July 31, 2020

Submitted via www.regulations.gov
Hon. Elisabeth DeVos
United States Secretary of Education
Attn: Amy Huber
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U.S. Department of Education
400 Maryland Avenue SW, Room 3W219
Washington, DC 20202

RE: Docket ID ED-2020-OESE-0091, Comment Regarding Interim Final Rule Entitled *CARES Act Programs; Equitable Services to Students and Teachers in Non-Public Schools*, 85 Fed Reg. 39479, (July 1, 2020), RIN 1810-AB59

The States of Michigan, California, Hawaii, Maine, Maryland, and New Mexico, the State of Wisconsin's Department of Public Instruction, the District of Columbia, and the Commonwealth of Pennsylvania (the "States"); and the Board of Education for the City School District of the City of New York (a/k/a New York City Department of Education), the Board of Education for the City of Chicago, the Cleveland Municipal School District Board of Education, and the San Francisco Unified School District (the local educational agencies or "LEAs" or "School Districts") (collectively, the "Signatories" or "States and School Districts") submit this Comment in opposition to the interim final rule entitled *CARES Act Programs; Equitable Services to Students and Teachers in Non-Public Schools* (the "Rule" or "IFR") issued by the U.S. Department of Education (the "Department") on July 1, 2020.

The Signatories urge the Department to withdraw the Rule as it is in clear conflict with the text and purpose of the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"), thereby infringing upon core separation of powers principles, and in violation of the spending clause of the U.S. Constitution as well as of the Administrative Procedures Act ("APA"). The IFR greatly harms States and School Districts and their students and teachers, diverting funds from public schools and/or preventing them from the full uses of the CARES Act Elementary and Secondary School Education Relief ("ESSER") and Governor's Emergency Education Relief ("GEER") Funds (collectively, "CARES Act Funds"). The Rule exacerbates the extraordinary economic, educational, and emotional challenges imposed by the COVID-19 pandemic on at-risk public school students who are especially vulnerable to the effects of the pandemic. The Rule ignores the funding realities of States and School Districts and leaves public schools with massive funding gaps just as the school year begins, when the States, School Districts, and their students and teachers are in dire need of new technology for distance learning, meals, personal protective equipment, increased sanitation, and other facilities-related services. The immense and irreparable harm the Signatories will suffer from this Rule has

compelled the Signatories to seek declaratory and injunctive relief.[1] The Rule is unlawful and harmful, and the Department should withdraw it.

I. INTRODUCTION

The impact of the COVID-19 pandemic on public elementary and secondary schools across the country has been enormous. The vast majority of the nation's public schools were forced to close their buildings to protect the health and safety of students, staff, and their families. Schools had to swiftly take the unprecedented step of implementing remote learning to decelerate the spread of the virus. The transition to virtual instruction for public schools required overcoming immense obstacles and incurring significant costs, including providing technology and internet connectivity for students learning at home without access to those resources, meals to children dependent on schools for nutrition, and other essential services to students in need. To prepare for the 2020-2021 school year, public schools need to take additional measures to ensure effective distance learning and/or to allow for safer in-person instruction (*e.g.* purchasing personal protective equipment and deep cleaning buildings). These existing and anticipated costs in response to the ever-changing information about the spread of the virus have had and will continue to have a substantial negative economic effect on public schools already facing severe budget cuts.

In response to this public health and financial crisis, Congress enacted the CARES Act on March 27, 2020, appropriating $30.75 billion to provide emergency relief to K-12 and higher education schools, students, and teachers. Numerous reports have shown that the most vulnerable public school students – including students from low income households and students with disabilities – have been especially hard hit by the pandemic. Public schools are financially responsible for providing crucial services and supports to these children; private schools are not. Recognizing the disproportionate impact of COVID-19 on public schools and their at-risk students, Congress directed states to distribute all CARES Act ESSER funds and a portion of GEER Funds to LEAs in proportion to their allocation under part A of Title I ("Title I") of the Elementary and Secondary Education Act of 1965 ("ESEA"), a formula indisputably based on the number of vulnerable children residing in a Title I school attendance area in the school district. Congress further required LEAs to allocate a portion of those funds "in the same manner as provided" under Section 1117 (or Title I) of the ESEA for equitable services to eligible private-school students and teachers, *i.e.* based on the ratios of low-income students in public and private schools residing in Title I school attendance areas. CARES Act, § 18005. The Department, however, has ignored this directive and its obvious intent.

