

EXHIBIT A

PART I

1 XAVIER BECERRA
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 2 MICHAEL NEWMAN
 Senior Assistant Attorney General
 3 SARAH E. BELTON
 Supervising Deputy Attorney General
 4 REBEKAH A. FRETZ
 JAMES F. ZAHRADKA II
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 8 *Attorneys for Plaintiff State of California*

9
 10 IN THE UNITED STATES DISTRICT COURT
 11 FOR THE NORTHERN DISTRICT OF CALIFORNIA
 12
 13

14 **STATE OF MICHIGAN, STATE OF**
CALIFORNIA, DISTRICT OF
 15 **COLUMBIA, STATE OF HAWAII, STATE**
OF MAINE, STATE OF MARYLAND,
 16 **STATE OF NEW MEXICO,**
COMMONWEALTH OF
 17 **PENNSYLVANIA, STATE OF**
WISCONSIN, THE BOARD OF
 18 **EDUCATION FOR THE CITY SCHOOL**
DISTRICT OF THE CITY OF NEW
 19 **YORK, BOARD OF EDUCATION FOR**
THE CITY OF CHICAGO, CLEVELAND
 20 **MUNICIPAL SCHOOL DISTRICT**
BOARD OF EDUCATION, and SAN
 21 **FRANCISCO UNIFIED SCHOOL**
DISTRICT,

22 Plaintiffs,

23 v.
24

25 **ELISABETH D. DEVOS, in her official**
capacity as the United States Secretary of
 26 **Education, and UNITED STATES**
DEPARTMENT OF EDUCATION,

27 Defendants.
28

Civil Case No. 3:20-cv-04478-SK

**APPENDIX IN SUPPORT OF MOTION
FOR PRELIMINARY INJUNCTION**

Judge: Hon. Sallie Kim
Trial Date: None set
Action Filed: July 7, 2020

APPENDIX OF DECLARATIONS

Exhibit Number	Declarant	
1	MI	Kyle Guerrant, Deputy Superintendent, Michigan Department of Education
2	CA	Lisa Constancio, Deputy Superintendent of Public Instruction, Operations and Administration Branch, California Department of Education
3	CA	Johanna Hoffmann, Strategic Resource Planning Specialist, Oakland Unified School District
4	DC	Nikki Stewart, Assistant Superintendent, Division of Systems and Supports, K-12, Office of the State Superintendent of Education
5	HI	Wanelle Kaneshiro-Erdmann, Director, Policy, Innovation, Planning and Evaluation Branch, Office of Strategy Innovation and Performance, Hawaii Department of Education
6	ME	A. Pender Makin, Commissioner of Education, Maine Department of Education
7	MD	Karen B. Salmon, Ph.D., State Superintendent of Schools, Maryland State Department of Education
8	MD	Dr. Monica E. Goldson, Chief Executive Officer, Prince George's County Public Schools
9	NM	Gabriel C. Baca, Director, Student, School and Family Support Bureau, New Mexico Public Education Department
10	PA	Matthew Stem, Office of Elementary Education, Pennsylvania Department of Education
11	WI	Benjamin R. Jones, Chief Legal Counsel, Wisconsin Department of Public Instruction
12	Chicago	Dr. Janice K. Jackson, Chief Executive Officer, Chicago Board of Education
13	Cleveland	Eric S. Gordon, Chief Executive Officer, Cleveland Municipal School District
14	New York City	Lindsey Oates, Chief Financial Officer, New York City Department of Education
15	SFUSD	Meghan Wallace, Chief Financial Officer, San Francisco Unified School District

EXHIBIT 1

1 XAVIER BECERRA
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 10 IN THE UNITED STATES DISTRICT COURT
 11 FOR THE NORTHERN DISTRICT OF CALIFORNIA
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13
 14 **STATE OF MICHIGAN, STATE OF
 CALIFORNIA, et al.,**

15 Plaintiffs,

16 v.

17
 18 **ELISABETH D. DEVOS, in her official
 capacity as the United States Secretary of
 19 Education, and UNITED STATES
 DEPARTMENT OF EDUCATION,**

20 Defendants.
 21
 22

Civil Case No. 3:20-cv-04478-SK

DECLARATION OF KYLE GUERRANT

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DECLARATION OF KYLE GUERRANT

1
2 I, KYLE GUERRANT, pursuant to 28 U.S.C. § 1746, hereby declare that the following is true
3 and correct:

4 1. I am the Deputy Superintendent for Finance & Operations at the Michigan
5 Department of Education (MDE), located in Lansing. My educational background includes a
6 Bachelors of Arts degree in psychology from Long Island University, and a Master of Social
7 Work degree from the University of Michigan. I have been employed as Deputy Superintendent
8 since April of 2014, and have been employed in other roles at the Michigan Department of
9 Education since August 2005.

10 2. My responsibilities in this role include providing leadership, direction, and
11 oversight for the Office of Financial Management (OFM), Office of Health and Nutrition
12 Services (OHNS), the Library of Michigan (LOM), and Office of Administrative Law (OAL).
13 For the purposes of this declaration, it is important to note the OFM is responsible for the
14 accounting and auditing all federal and state funds MDE receives, and allocates to sub-recipients
15 (local education agencies (LEA), schools, child care providers, etc.), including Title I, Part A
16 funding.

