



July 31, 2020

The Honorable Betsy DeVos
Secretary of Education
U.S. Department of Education
400 Maryland Avenue, SW
Washington, D.C. 20202

Re: Docket ID (ED-2020-OESE-0091) Comment in Response to Interim Final Rule on CARES Act Programs; Equitable Services to Students and Teachers in Non-Public Schools

Dear Secretary DeVos:

The Lawyers' Committee for Civil Rights Under Law (herein, "Lawyers' Committee"), a national racial justice organization that works to ensure all students have equal access to meaningful educational opportunities, particularly Black students and other underserved students of color, submits this comment letter in response to the U.S. Department of Education's ("Department") interim final rule *CARES Act Programs; Equitable Services to Students and Teachers in Non-Public Schools* (Docket ID ED-2020-OESE-0091), published in the Federal Register on July 1, 2020. (herein, "Interim Final Rule").¹ **The Lawyers' Committee opposes the Interim Final Rule because it would deprive the most marginalized children who attend traditional public schools—including low-income Black, Indigenous, and other People of Color ("BIPOC"),² students with disabilities ("SWD"), and English Language Learners ("ELL"), of the critical resources they need during the precarious COVID-19 outbreak, and exacerbate the worst effects of the pandemic for their families.** As further explained below, the options for Local Education Agencies ("LEAs") under the rule would force LEAs to divert funds from majority BIPOC, high-poverty public schools, to better-resourced private schools, some of which were originally established to avoid school desegregation. Such a result was not foreseen by Congress in drafting the CARES Act and the Department's unilateral, arbitrary decision to create ambiguity in the statute through the Interim Final Rule violates its duties under the Administrative Procedures Act, the Spending Clause, and the Supremacy Clause.³

Perhaps worse, the forced redirection of limited funds to private schools would be on top of the estimated \$2.67 billion to \$6.47 billion from the Paycheck Protection Program grants that private

¹ Equitable Services to Students and Teachers in Non-Public Schools, 85 Fed. Reg. 39,479 (interim final rule with request for comments) (effective July 1, 2020) (herein, "85 FR 39479").

² The acronym "BIPOC" refers to "Black, Indigenous, and other People of Color" including Latinx and Asian American individuals. It is used as a proxy for "racial minorities" in order to more precisely identify the communities impacted.

³ See Complaint for Declaratory and Injunctive Relief, *NAACP v. DeVos and United States Department of Education*, 2020 WL 4210345 (No. 1:20-cv-01996).



schools have received.⁴ The disproportionate impact that this rule would have on low-income BIPOC students could have long-lasting negative effects on those students, their ability to learn, and their future earning potential, thereby incurring substantial costs for the individual students and their families, and the country, by decreasing the future productivity and growth potential of the nation's economy.⁵ For these reasons, the Lawyers' Committee requests that the Department immediately withdraw the Interim Final Rule, and allow LEAs to use the emergency funds to serve the needs of low-income BIPOC students, consistent with the law and original intent of Congress.

I. The Interim Final Rule will unlawfully force LEAs to choose an option that conflicts with the CARES Act and relevant federal regulations.

A. The use of a novel notion of “proportional share” that considers all students enrolled in private schools for the purpose of CARES Act emergency funding, instead of the number of low-income students enrolled, conflicts with the Title I formula, which seeks to ensure equity for the most underserved students.

In the Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”),⁶ Congress appropriated emergency funds to support LEAs that are most impacted by the pandemic and to ensure the continued provision of education for vulnerable students.⁷ Congress established two funds that contain an “equitable services” requirement—the Governor’s Emergency Education Relief Fund (“GEER”) and the Elementary and Secondary School Emergency Relief Fund (“ESSER”).⁸ Section 18005 of the statute⁹ unambiguously requires LEAs to provide equitable services to private schools “in the same manner” as provided under Section 1117 of the Elementary and Secondary Education Act (“ESEA”).¹⁰ The formula for providing equitable services in Section 1117 of the ESEA calculates the “proportional share” of Title I-A funds that will provide support services for low-income students in private schools by counting the number of *low-income children* living in a Title I-A LEA’s attendance area and attending private schools either within or outside of the LEA boundaries.¹¹ This standard ensures that critical services are provided to a narrow subset of the most vulnerable and low-income students in the LEA attending private schools. Some of the services covered by Section 1117 include counseling, tutoring, mobile education services, and special education services.¹²

⁴ Samantha Sokol et al., *The Paycheck Protection Program has Provided Billions in Federal Funds to Private and Religious Schools*, Americans United for Separation of Church and State (2020), <https://tinyurl.com/y2or2f55>.