In April 2020, the Department issued a guidance document ("Guidance Document") suggesting that LEAs allocate funds for equitable services to private schools on the basis of the *total* numbers of private and public school students, rather than on the number of *low-income*

[1] *State of Michigan, et al. v. Elisabeth D. DeVos, et al.*, Case No. 3:20-cv-04478 (N.D. Cal. July 17, 2020). The Signatories incorporate their filings from that lawsuit herein. Nothing in this comment constitutes a waiver of any arguments that the Signatories may assert in that matter or in any other forum.

students. The Guidance Document also suggested LEAs provide equitable services to all private school students, regardless of whether students are low income, academically at-risk, or reside in Title I school attendance areas. Following the methodology and procedures in the Guidance Document – none of which are in the CARES Act – would have the immediate effect of diverting tens of millions of dollars in CARES Act Funds from public schools and their most vulnerable students to private schools that already may receive millions of dollars in funding from other CARES Act sources, such as the Paycheck Protection Program.

Despite the widespread criticism of the Guidance Document, the Department issued the Rule on July 1, 2020, and made it effective immediately without any prior notice and comment procedures. The Rule forces States and School Districts to choose between two untenable and unlawful options. LEAs can either employ the Title I formula to determine the private-school share but only use the public-school share of the CARES Act Funds for their Title I schools to which a "supplement not supplant" provision would apply (Option #1), or follow the methodology outlined in the Guidance Document (Option #2). The Department's attempted re-writing of the CARES Act is at bottom based on a factually incorrect contention that the pandemic has harmed all the Nation's students equally, and that nothing in the CARES Act suggests Congress intended to differentiate between the eligibility of schools based upon the economic challenges they faced. That erroneous view of the CARES Act flies in the face of the plain language of the statute, which in the first instance allocates funds according to Title I's income-sensitive formula and then plainly orders the distribution of equitable services "in the same manner as provided by" the income-sensitive procedures of section 1117 of the ESEA.

II. THE RULE IS UNLAWFUL AND UNCONSTITUTIONAL

A. The Rule Exceeds the Department's Authority, Is Not in Accordance with Governing Law, and Violates Separation of Powers

The Department lacks authority to issue the Rule, and its actions violate the fundamental separation of power principles of the United States Constitution, which "exclusively grants the power of the purse to Congress, not the President." *City & Cty. of S.F. v. Trump*, 897 F.3d 1225, 1231 (9th Cir. 2018) (citing U.S. Const. art. I, § 8 cl. 1, § 9, cl. 7). The Supreme Court has stated "[i]t is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988); *see also Nat. Res. Def. Council v. Nat'l Highway Traffic Safety Admin.*, 894 F.3d 95, 108 (2d Cir. 2018) ("It is well settled that an agency may only act within the authority granted to it by statute."); *Washington v. DeVos*, 2020 WL 3125916 (E.D. Wash. June 12, 2020) (holding that the Department's eligibility restrictions exceeded any delegated authority under the CARES Act).

The Department simply has no rulemaking authority under Sections 18002, 18003, and 18005 of the CARES Act. Congress expressly delegated rulemaking authority to the Department and other agencies in other sections of the CARES Act, but did not do so for the GEER and ESSER Funds. Congress also explicitly included a supplement-not-supplant requirement in another part of the CARES Act but not, as the Department attempts to do, in the provisions for

GEER and ESSER Funds. "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983). Congress authorized broad, flexible uses of GEER and ESSER Funds, an intention that is irreconcilable with the Department's insertion of a "supplement-not-supplant" limitation. *See* CARES Act §§ 18002(c)(1), 18003(d)(12) (permitting LEAs to use funds for existing services).