17 3. I submit this Declaration in support of the State of Michigan’s litigation against
18 Elisabeth D. DeVos, in her official capacity as Secretary of Education, and the United States
19 Department of Education (the “Department”) (collectively, Defendants) regarding the
20 Department’s April 30, 2020 guidance document, as updated June 25, 2020, entitled “Providing
21 Equitable Services Under the CARES Act Programs” (Guidance Document), and the recently
22 issued interim final rule, entitled *Providing Equitable Services to Students and Teachers in Non-*
23 *public Schools*, 85 Fed. Reg. 39,479 (July 1, 2020) (the “Equitable Services Rule” or the “Rule”).
24 I have compiled the information in the statements set forth below through personal knowledge,
25 through MDE personnel who have assisted me in gathering this information from our institution,
26 and on the basis of documents that have been provided to and/or reviewed by me. I have also
27 familiarized myself with the Guidance Document and the Rule in order to understand its
28 immediate impact on MDE and schools in Michigan.

MDE’s Role in K-12 Education in Michigan

4. The Michigan Constitution charges the Michigan Legislature with “maintain[ing] and support[ing] a system of free public elementary and secondary schools as defined by law.” Mich. Const. art. VIII, § 2.

5. The State Board of Education is vested with “[l]eadership and general supervision over all public education.” *Id.* § 3. The State Board of Education “serve[s] as the general planning and coordinating body for all public education, including higher education, and shall advise the legislature as to the financial requirements in connection therewith.” *Id.*

6. While the LEAs exercise primary responsibility over budgetary and other decisions within their respective districts, MDE implements federal and state legislative mandates in education and carries out the policies of the State Board of Education. *See* Mich. Comp. Laws § 388.1009.

7. Michigan provides more than \$13 billion each year to its approximately 836 public school districts and 56 intermediate school districts. The 3,400 public school buildings in these districts educate more than 1.5 million students each year.

8. For the 2019-2020 school year, Michigan received \$470,143,688 from the Department in Title I-A funds, which are designated for districts and schools with a high proportion of low-income students. In Michigan, 813 LEAs received Title I-A funds during the 2019-2020 school year. Within these LEAs, 1,840 schools received Title I-A funds (“Title I schools”). These Title I schools educate approximately 731,500 students.

9. Within the Michigan LEAs that receive Title I-A funds, approximately 105,000 students attend private schools, in which 4,580 students were free and reduced lunch eligible. And while all of these private-school students are eligible for services under Title II of the ESEA, only 4,580 of private school students were eligible to receive equitable services from Title I-A funds during the 2019-2020 school year.

Effects of the COVID-19 Pandemic on Education in Michigan

10. The COVID-19 pandemic has drastically impacted K-12 education in Michigan.

1 11. The State of Michigan closed all of its state-owned buildings to employees and the
2 public towards the end of March 2020 due to the COVID-19 pandemic. All state employees were
3 to work from home. MDE obtained security access to SOM-owned IT systems to continue
4 budgeting, programming, accounting, purchasing, payment activities and other activities
5 associated with MDE's responsibilities. MDE is also experiencing temporary layoff days. The
6 vast majority of MDE employees are required to take one temporary layoff day each week for ten
7 weeks, the week of July 25, 2020.

8 12. Michigan is facing severe revenue shortfalls in both fiscal years 2020 and 2021.
9 MDE and all other state departments expect further administrative reductions to account for the
10 fiscal years 2020 and 2021 revenue declines.

11 13. Michigan schools were forced to take action to protect the health and safety of
12 students from the COVID-19 pandemic. Governor Whitmer closed Michigan schools to in-
13 person learning on March 16, 2020, and subsequently signed Executive Order 2020-35
14 suspending in-person learning K-12 instruction for the remainder of the 2019-2020 school year.¹
15 Educators faced the unprecedented challenge to educate all students, with a wide spectrum of
16 learning needs, who were required to stay in their home. The transition to learning at a distance
17 was difficult for most school districts, and required a significant transformation to provide
18 educational services to students. That included providing instruction to students in homes without
19 internet service, limited access to a digital device, and parents who worked during the day.
20 Schools continue to address these complex challenges for summer programming, as well as
21 planning for the 2020-2021 school year. Schools are planning for hybrid instructional models
22 that will blend in-person and learning at a distance instruction, as well as meeting the physical
23 and social-emotional needs of their students. The American Association of School
24 Administrators (AASA) and Association of School Business Officials (ASBO) estimate the
25 average school district may incur \$1,778,139 to reopen this fall to in-person instruction.

26
27
28 ¹ Available at <http://www.legislature.mi.gov/documents/2019-2020/executiveorder/pdf/2020-EO-35.pdf>.

1 14. Per Executive Order 2020-35, LEAs were required to submit a Continuity of
2 Learning Plan (COL) on or before April 28, 2020 to ensure continuation of credits earned for the
3 remainder of the 2019-2020 school year. Instructions for developing and implementing the COL
4 Plans were included in Executive Order 2020-65.² Subject matter experts throughout MDE, who
5 have assisted LEAs with questions and concerns since the pandemic started, helped LEAs
6 develop their COL Plans. MDE continues to provide guidance and assistance to LEA's planning
7 for the 2020-2021 school year.

