DeVos*, No. 1:20-cv-01996 (D.D.C. filed July 22, 2020), available at https://www.splcenter.org/sites/default/files/devos_complaint.pdf.

¹³ 5 U.S.C. § 706(2)(A), (C).

¹⁴ CARES Act § 18005(a).

The Department’s Rule attempts to distinguish between Title I and the CARES Act, but the Department’s rationale for such a distinction is a weak, extra-legal rationalization. The Department says it must “interpret” the phrase “provide equitable services in the same manner as provided under Section 1117 [of Title I] of the ESEA of 1965,” somehow reading this abundantly clear phrase as ambiguous. In “interpreting” this phrase, the Department says that Congress did not actually intend to incorporate Section 1117 into the CARES Act, despite clearly referencing it. This is bad faith legal chicanery. The phrase is clear—Congress intended LEAs to provide equitable services under the CARES Act in the same way LEAs provide equitable services under Section 1117 of Title I—considering the proportion of *low-income* students in private schools. If Congress wanted to consider *all* students in private schools for equitable services, Congress would have incorporated ESEA Section 8501’s formula for allocating funds instead of Section 1117, as Section 8501 deals with services that must be provided based on the *total* enrollment of private school students.

The Department further attempts to rationalize its Rule by noting that once an allocation is made, “the CARES Act authorizes an LEA to serve all students—public and non-public—who have been affected by COVID-19.” The Department goes on to say that “If the CARES Act does not limit services based on residence and poverty, then it stands to reason than an LEA should not use residence and poverty to determine the proportional share of the available funds for equitable services to non-public school students.” However, the Department here is confusing *allocation* with *use of funds*. There is nothing new about using low-income status for *allocation* but then not limiting *use of funds* to low-income students—that is exactly how Title I functions. Under Section 1117 of Title I, the *allocation* of funds to serve students in schools is based on the number of low-income students, but there is no requirement that the Title I funds be used to serve only low-income students in those schools. Instead, Title I funds are to be used to serve all students who are failing, or at risk of failing, to meet academic standards. In fact, the Department’s existing regulations¹⁵ recognize that Title I allocates funds for public and private school students based on the relative shares of low-income students.

Congress’s intent with the CARES Act was clear—provide funds to public school districts and share those funds with private schools based on the proportion of *low-income* students attending private schools in the districts. The plain language of the CARES Act, the letter by Congressmembers to Secretary DeVos, and Senator Alexander’s statements resolve any and all doubt that Congress intended CARES Act funds to be distributed in the same way funds are distributed under Title I. If Congress intended to provide funding for services to *all* private school students, the CARES Act would have included provisions indicating divergence from Title I allocation requirements rather than explicitly incorporating Title I allocation requirements. The Department’s Rule contradicts Congress’ intent and therefore must be rescinded.

The Department’s IFR will have a devastating impact on public school students.

Under Option 1, non-Title I public schools would receive no CARES Act funds whatsoever. In a district electing this option, funds can only go to schools that received Title I funds during the 2019-2020 school

¹⁵ 34 C.F.R. § 200.64(a)(1) (“Funds expended by an LEA . . . for services for eligible private school children in the aggregate must be equal to the amount of funds *generated* by private school children from low-income families.”) (emphasis added).

year. However, not all schools that are eligible for Title I aid ultimately receive these funds due to budget limitations. Additionally, many public schools serve a significant number of low-income students but are not designated as Title I schools.¹⁶ The effects of COVID-19 demand that *all* public schools spend additional resources to tackle sanitation, distance learning, and implement other safety measures to protect the health and safety of students and staff.

The restrictions in Option 1, considered “poison-pill” restrictions by many school districts,¹⁷ will coerce many LEAs to choose Option 2. But Option 2 also seriously hinders public schools’ ability to combat COVID-19. Under Option 2, private schools will receive a significantly greater proportion of funds than they are entitled to under the CARES Act, as *all* private school students must be considered when apportioning the funds. Michigan estimates that under Option 2, private schools would receive \$21.6 million, but using proper Title I allocation, private schools would receive \$5.1 million—meaning that nearly \$16.5 million would be diverted from public to private schools.¹⁸ In the District of Columbia, \$5.4 million would go to private schools under Option 2, as opposed to \$1.5 million under proper Title I allocation.¹⁹ In Wisconsin, the difference would be \$28.4 million to \$24.4 million, with approximately \$4 million diverted to private schools.²⁰ In Maine, the difference would be \$2.1 million to \$248,000, diverting more than \$1.8 million to private schools.²¹ Depriving public schools of hundreds of millions of dollars, as Option 2 does, is clearly not what Congress intended with the CARES Act.