The Department also has no implicit authority to issue the Rule because Congress mandated adoption of the Title I income-based method for calculating funds for equitable services in the CARES Act. The Department is prohibited from using any other method or attaching new restrictions on these CARES Act Funds. The Department argues that Congress's use of "in the same manner as provided under" in section 18005(a) "is facially ambiguous," disregarding the settled body of case law holding that "in the same manner" has a "well-understood meaning in legislation" that is used to specify the procedure or methods used to achieve the statutory act described. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2583-84 (2012) (Congress's directive in a statute to collect a penalty "in the same manner" as under a referenced statute was "best read" to mandate use of "the same 'methodology and procedures'" as found in the referenced statutory sections); *Wilder's S.S. Co. v. Low*, 112 F. 161, 164 (9th Cir. 1901) ("'in the same manner' has a well-understood meaning in legislation, and that meaning is not one of restriction or limitation, but of procedure"); *United States v. Timilty*, 148 F.3d 1, 3, 5 (1st Cir. 1998) (federal law permitting the restitution order to be enforced "in the same manner as a judgment in a civil action" meant the order was enforced by the same procedural mechanisms as a judgment in a civil action); *Hilliard v. Shell W. E & P*, No. 96-1530, 1998 U.S. App. LEXIS 10731, at *14 (6th Cir. May 22, 1998) (the statute directing the fee to be collected "in the same manner" as another taxing statute meant that the fee should be collected through "the same procedures" as the referenced tax statute).

Rather than follow the "well-understood" meaning of "in the same manner," the Department contends that the various sections of Section 1117, which describe procedures of apportioning funds for equitable services on the basis of income or considers the household income of children, are not to be applied to CARES Act funds. The Department's interpretation is illogical and thwarts the will of Congress, since Section 1117 only applies to equitable services proportioned based on the population of low-income children. Section 8501 of the ESEA, on the other hand, calculates expenditures for equitable services based on the proportion of ***all*** eligible children in the LEA's area. Had Congress intended the Department's reading of the statute, Congress would have replaced Section 1117 with Section 8501 of the ESEA in Section 18005(a) of the CARES Act.

The Department points to the inclusion of a separate consultation requirement and public control of funds provisions in sections 18005(a) and 18005(b) of the CARES Act, respectively, arguing if Congress intended to incorporate section 1117 of the ESEA in its entirety then these CARES Act provisions would be superfluous. The soundest reading of the consultation provision in section 18005(a), that equitable services shall be provided to non-public schools "as determined in consultation with representatives of non-public schools," is to exclude other

parties from this procedure. For example, SEAs may be required to provide equitable services under Section 1117(b)(6)(C) of the ESEA. Congress included this provision to clarify that this consultation procedure applies to only LEAs. The inclusion of the control of funds provision in section 18005(b) reiterates a restriction that is not procedural in nature, comporting with the well-understood meaning of "in the same manner." The Department's interpretation would render these provisions surplusage.

Instead of following the CARES Act, "[w]hat we have here . . . is a fundamental revision of the statute." *MCI Telecomms. Corp. v. AT&T*, 512 U.S. 218, 231 (1994); *see also Util. Air Regulatory Grp. V. E.P.A.*, 573 U.S. 302, 328 (2014) (it is a "core administrative-law principle that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate"); *Nat. Res. Def. Council*, 894 F.3d at 108-13 (vacating the agency's decision for failure to comply with the clear, unambiguous statutory text). The Department has in effect rewritten the statute by including the funding restrictions in Option #1 and implementing the procedures of Section 8501 in Option #2. Congress did not incorporate the ESEA's "supplement not supplant" provision into the CARES Act or make an additional appropriation under the existing Title I program of the ESEA to apply the "supplement not supplant" restriction to CARES Act Funds; rather, Congress appropriated the funds in a separate statute consistent with Congress's intent for the funds to be used without Title I or supplement not supplant restrictions. The Rule is not in accordance with law and should be withdrawn.

B. The Rule Violates the Spending Clause of the U.S. Constitution

The Rule violates the Spending Clause by imposing conditions on federal funding other than those that Congress explicitly and "unambiguously" imposed. *South Dakota v. Dole*, 483 U.S. 203, 207 (1987); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17–18 (1981) (where "Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously"); *see also Oakley v. Devos*, 2020 WL 3268661, at *7 (N.D. Cal. June 17, 2020) (concluding that the Department's restrictions for emergency grants to institutions of higher education under the CARES Act violate the spending clause). The CARES Act did not "unambiguously" impose the funding conditions in the Rule; none of the Rule's funding restrictions are in the CARES Act, and Congress did not even delegate authority to the Department to impose the Rule's funding restrictions.