8 15. Michigan uses official revenue estimates to create its budget. Under normal
9 circumstances, revenue estimates approved in January and May of each year are used to create the
10 budgets. But at the State Legislature's May 2020 revenue conference, revenue estimates, which
11 were significantly decreased, were deemed not reliable based on all of the unknowns created by
12 the COVID-19 pandemic. The Legislature decided to recalculate revenue estimates in August
13 2020. It is expected that the estimates will show severe declines in revenues for both fiscal years
14 2020 and 2021.

15 **CARES Act Funds Received by Michigan for K-12 Education**

16 **A. Elementary and Secondary School Emergency Relief (ESSER) Funds**

17 16. In order to receive the ESSER funds designated for Michigan and as required by
18 the Department, I executed a Certification and Agreement form and submitted it to the
19 Department on behalf of MDE on April 27, 2020.³ A true and correct copy of the Certification
20 and Agreement completed by MDE and submitted to the Department is attached hereto as Exhibit

21 A.

22 17. Within this Certification and Agreement, MDE agreed to the following terms:

23 I acknowledge and agree that the failure to comply with all Assurances and
24 Certifications in this Agreement, all relevant provisions and requirements of

25 ² Available at <http://www.legislature.mi.gov/documents/2019-2020/executiveorder/pdf/2020-EO-65.pdf>.

26 ³ U.S. Dep't of Educ., Certification and Agreement for Funding under the Education
27 Stabilization Fund Program Elementary and Secondary School Emergency Relief Fund (ESSER
28 Fund), CFDA Number 84.425D, April 24, 2020, available at
<https://oese.ed.gov/files/2020/04/ESSERF-Certification-and-Agreement-2.pdf>.

1 the CARES Act, Pub. L. No. 116-136 (March 27, 2020), or any other
2 applicable law or regulation may result in liability under the False Claims Act,
3 31 U.S.C. § 3729, et seq.; OMB Guidelines to Agencies on Governmentwide
4 Debarment and Suspension (Nonprocurement) in 2 CFR part 180, as adopted
5 and amended as regulations of the Department in 2 CFR part 3485; and 18
6 USC § 1001, as appropriate.

7 ...

8
9 4. LEAs receiving ESSER funds will provide equitable services to students
10 and teachers in non-public schools as required under 18005 of Division B
11 of the CARES Act.

12 ...

13 5. LEA receiving ESSER funds will provide equitable services to students
14 and teachers in non-public schools located within the LEA in the same
15 manner as provided under section 1117 of the ESEA, as determined
16 through timely and meaningful consultation with representatives of non-
17 public schools.

18 [Ex. A at pp. 1-2.].

19
20 18. At the time that I executed the Certification and Agreement form, the Department
21 had not yet published its Guidance Document or the Rule. Accordingly, MDE was unaware that
22 the Department would subsequently change the required proportional share calculation for
23 equitable services required under the CARES Act and the private school students eligible to
24 receive equitable services under the CARES Act.

25 19. The Department distributed \$389,796,984 in ESSER funds to MDE on April 29,
26 2020.

27 20. MDE announced the ESSER formula grant application on May 8, 2020 for the
28 purpose of providing LEAs, including charter schools, with emergency relief funds to address the
impact that COVID-19 has had, and continues to have, on elementary and secondary schools
across Michigan. Eligible applicants are those school districts that received a 2019-20 Title I,
Part A allocation from the Michigan Department of Education. The ESSER formula application
consists of assurances, certifications, and narrative statements on the use of funds. Eligible
applicants must initiate an application in the Michigan Electronic Grants System Plus (MEGS+)
and either accept or refuse ESSER funds. Upon successful submission of an ESSER application,
designated MDE staff review each application. Once the application has been reviewed and all

1 portions of the grant are satisfactory, it is approved. Once approved, the grant is made “Grant
2 Funds Available” and an approval file is forwarded to the Cash Management System (CMS). The
3 system then notifies the sub-recipient that the federal funds are available. Funds must be spent on
4 approved budget items and the funds are drawn by the sub-recipients on a reimbursement basis.
5 As of July 1, 2020, MDE has approved \$82,236,042 to 263 eligible LEAs within Michigan,
6 which represents 32.1% of LEA eligible to receive ESSER Funds.

7 21. Of the 817 eligible applicants there are 554 that have either not completed an
8 application or not yet been approved. Of these 544, 106 districts have not yet initiated the
9 application, while another 427 districts are still working on their applications. Upon information
10 and belief, many districts have not yet submitted their applications as they wait on state budget
11 details for the 2020-21 school year. Districts have had to determine where their greatest needs
12 are, include which instructional model(s) the district will implement in the Fall of 2020, as they
13 consider submitting their ESSER fund application.

14 22. Using the proportional share calculation set forth in Section 1117 of the
15 Elementary and Secondary Education Act (ESEA), LEAs in Michigan would reserve \$5,107,921
16 in ESSER funds to provide equitable services to private-school students and teachers.