The CARES Act Education Stabilization fund was intended to assist public school systems, including both Title I and non-Title I schools, to address the numerous issues created by the pandemic. Public schools desperately need these CARES Act funds. These schools provide education to 90% of our country’s students, and they largely depend on state tax revenue, but COVID-19’s effects on the economy have vastly reduced the amount of tax revenue available to public schools. Furthermore, the disruption caused by COVID-19 has negatively impacted the education of many students, and students whose families are experiencing economic hardship are at even greater risk of falling behind their peers.²² Students without access to technology have not even been able to attend class. Public schools need more funds to protect students and staff from disease, feed students whose families who have been thrust into poverty, provide technology for remote learning, and remedy the disruption to education. Funding public education and directing those funds at the most disadvantaged students should always be a top priority, especially during these troubling times.

¹⁶ Schools must serve a population that is at least 40% low-income to be designated as a Title I school. 20 U.S.C. § 6314(a)(1)(A).

¹⁷ Complaint, *Michigan v. DeVos*.

¹⁸ Craig Mauger & Melissa Nann Burke, *Nessel leads four states to sue DeVos on COVID-19 aid for rule for private schools*, The Detroit News, (published July 7, 2020), available at <https://www.detroitnews.com/story/news/local/michigan/2020/07/07/nessel-joins-lawsuit-against-devos-covid-19-rule-private-schools/5391493002/>.

¹⁹ See Complaint, *Michigan v. DeVos*.

²⁰ *Id.*

²¹ *Id.*

²² Courtney Bollig, *Hungry Kids Continue to Struggle Through a Pandemic During Summer Months*, The Education Trust (June 7, 2020), available at <https://edtrust.org/the-equity-line/hungry-kids-continue-to-struggle-through-a-pandemic-during-summer-months/>.

Congress recognized that some private schools are also facing complications due to COVID-19. However, private school interests are addressed through other provisions of the CARES Act. For example, private schools received billions of dollars through the Paycheck Protection Program,²³ which were not available to public schools. Public schools have been defunded for decades and already lose hundreds of millions of dollars to private school vouchers every year. Private schools do not need to double up in federal aid, especially considering the disproportionate number of low-income students in public versus private schools.

Private schools get to pick and choose which students they educate. Low-income families make up only 9% of private-school enrollment but over 50% of public-school enrollment.²⁴ A national study of a sample of private schools found that at least 14% of surveyed religious private schools actively discriminate against LGBTQ students and staff.²⁵ At least 5% of these schools had explicit policies against hiring or retaining LGBTQ staff. Similarly, many of these schools discriminate against students and staff who are atheists or religious minorities. Finally, private schools are not accountable to the public for their use of federal funds. They may choose not to educate a single child in poverty. The Department should focus on strengthening public schools instead of redirecting funds intended for public schools to exclusionary, and too-often discriminatory, private and religious schools.

Conclusion

The Department's Rule violates the plain language of the CARES Act and diverts hundreds of millions of dollars away from public schools to private and religious schools. We strongly urge the Department to withdraw this IFR and allow school districts to spend this critical funding as provided by the CARES Act. If you should have any questions regarding American Atheists opposition to the Department's Rule, please contact me at 908.276.7300 x309 or by email at agill@atheists.org.

Sincerely,



Alison Gill, Esq.
Vice President, Legal & Policy
American Atheists

²³ *Trump Administration's Church Bailouts Cost Taxpayers \$6-10 Billion, American Atheists Reveals*, American Atheists (July 6, 2020), available at <https://www.atheists.org/2020/07/church-bailouts-cost-taxpayers-6-to-10-billion-dollars/>.

²⁴ Jongyeon Ee, Gary Orfield, & Jennifer Teitell, *Private Schools in American Education: A Small Sector Still Lagging in Diversity*, The Civil Rights Project (published Mar. 5, 2018), available at <https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/private-schools-in-american-education-a-small-sector-still-lagging-in-diversity/>.

²⁵ Rebeca Klein, *These Schools Get Millions of Tax Dollars to Discriminate Against LGBTQ Students*, HuffPost (Dec. 16, 2017), available at https://www.huffpost.com/entry/discrimination-lgbt-private-religious-schools_n_5a32a45de4b00dbbcb5ba0be?fz7.