⁵ Emma Dorn et al., *COVID-19 and Student Learning in the United States: The Hurt Could Last a Lifetime*, Jun. 19 2020, <https://tinyurl.com/yamr9sq6>.

⁶ Pub. L. No. 116-136 (Mar. 27, 2020) (“CARES Act”).

⁷ CARES Act § 18002(c)(1).

⁸ CARES Act §§ 18002–18004.

⁹ CARES Act § 18005(a).

¹⁰ Pub. L. No. 89-10 (Apr 11, 1965).

¹¹ 20 U.S.C. § 6320.

¹² 20 U.S.C. § 6320(a)(1)(A).



Instead of using the Title I-A formula to determine proportional share, thereby providing emergency resources for the maximum number of low-income students as intended by Congress, the Interim Final Rule seeks to pressure LEAs into providing more resources to private schools, and fewer resources to high-need traditional public schools serving BIPOC students and families. The Interim Final Rule provides two options for LEAs in determining proportional share: (1) the *total* enrollment of students attending private schools, instead of the number of low-income students; or (2) the proportional share calculated by the LEA for 2019 - 2020 (using the Title I-A formula and standard mentioned above), subject to two requirements.¹³ The first requirement stipulates that the LEA may not spend CARES Act funding on any non-Title I-A school—*i.e.* a school that falls below the threshold proportion of 40% low-income students—regardless of whether those funds will be used to serve low-income students in that non-Title I schools.¹⁴ Many schools with low-income populations below that threshold serve substantial numbers of low-income BIPOC, SWD, and ELL students. Excluding those students from accessing resources needed to navigate the pandemic, while expanding the number of private school students—with far larger numbers of less diverse, higher-income students—undermines the purpose of the CARES Act and Title I and amounts to a subsidy for more privileged students. The second requirement restricts LEAs from using emergency funding to cover previous expenditures.¹⁵

B. Low-income BIPOC students who already face educational inequity will bear the burden of increased inequity during a national and global health emergency.

Though all schools are impacted by the current health crisis, research indicates that BIPOC communities are disproportionately impacted and at higher risk.¹⁶ BIPOC communities are also shown to disproportionately shoulder the effects of concentrated poverty and continued resource inequity.¹⁷ Schools in these areas lack access to the resources required to adequately serve the needs of their students and families, which is then reflected in student success and achievement outcomes.¹⁸ For example, on the 2017 National Assessment of Educational Progress (NAEP) given to fourth-graders in math, low-income students attending more affluent schools scored roughly two years of learning ahead of low-income students in high-poverty schools.¹⁹ Amid the

¹³ 85 FR 39479 at 39482.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Health Equity Considerations and Racial and Ethnic Minority Groups*, Centers for Disease Control and Prevention, Coronavirus Disease, (2019), <https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/race-ethnicity.html> (last visited July 28, 2020).

¹⁷ Alan Berube et al., *The Enduring Challenge of Concentrated Poverty in America*, Brookings Inst. (2008), https://www.brookings.edu/wp-content/uploads/2016/06/1024_concentrated_poverty.pdf.

¹⁸ The Education Trust, *Funding Gaps: An Analysis of School Funding Equity Across the U.S. and Within Each State* Feb. 2018, <https://edtrust.org/resource/funding-gaps-2018/>; Mark Lieberman, *A Third of K-12 Students Aren't Adequately Connected for Remote Learning, Report Says*, Education Week - Digital Education, June 29, 2020, <https://tinyurl.com/y23ghoqo>.

¹⁹ See Richard D. Kahlenberg, Halley Potter and Kimberly Quick, *A Bold Agenda for School Integration*, The Century Foundation, Figure 1, April 8, 2019, <https://tcf.org/content/report/bold-agenda-school-integration/>.



COVID-19 pandemic, low-income BIPOC students will need resources that match the increased risk and resource deprivation facing their communities.

By forcing LEAs to either share a larger proportion of their limited CARES Act funds with well-resourced private schools or risk not serving other low-income BIPOC students in the LEA's non-Title I schools, the Interim Final Rule would only worsen the already dire circumstances facing these families.

II. Diverting limited resources under the CARES Act to well-resourced, less racially diverse private schools will have devastating financial impacts on LEAs serving low-income BIPOC children and families.

A. Historical Analysis: The race-based origins of many private school efforts and the resource effects on BIPOC communities.