17 23. However, using the proportional share calculation set forth in the Department’s
18 Guidance Document and in Option #2 in the Rule, see 34 C.F.R. § 76.665(c)(1)(ii), LEAs in
19 Michigan would reserve \$21,604,648.63 in ESSER funds to provide equitable services to private
20 school students and teachers. Thus, under the Department’s preferred proportional share
21 calculation, private school students in Michigan would have access to an additional
22 \$16,497,727.63, and public schools would lose this same amount of funds.

23 **B. Governor’s Emergency Education Relief (GEER) Funds**

24 24. Michigan received \$89,432,673 from the GEER Fund on May 19, 2020.

25 25. GEER funding has not yet been distributed to LEAs in Michigan as MDE is
26 awaiting direction from the Governor’s office.

The Department's Rule Significantly Harms MDE

1
2 26. For every dollar that is diverted from public schools to private schools by LEAs
3 following the Department's Guidance Document and the Rule, MDE will be required to backfill
4 these dollars in the LEAs budgets. At a time when MDE faces an estimated \$611,065,000 hole in
5 its education budget for public education as a result of the pandemic, MDE will need to assist
6 LEAs find \$16,497,727.63 to fill the budgets of public schools that the CARES Act funds were
7 supposed to fill.

8 27. Even if every LEA in Michigan followed Option #1 (Title I-schools only Option)
9 in proportioning the CARES Act funds for equitable services, MDE will need to assist LEAs with
10 significant funding for the over 2,000 of non-Title I schools in Michigan that were expecting to
11 receive CARES Act funds. In addition, MDE will need to assist LEAS with significant funding
12 for Title I schools that may risk supplanting violations if they use CARES Act funds to supplant
13 their budgets, which have been slashed due to the pandemic.

14 28. This increase in funding for public schools will be required immediately. As
15 Michigan remains in the throes of the pandemic, public schools remain desperate for funding as
16 they continue to transition to remote learning and preparing for next school year. Policies and
17 procedures must be developed for remote learning; teachers must be trained to use remote
18 learning techniques; technologies must be purchased and provided to students and staff to enable
19 certain remote learning plans; school buildings must be thoroughly sanitized; and personal
20 protection equipment (PPE) must be purchased. The costs of reacting to this pandemic are drastic
21 for public schools and without the funds the CARES Act was intended to provide, MDE must
22 immediately assist the LEAs adjust to the new realities presented by the pandemic.

23 29. Beyond the additional funding that Michigan will be required to expend in lieu of
24 the designated CARES Act funds, the Department's Guidance Document and Rule have imposed
25 significant administrative burdens on MDE directly.

26 30. MDE has issued drafted and issued six memoranda to LEAs regarding proportioning
27 of CARES Act funds. Ten staff members spent approximately 80 hours developing these
28 memoranda to date.

1 31. MDE staff provided and continue to provide LEAs and schools with extensive
2 technical assistance, problem solving, and other assistance with completing applications for
3 funds. Over ten MDE staff were dedicated part-time to this effort.

4 32. MDE will assign a manager to be responsible for developing the ESSER funds
5 monitoring team. The team will be responsible for developing procedures and checklists for all
6 monitoring activities, including ensure compliance with the Office of Management and Budget 2
7 CFR 200 Uniform Administrative Requirements, Cost Principles, and Audit requirements for federal
8 awards, 34 CFR the Education Department General Administrative Regulations, and the terms and
9 conditions of the ESSER grant award notification. MDE will use its current monitoring processes
10 for all ESSER grants. The effort for the first year will focus on the ESSER formula grants. This will
11 include reviewing the delivery of equitable services as it is required in the CARES Act. While some
12 monitoring requirements are ESSER specific, the program and fiscal monitoring is standard for all
13 federal grants. MDE's ESSER subrecipient monitoring program will serve several important
14 purposes:

- 15 a. To ensure that subrecipients of ESSER grants, especially ESSER formula grants,
16 have appropriate internal controls; promote operating efficiency; and achieve
 compliance with applicable statutory and regulatory requirements.
- 17 b. To track MDE's progress in implementing goals of the grant programs.
- 18 c. To ensure LEAs/PSAs provide equitable access to students and teachers in non-
19 public schools as required under the CARES Act, and in accordance with USED
 guidance.
- 20 d. To identify potential or existing problem areas or weaknesses.
- 21 e. To identify areas where additional technical assistance is warranted.
- 22 f. To identify areas of strength, as state assets, to build a network to share best practices,
23 lessons learned, and resources.

24 Both program and fiscal monitoring will be designed to be conducted as desk reviews. MDE
25 will develop monitoring protocols with check sheets for each grant program. MDE will request
26 specific documents to be uploaded into GEMS/MARS for review.