Moreover, "legislation enacted pursuant to the spending power is much in the nature of a contract . . . [and] the legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'" *Pennhurst State Sch. & Hosp.*, 451 U.S. at 17. The States did not voluntarily and knowingly accept the Rule's funding restrictions when applying for the ESSER and GEER Fund grants that were only thereafter "interpreted" by the Department. The Rule and the Guidance Document created such uncertainty and confusion as a result of their inconsistencies with the CARES Act that the Signatories were not "enable[d] . . . to exercise their choice knowingly, cognizant of the consequences of their participation." *Id.* For example, the CARES Act did not impose a "supplement not supplant" requirement, and the Rule's references to such a restriction are unclear and confusing.

The Rule's restrictions separately violate the requirement that administrative rules must be related to the purpose of the statutory program that they implement. *South Dakota v. Dole*, 483 U.S. at 207. The Rule's funding conditions bear no relationship to the purpose of the CARES Act – to fill the COVID-19 related gaps created by reduced state and local funding – and are contrary to Congress's intent to apportion CARES Act Funds for equitable services based on income. Under Option #1, non-Title I schools (which do educate many economically disadvantaged and higher-needs students) lose substantial emergency funding. Title I schools lose funds as well because centrally-provided services such as pupil transportation cannot be paid for under the Option #1 restrictions. In addition, the Signatories would be unable to use CARES Act Funds for expenditures usually paid for with City and State funds that have now been diminished as a result of the economic impact of COVID-19. Under Option #2, public schools will lose tens of millions in CARES Act Funds, diverted to private schools, including those ineligible for Title I programs but eligible for other CARES Act funding. All of these outcomes, along with the delays in funding distributions to LEAs occasioned by the confusion and uncertainties arising from the Rule, are not only unrelated to but in direct contravention of the purpose of the CARES Act to provide immediate emergency relief.

C. The Rule Violates the APA Because it is Arbitrary and Capricious

The APA requires courts to "hold unlawful and set aside agency action, findings, and conclusions that are, among other things, 'arbitrary, capricious [and] an abuse of discretion' . . . ." 5 U.S.C. § 706(2)(A). This standard requires the Department to "examine the relevant data and articulate a satisfactory explanation for its action," including a "rational connection between the facts found and the choice made," based upon relevant factors. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). An agency's rule is arbitrary and capricious "if the agency has relied on factors which Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id.*

A "flawed premise [that] is fundamental" to an agency's action must be set aside. *See Safe Air for Everyone v. EPA*, 488 F.3d 1088, 1101 (9th Cir. 2007). The Rule should be withdrawn because it is based on a mistake of law – an incorrect interpretation of the CARES Act. Moreover, the Rule is based on the false premise that the pandemic's impact on a student is the same regardless of the student's economic circumstances and that Congress would have been blind to this fact. The Department has also failed to articulate anything other than these flawed explanations for reversing its prior Title I guidance or its instructions that equitable services under Section 1117 are to be allocated according to income measures. For example, as late as May 2020, the Department stated that the "supplement not supplant" rules of Title I did not apply to CARES Act Funds, guidance States and School Districts relied on when developing their budgets. The Department gave no explanation for this reversal and has ignored the States' and School Districts' reliance interests.

The Department also ignores the immense and irreparable harms to States, School Districts, and their students and teachers, "an important aspect of the problem." *State Farm*, 463 U.S. at 43. *See* Section III below. The Department's rationale that the pandemic has harmed all students and the CARES Act does not distinguish between public or non-public schools in their eligibility for relief is simply wrong. The CARES Act Funds were clearly intended to be allocated to focus on at-risk students most vulnerable to the impacts of the pandemic. *See, e.g.*, 166 Cong. Rec. E340 (daily ed. Mar. 31, 2020) (statement of Rep. Jayapal) (Congress intended this funding to "help alleviate the challenges educators, students and families are struggling with in light of school closures," especially "students with disabilities, English language learners, and students experiencing homelessness"). The Rule's restriction of CARES Act Funds to Title I schools in Option #1 pays no mind to the realities of school funding, forcing public schools to frantically scramble for other funding sources in the face of pervasive budget cuts, while hobbled by the Rule's imposition of a "supplement not supplant" restriction. These are precisely the harms that the CARES Act Funds were designed to prevent or ameliorate. The Rule exacerbates the financial harms that States and School Districts are facing because of COVID-19, limits their flexible uses of these CARES Act Funds, and fails to allow them to use the funds to support the students most in need because of the effects of the pandemic – all of which are "contrary to plain congressional intent" and thus render the Rule arbitrary and capricious. *E. Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1277 (9th Cir. 2020).