The rise of many school privatization efforts stems from opposition to school integration advanced by the 1954 *Brown v. Board* ruling.²⁰ Southern states participated in an aggressive “massive resistance”²¹ movement, which fostered the advent of institutional racist measures to support private schools while diverting resources from public schools.²² In cases like *Griffin et al. v. County Board of Prince Edward County*, where the county board supervisors closed their entire public school system after the initial ruling of *Brown* in 1954,²³ southern legislators, school districts, and white families committed to establishing private schools that would not serve Black students. By institutionalizing a school system that was favored with tuition grant programs (inaccessible to Black students), tax incentives, and legislation that redirected resources from public to private schools, the latter was implemented to serve all white students in the hopes of re-segregation.²⁴

While *de jure* public school education was ruled unconstitutional by the Supreme Court, there was still a persistent structural disadvantage for Black students seeking an equitable education. As white flight²⁵ occurred and heightened residential segregation between Black and white families, private schools were developed in the suburbs to further segregation.²⁶ Many private schools were implemented to intentionally undermine racial equity along the lines of race and socioeconomic

²⁰ Molly Townes O'Brien, *Private School Tuition Vouchers and the Realities of Racial Politics*, 64 Tenn L Rev 359 (1997); see *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

²¹ Chris Ford, Stephenie Johnson. *The Racist Origins of Private School Vouchers*, Center for American Progress, July 12, 2017, www.americanprogress.org/issues/education/2017.

²² *Id.*

²³ *Id.*; see *Griffin v. County School Bd. of Prince Edward County*, 377 U.S. 218 (1964).

²⁴ *A History of Private Schools & Race in the American South*, Southern Education Foundation, (2019), <https://www.southerneducation.org/publications/historyofprivateschools/>

²⁵ The term “white flight” refers to the phenomenon of white Americans fleeing neighborhoods and schools due to increased BIPOC population growth in those areas, and restricting access to public goods and other resources that can build individual, familial, community and generational wealth.

²⁶ Ramsey, Sonya. *The Troubled History of American Education after the Brown Decision*, *The American Historian*, www.oah.org/tah/issues/2017.



status and, as noted below, many still struggle to racially and socioeconomically integrate their student bodies. Through the CARES Act, Congress did not intend to authorize the Department to enact a rule that would benefit such schools and disadvantage other high-need schools and students.

B. The demographic makeup of private schools vs. public schools.

Public schools enroll a much greater racially and socioeconomically diverse student body compared to private schools. In 2017, white students represented 67% of the country's elementary and secondary private school population, compared to 9% Black-student-representation, 11% Latinx, and 5% Asian American.²⁷ Conversely, in traditional public schools, 2017 figures show that 48% of students were white, 15% Black, 27% Latinx, and 5% Asian American.²⁸

In public schools enrolling at least 75% of students of color, the numbers reflect starker segregative patterns. In 2017, 58% of all Black students were enrolled in such schools, 60% of all Latinx students, 39% of all Asian American students, and 53% of Pacific Islander students, compared to 6% of all white students.²⁹ This racial disparity indicates that a disproportionate number of students who require emergency CARES Act funding may not receive those resources, while white students in private schools will continue to be well-resourced and favored by state and federal governments under the Interim Final Rule.

Other demographic data further evidence potential advantages favoring students from higher-income, majority-white private schools. In 2016, 65% of public school students lived in two-parent households while 81% of private school students lived in two-parent households.³⁰ Furthermore, parents of students in private schools hold a bachelor's degree at more than double the rate of public school students' parents.³¹ Not surprisingly, low-income families are underrepresented in private schools, accounting for only 9% of enrollment, while low-income students make up 50% of enrollment in public schools.³²

These prevalent socioeconomic disparities demonstrate that many private schools remain closed to most of the low-income BIPOC student population. Moreover, public schools have a higher enrollment of SWD and ELL students.³³ With the additional burden of COVID-19, the Interim

²⁷ National Center for Education Statistics (NCES), *The Condition of Education: Private School Enrollment*, 2017, (Last Updated: May 2020) https://nces.ed.gov/programs/coe/indicator_cgc.asp.

²⁸ National Center for Education Statistics (NCES), *The Condition of Education: Racial/Ethnic Enrollment in Public Schools*, 2017, (Last Updated: May 2020) https://nces.ed.gov/programs/coe/indicator_cgc.asp.

²⁹ *Id.*

³⁰ *The NCES Fast Facts Tool Provides Quick Answers to Many Education Questions*, Center for Education Statistics (NCES) U.S. Department of Education, <https://nces.ed.gov/fastfacts/display.asp?id=55>.