1 33. Finally, the Department’s Guidance Document and Rule place MDE in legal
2 jeopardy. MDE was required to certify in its ESSER Fund application that it will comply, and
3 will ensure that LEAs comply, with the equitable services provision of the CARES Act (§ 18005)
4 and “any other applicable law or regulation.” (Ex. A at p. 1.) Because the Guidance Document
5 and the Rule require LEAs to calculate the proportional share for equitable services and
6 determine eligibility of private school students for equitable services contrary to the proportional
7 share calculation and eligibility requirements in the CARES Act, MDE (and its LEAs) cannot
8 satisfy both the Rule and the CARES Act. Accordingly, the Department’s Rule forces MDE
9 choose whether to comply with Section 18005 of the CARES Act or the Guidance Document and
10 the Rule, either way placing MDE in breach of the certification in the Certification and
11 Agreement and subjecting MDE to “liability under the False Claims Act, . . . [and the] OMB
12 Guidelines to agencies on Governmentwide Debarment and Suspension (Nonprocurement).” (Ex.
13 A at p. 1.)

14 34. As the LEAs in Michigan need to use the ESSER funds as soon as possible to
15 assist with the numerous pandemic-related challenges, this legal jeopardy will impact MDE
16 immediately.

17 **The Department’s Rule Significantly Harms Michigan’s K-12 Students**

18 35. The Department’s Guidance and Rule will result in less funding being distributed
19 to public K-12 schools in Michigan.

20 36. If LEAs in Michigan calculate the proportional share of CARES Act funds for
21 private school students under Option #1 in the Rule, non-Title I schools in LEAs receiving
22 CARES Act funds will receive no funds. In Michigan, there are over 2000 non-Title I schools in
23 LEAs that are eligible to receive CARES Act funds that would not receive any funding. Like all
24 schools in Michigan, these schools are equally impacted by the COVID-19 pandemic and would
25 greatly benefit from the influx of CARES Act funds to assist them through the pandemic. In
26 addition, there are approximately 1840 Title I schools in Michigan that would risk supplanting
27 violations—and future Title I-A funding—if they use CARES Act funds to respond to and
28 prepare for the pandemic, as the schools cannot supplant State and local funding sources under

1 the Rule. This would significantly impact the Title I schools, as many are in desperate need of
2 additional funding to cope with the pandemic, and to assist students with online, remote learning
3 tools that students often cannot afford within these Title I schools.

4 37. If LEAs in Michigan calculate the proportional share of CARES Act funds for private
5 school students under Option #2 in the Rule, approximately \$16,496,727.63 will be diverted from
6 public schools to private school students, which represents 7% of Michigan's total ESSER funding for
7 education.

8 a. In Detroit, this amounts to \$2,251,130.61 less for public school students, or 2.64
9 of the total ESSER funds available to the Detroit Community School District;

10 b. In Grand Rapids, this amounts to \$2,643,213.87 less for public school students, or
11 33.08% of the total ESSER funds available to Grand Rapids Public Schools;

12 c. In Flint, this amounts to \$1,474,676.48 less for public school students, or
13 15.60% of the total ESSER funds available to Flint Public School District.

14 38. For every \$259 diverted from the public schools (Title I or non-Title I schools), a
15 public-school student in Michigan loses out on a needed Chromebook that could allow the student
16 to access online learning while schools are closed due to the pandemic.

17 39. For every \$35,339 diverted from the public schools (Title I or non-Title I schools),
18 a public-school teacher in Flint, Michigan may lose their position and, leaving the district with
19 fewer resources to provide students with access to learning during the pandemic.

20 40. Regardless of how LEAs proportion the CARES Act funds in Michigan, the Rule
21 requires that all private school students receive equitable services. In Michigan, during the 2019-
22 2020 school year, approximately 4,580 private school students were eligible to receive equitable
23 services under Title I-A as they were at-risk students within a LEA receiving Title I-A funds. As
24 the Rule requires all private school students to receive equitable services, the approximately 4,580
25 private-school students who received equitable services under Title I-A last year will receive less
26 services as the CARES Act funds proportioned for equitable services will be spread amongst all
27 private school students.
28

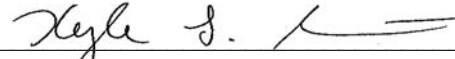
1 I declare under penalty of perjury that, to the best of my knowledge, the foregoing is true and
2 correct.

3

4 Executed on this 16 day of July, 2020, at Lansing, Michigan

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KYLE GUERRANT
Deputy Superintendent
Michigan Department of Education

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EXHIBIT A

ELEMENTARY AND SECONDARY SCHOOL EMERGENCY RELIEF FUND (ESSER FUND)

STATE EDUCATIONAL AGENCY

PART A: CERTIFICATION AND AGREEMENT COVER SHEET

State: Michigan CFDA Number: 84.425D
Legal Name: Michigan Department of Education DUNS Number: 80-533-6641
Chief State School Officer: Mailing Address:
Dr. Michael F. Rice, Ph.D P.O Box 30008, Lansing, MI 48909

State Contact for Elementary and Secondary School Emergency Relief Fund:	Mr. Kyle L. Guerrant
Position and Office:	Deputy Superintendent, Finance and Operations
Mailing Address:	P.O Box 30008. Lansing, MI 48909
Telephone:	517-241-0062
Email address:	guerrantk@michigan.gov

To the best of my knowledge and belief, all the information and data in this agreement are true and correct. I acknowledge and agree that the failure to comply with all Assurances and Certifications in this Agreement, all relevant provisions and requirements of the CARES Act, Pub. L. No. 116-136 (March 27, 2020), or any other applicable law or regulation may result in liability under the False Claims Act, 31 U.S.C. § 3729, *et seq.*; OMB Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement) in 2 CFR part 180, as adopted and amended as regulations of the Department in 2 CFR part 3485; and 18 USC § 1001, as appropriate.