D. The Rule Violates the APA's Notice-and-Comment Requirement

The Rule is procedurally defective under the APA. The APA "requires that, prior to promulgating rules, an agency must issue a general notice of proposed rulemaking." *California v. Azar*, 911 F.3d 558, 575 (9th Cir. 2018); 5 U.S.C. § 553(b). An agency may publish a rule without observing the prior notice and comment procedure only "for good cause" when complying with this requirement would be "impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(B). The Department ignored the procedural requirements under the APA, issuing an interim final rule effective immediately while bypassing the mandated notice-and-comment procedures, without "good cause" to do so.

The Department paradoxically asserts that there is good cause to sidestep the APA's notice and comment procedures because of the "*immediate need* for certainty," a need that the Rule has gone far to thwart. The claimed "uncertainty" is a problem of the Department's own making. And if "good cause" could be satisfied every time "because of the need to provide immediate guidance and information . . . [the] exception . . . would swallow the rule." *United States v. Valverde*, 628 F.3d 1159, 1166 (9th Cir. 2010). The Department's allowance of a 30-day post promulgation comment period "casts further doubt upon the authenticity and efficacy of the asserted need to clear up potential uncertainty." *Id.* The CARES Act clearly mandates LEAs use the Title I formula in distributing funds for equitable services. The Department failed to comply with the APA's procedural requirements, rendering the Rule unlawfully issued.

III. THE RULE IRREPARABLY HARMS STATES AND SCHOOL DISTRICTS AND THEIR STUDENTS AND TEACHERS

The Rule provides the opposite of what Congress intended, siphoning funds from public schools and the nation's most vulnerable students. Instead of helping them, the Rule causes significant economic harm to the Signatories and their students and teachers by precluding them from the flexible and immediate uses of the emergency funds meant to alleviate the ravages of the COVID-19 pandemic.

The Signatories' action for injunctive relief appends fifteen declarations and hundreds of pages detailing the harms the Rule causes to States and School Districts across the country,[2] which include:

(1) For LEAs choosing the Option #1 methodology and thus only able to use the CARES Act Funds for Title I schools:
(a) the loss of millions of CARES Act Funds for non-Title I schools,
(b) the loss of the full, flexible uses of the CARES Act Funds, such as the inability to use the funds for centralized services, supports, and operations, applicable to non-Title I and Title I schools, and
(c) the inability of those LEAs' Title I schools to cover existing costs with CARES Act Funds because of the Department's misinterpretation of the Title I "supplement not supplant" provision.
(2) For LEAs choosing the Option #2 methodology, the loss of tens of millions in CARES Act Funds for LEAs and their public schools, diverted to private schools for students ineligible for Title I equitable services. For the Signatories, the estimated financial harm is huge – public schools stand to lose over $150 million under this Option compared to using the Title I formula mandated by the CARES Act.

The Rule will also cause the following harms:

(1) Devastating impact on States, LEAs, students, and teachers from the loss of CARES Act Funds, including the negative impact on the States' and LEAs' fiscs as they attempt to fill the gaps in funding caused by the Rule in the face of across-the-board budget cuts and increased expenses arising from the COVID-19 pandemic.
(2) Significant increased administrative burdens and costs for States and School Districts.
(3) Diversion of States' resources to provide support and assistance to School Districts regarding the Rule and potential adverse legal action no matter which option is chosen.
(4) Delay in distributing funds to public schools and their students and teachers caused by the confusion and uncertainty arising from the Department's inconsistent and ambiguous interpretations, including the lack of clarity surrounding the Department's "supplement not supplant" interpretation.

[2] *See* attached Ex. A, Parts I-IV, Appendix in Support of Motion for Preliminary Injunction, *State of Michigan, et al. v. Elisabeth D. DeVos, et al.*, Case No. 3:20-cv-04478, Doc No. 25-5 (July 17, 2020).

IV. CONCLUSION

For the above reasons, the Signatories urge the Department to withdraw the IFR. The Rule is unlawful and unconstitutional, and ignores the severe harms the Rule imposes on States and School districts, and their students and teachers.

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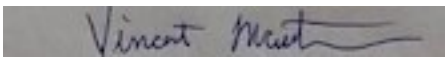

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