³¹ *See id.* ("For example, 15 percent of assigned public school students and 16 percent of chosen public school students had parents who had completed a graduate/professional degree, compared with 32 percent of private school students.").

³² Jongyeon Ee, et al., *Private Schools in American Education: A Small Sector Still Lagging in Diversity*, at 5 - 6, UCLA Civ. Rights Project Working Paper, Mar. 5, 2018, <https://www.civilrightsproject.ucla.edu/>.

³³ Maura Spiegelman et al., *Characteristics of Public and Private Elementary and Secondary Schools in the United States: Results From the 2017–18 National Teacher and Principal Survey First Look*, NCES, U.S. Department of Education, Aug. 2019, <https://nces.ed.gov/pubs2019/2019140.pdf> ("About 99 percent of public schools reported



Final Rule amounts to divestment from meeting the needs of the nation's most underserved students.

C. The monetary impact that the Interim Final Rule would have on high BIPOC, low-income schools.

LEAs across the country will need to make deep cuts to education spending to fend off the financial collapse caused by the current health crisis.³⁴ Now, the LEAs most at risk for this great economic impact are those that rely on state funding and share similar demographic profiles – serving student populations that are heavily BIPOC and low-income.³⁵ Consequently, the Interim Final Rule will have a significant monetary impact on already-underfunded majority BIPOC, low-income schools. For example, in Louisiana, non-public schools could receive at least 267% more funding under the Interim Final Rule.³⁶ In Orleans Parish, Louisiana, 77% of its CARES allocation would be diverted to non-public schools, thereby increasing inequity.³⁷ Denver Public Schools—which is more than 75% BIPOC, 65% of whom are low-income—has 7,751 private school students residing in the district but less than 10 percent (698) are from low-income families.³⁸ Consequently DPS would be forced to divert over ten times as much of its CARES Act funding to private schools under the Interim Final Rule compared to the Title I formula.³⁹ This and many other examples highlight the dreaded miscalculation made by the Interim Final Rule.⁴⁰ In total, an estimated \$1.35 billion is expected to be diverted from the nation's public schools to private schools—irrespective of the number of low-income students served in the private schools.⁴¹

Conclusion

As shown above, the Interim Final Rule would divert substantial funds away from marginalized BIPOC communities with greater needs, toward more affluent white communities. Congress intended the emergency fund to be used “in the same manner” as provided under Section 1117 of ESEA, which would consider the number of low-income students attending private schools—not the total number of enrolled students at private schools—to calculate equitable services funds. To

having at least one student with an Individual Education Plan (IEP) because of special needs. Public schools reported that 13 percent of K–12 students had an IEP. Among private schools, 59 percent reported having at least one student with a formally identified disability. Private schools reported that 8 percent of K–12 students had a formally identified disability.”)

³⁴ Daarel Burnette II, *Devastated Budgets and Widening Inequities: How the Coronavirus Collapse Will Impact Schools*. Education Week (May 8, 2020), <https://www.edweek.org/ew/articles/2020/05/09/devastated-budgets-and-widening-inequities-how-the.html>.

³⁵ *See id.*

³⁶ Letter from Carissa Moffat Miller, Exec. Dir., Council of Chief State Sch. Officers, to Betsy D. DeVos, Sec’y, U.S. Dep’t of Educ. (May 5, 2020), <https://ccsso.org/sites/default/files/2020-05/DeVosESLetter050520.pdf>.

³⁷ *Id.*

³⁸ Complaint, *supra* note 3, at 18.

³⁹ *Id.*

⁴⁰ *See, e.g.*, Complaint, *supra* note 3, at 18 - 22 (referencing the loss in CARES Act funding that the Interim Final Rule would cause to low-income families in Pasadena Unified School District (California) and Stamford Public Schools (Connecticut)).

⁴¹ Michael Griffith, *What Will It Take to Stabilize Schools in the Time of COVID-19?*, Learning Policy Institute (May 7, 2020), <https://learningpolicyinstitute.org/blog/what-will-it-take-stabilize-schools-time-covid-19>



avoid exacerbating the negative effects of the COVID-19 crisis on low-income BIPOC communities, and to better meet the needs of those students and the needs of SWDs and ELLs in those communities, the Department should withdraw the current rule and commit to adhering to the spirit of Title I, by prioritizing the needs of the nation's most vulnerable students and families, consistent with the law and the original intent of Congress.

Should you have any questions or need any additional information, please contact David Hinojosa at the email below.

Sincerely Yours,

/s/ David G. Hinojosa

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