Chief State School Officer or Authorized Representative (Typed Name): Telephone:
Dr. Michael F. Rice, Ph.D 517-241-0494
Signature of Chief State School Officer or Authorized Representative: Date: 04/27/2020



PART B: PROGRAMMATIC, FISCAL, AND REPORTING ASSURANCES

The [Chief State School Officer or his/her authorized representative] assures the following:

1. The SEA will allocate no less than 90 percent of the grant funds under this program to local educational agencies (LEAs) (including charter schools that are LEAs) in the State. Under the ESSER Fund, the SEA will award grants by formula to State educational agencies (SEAs) for the purpose of providing LEAs, including charter schools that are LEAs, with emergency relief funds to address the impact that the Novel Coronavirus Disease 2019 (COVID-19) has had, and continues to have, on elementary and secondary schools across the Nation. This includes both continuing to provide educational services, such as remote learning, while schools and campuses are closed, and developing and implementing plans for the return to normal operations. The SEA will allocate these funds to LEAs on the basis of their respective shares of funds received under title I, part A of the Elementary and Secondary Education Act of 1965 in fiscal year 2019.
2. The SEA will use the remaining funds (hereafter SEA reserve) for emergency needs as determined by the SEA to address issues related to COVID-19, which may be addressed through the use of grants or contracts. From an SEA's reserve, the SEA may use not more than 1/2 of 1 percent of the SEA's total grant for administrative costs.
3. The SEA will ensure that LEAs use ESSER funds for activities allowable under section 18003(d) of Division B of the CARES Act. (See Appendix A.)
The Department generally does not consider the following to be an allowable use of ESSER funds, under any part of 18003: 1) subsidizing or offsetting executive salaries and benefits of individuals who are not employees of the SEA or LEAs or 2) expenditures related to state or local teacher or faculty unions or associations.
4. The SEA will ensure that LEAs receiving ESSER funds will provide equitable services to students and teachers in non-public schools as required under 18005 of Division B of the CARES Act.
5. The SEA will ensure that an LEA receiving ESSER funds will provide equitable services to students and teachers in non-public schools located within the LEA in the same manner as provided under section 1117 of the ESEA, as determined through timely and meaningful consultation with representatives of non-public schools.
 - The SEA will ensure that a public agency will maintain control of funds for the services and assistance provided to a non-public school under the ESSER Fund.
 - The SEA will ensure that a public agency will have title to materials, equipment, and property purchased with ESSER funds.
 - The SEA will ensure that services to a non-public school with ESSER funds will be provided by a public agency directly, or through contract with, another public or private entity.
6. The SEA will comply with the maintenance of effort provision in Section 18008(a) of Division B of the CARES Act absent waiver by the Secretary pursuant to Section 18008(b) thereof.
7. The SEA and each LEA and any other entity that receives ESSER funds will, to the greatest extent practicable, continue to compensate its employees and contractors during the period of

any disruptions or closures related to COVID-19 in compliance with Section 18006 of Division B of the CARES Act. In addition, each entity that accepts funds will continue to pay employees and contractors to the greatest extent practicable based on the unique financial circumstances of the entity. CARES Act funds generally will not be used for bonuses, merit pay, or similar expenditures, unless related to disruptions or closures resulting from COVID-19.

8. The SEA must assure that, when applicable, it will provide technical assistance to LEAs on the use of ESSER funds for remote learning, which includes both distance education as defined in section 103(7) of the HEA and distance learning as defined in ESEA section 8101(14), so that students can continue learning during school closures.
9. The SEA will comply with all reporting requirements, including those in Section 15011(b)(2) of Division B of the CARES Act, and submit required quarterly reports to the Secretary at such time and in such manner and containing such information as the Secretary may subsequently require. (See also 2 CFR 200.327-200.329). The Secretary may require additional reporting in the future, which may include: the methodology LEAs will use to provide services or assistance to students and staff in both public and non-public schools, the uses of funds by the LEAs or other entities and demonstration of their compliance with Section 18003(d), such as any use of funds addressing the digital divide, including securing access to home-based connectivity and remote-use devices, related issues in supporting remote learning for all students, including disadvantaged populations.
10. The SEA will submit to the Department, within 60 days of receiving ESSER funds, a report that will include:
 - A budget for the SEA’s reserve that includes information about the up to 1/2 of 1 percent of the SEA’s total grant for administrative costs and the uses of funds for emergency needs to address issues related to COVID-19; and
 - An Internal Control and Subrecipient Monitoring Plan to ensure that funds are used for allowable purposes in accordance with cash management principles.
11. The SEA will ensure that every recipient and subrecipient of ESSER funds will cooperate with any examination of records with respect to such funds by making records available for inspection, production, and examination, and authorized individuals available for interview and examination, upon the request of (i) the Department and/or its Inspector General; or (ii) any other federal agency, commission, or department in the lawful exercise of its jurisdiction and authority.
12. The SEA will return to the Secretary any funds received under the ESSER Fund that the SEA does not award within 1 year of receiving such funds.

Chief State School Officer or Authorized Representative (Printed Name):

Signature: 	Date: 04/27/2020
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PART C: USES OF ELEMENTARY AND SECONDARY SCHOOL EMERGENCY RELIEF FUNDS

Section 18003 of Division B of the CARES Act provides in relevant part that grants awarded under the Elementary and Secondary School Emergency Relief Fund be used to support the ability of local educational agencies (LEAs) to continue to provide educational services to their students. The Department requests the following:

1. Information that the SEA may request LEAs to include in their subgrant applications to the SEA.

The Michigan Department of Education will request the following information from eligible LEAs applying for ESSER funds:

- How the LEA will determine its most important educational needs as a result of COVID19.
- The extent to which the LEA intends to use ESSER funds in the 12 allowable use-of funds categories (Section 18003(d) of Division B of the CARES Act). Eligible LEAs will submit a budget indicating allowable uses, function codes, and accounting classifications.
- In accordance with Section 427 of the General Education Provisions Act (GEPA), information on how the LEA will provide equitable access to students, teachers, parents and families in non-public schools located within the LEA boundary in the same manner as provided in their consolidated application.
- Required assurances and certifications based on ESSER Fund requirements and guidance to include compliance with any LEA reporting requirements that will be subsequently determined by USED. This includes all assurance requirements from section 442 of the General Education Provisions Act (GEPA).

2. The extent to which the SEA intends to use any portion of its SEA reserve (up to 10 percent of its ESSER Fund award) to support:

The Michigan Department of Education intends to reserve up to 10 percent of the ESSER Fund to establish an educational equity fund. These dollars will be allocated to LEAs through subgrant applications. The primary purpose of the reserve fund is to reduce the digital divide in Michigan's highest-need school communities. Eligible LEAs include those with documented limited technological capacity and access, and a high number of students who qualify as economically disadvantaged. Eligible LEA applications may also include requests to use reserve funds in the 12 allowable use of funds categories (Section 18003(d) of Division B of the CARES Act).

PART D: OTHER ASSURANCES AND CERTIFICATIONS

The [Chief State School Officer or his/her authorized representative] assures or certifies the following:

1. The SEA will comply with all applicable assurances in OMB Standard Forms 424B and D (Assurances for Non-Construction and Construction Programs), including the assurances relating to the legal authority to apply for assistance; access to records; conflict of interest; merit systems; nondiscrimination; Hatch Act provisions; labor standards; flood hazards; historic preservation; protection of human subjects; animal welfare; lead-based paint; Single Audit Act; and the general agreement to comply with all applicable Federal laws, executive orders and regulations.
2. With respect to the certification regarding lobbying in Department Form 80-0013, no Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the making or renewal of Federal grants under this program; the SEAE will complete and submit Standard Form-LLL, "Disclosure Form to Report Lobbying," when required (34 C.F.R. Part 82, Appendix B); and the SEA will require the full certification, as set forth in 34 C.F.R. Part 82, Appendix A, in the award documents for all subawards at all tiers.
3. Any LEA receiving funding under this program will have on file with the SEA a set of assurances that meets the requirements of section 442 of the General Education Provisions Act (GEPA) (20 U.S.C. 1232e).
4. To the extent applicable, an LEA will include in its local application a description of how the LEA will comply with the requirements of section 427 of GEPA (20 U.S.C. 1228a). The description must include information on the steps the LEA proposes to take to permit students, teachers, and other program beneficiaries to overcome barriers (including barriers based on gender, race, color, national origin, disability, and age) that impede equal access to, or participation in, the program.
5. The SEA will comply with the *Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards* (Uniform Guidance) requirements in Subpart D—Post Federal Award Requirements (2 CFR §§200.300-345) and Subpart E—Cost Principles (2 CFR §§200.400-475) to ensure that LEAs, including charter schools that are LEAs, are using ESSER funds for purposes that are reasonable, necessary, and allocable under the CARES Act.
6. The SEA and other entities will comply with the provisions of all applicable acts, regulations and assurances; the following provisions of Education Department General Administrative Regulations (EDGAR) 34 CFR parts 76, 77, 81, 82, 84, 97, 98, and 99; the OMB Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement) in 2 CFR part 180, as adopted and amended as regulations of the Department in 2 CFR part 3485; and the Uniform Guidance in 2 CFR part 200, as adopted and amended as regulations of the Department in 2 CFR part 3474.

Chief State School Officer or Authorized Representative (Printed Name):

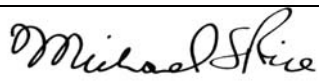
Signature: 	Date: 04/27/2020
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EXHIBIT 2

1 XAVIER BECERRA
 Attorney General of California
 2 MICHAEL NEWMAN
 Senior Assistant Attorney General
 3 SARAH E. BELTON
 Supervising Deputy Attorney General
 4 REBEKAH A. FRETZ
 JAMES F. ZAHRADKA II
 5 GARRETT LINDSEY (SBN 293456)
 Deputy Attorneys General
 6 300 South Spring Street, Suite 1702
 Los Angeles, CA 90013
 7 Telephone: (213) 269-6402
 E-mail: Garrett.Lindsey@doj.ca.gov
 8 *Attorneys for Plaintiff State of California*

9
 10 IN THE UNITED STATES DISTRICT COURT
 11 FOR THE NORTHERN DISTRICT OF CALIFORNIA
 12

13
 14 **STATE OF MICHIGAN, STATE OF
 CALIFORNIA, et al.,**

Civil Case No. 3:20-cv-04478-SK

15 Plaintiffs,

16 v.

**DECLARATION OF LISA
 CONSTANCIO**

17
 18 **ELISABETH D. DEVOS, in her official
 capacity as the United States Secretary of
 19 Education, and UNITED STATES
 DEPARTMENT OF EDUCATION,**

20 Defendants.
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DECLARATION OF LISA CONSTANCIO

1
2 I, Lisa Constancio, pursuant to 28 U.S.C. § 1746, hereby declare that the following is true and
3 correct:

4 1. I am a resident of the State of California and over eighteen years of age, am
5 competent to testify to the matters contained herein, and testify based on my personal knowledge and
6 information.
7

8 2. I am the Deputy Superintendent of Public Instruction over the Operations and
9 Administration Branch at the California Department of Education (CDE). My educational
10 background includes a Bachelor of Science degree in Psychology from California State University,
11 Sacramento and a Master’s degree in Organizational Management from the University of Phoenix. I
12 have been employed by CDE since 2006 and have been in my current position as Deputy
13 Superintendent since December 1, 2019. While at CDE I have also held Director positions with the
14 Charter Schools Division and School Fiscal Services Division.
15

16 3. In my role as Deputy Superintendent, I oversee the Charter Schools Division, Fiscal
17 and Administrative Services Division, Human Resources Division, School Facilities and
18 Transportation Division, and School Fiscal Services Division.

19 4. I submit this Declaration in support of the State of California’s litigation against
20 Elisabeth D. DeVos, in her official capacity as Secretary of Education; the United States Department
21 of Education (the Department); and the United States of America regarding the recently issued Rule
22 entitled *CARES Act Programs; Equitable Services to Students and Teachers in Non-Public Schools*,
23 85 Fed. Reg. 39479 (July 1, 2020) (the “Equitable Services Rule” or the “Rule”). I have also
24 familiarized myself with the Rule in order to understand its immediate impact on the CDE and
25 public schools in California.
26
27
28

CDE’s Work in Education and State’s Education Programs

1
2 5. The State of California is the legal and political entity with plenary responsibility for
3 educating all California public school students. California has the constitutional responsibility to
4 establish and maintain the system of common schools and a free education. Under the California
5 Constitution, the State is responsible for ensuring basic educational equity.

6 6. The CDE is a state administrative agency responsible for administering and enforcing
7 laws related to education throughout California. Cal. Educ. Code §§ 33300, 33301, 33306 & 33308.

8
9 7. California funds and oversees the operation of the largest common system of public
10 schools in the nation, which serves over 6.2 million children in more than 11,800 schools. In state
11 fiscal year (FY) 2018–2019, California provided \$55.9 billion in General Funds to its 944 public
12 school districts, 1,277 charter schools, and 58 county offices of education.

13 8. For FY 2019-2020, 866 local public school districts, 727 independent charter
14 schools, and 46 county offices of education were allocated \$1.8 billion dollars in Title I-A funds. In
15 FY 2018-2019, Title I-A funds were expended at 7,074 California public schools.

16
17 9. There are about 2,895 private schools in California, of which at least 1,277 nonprofit
18 private schools are located in the 157 LEAs which received Title I-A funds and provided Title I
19 equitable services. Some of the private schools located in Title I-A-recipient LEAs have annual
20 tuition comparable to private four-year colleges.

21 **The Effect of the COVID-19 Pandemic on Education in California**

22 10. The COVID-19 pandemic has caused enormous upheaval in California’s K-12
23 education system.

24 11. On March 4, 2020, Governor Newsom declared a state of emergency in California in
25 response to the COVID-19 pandemic. On March 13, 2020, Governor Newsom signed an executive
26 order that would allow school districts to shift from a physical classroom environment to a distance-
27

1 learning environment. On March 19, 2020, Governor Newsom issued a stay at home order for the
2 entire state.

3 12. Against this backdrop, on March 17, 2020, the California Department of Public
4 Health, in collaboration with CDE, issued guidance to schools shifting to distance learning
5 environments.

6
7 13. During this period, numerous school districts quickly shifted to distance learning
8 environments across the state. California school districts have had to rapidly create distance learning
9 environments for teachers and students; deploy technology, internet access, or instructional material
10 to students learning at home; provide meals to students who depend on free or reduced price meals
11 from schools for nutrition; provide suitable special education services to students learning at home;
12 and respond to the needs of children experiencing trauma or disturbance from the effects of the
13 COVID-19 pandemic. A limited number of schools have continued to operate or resumed physical
14 classroom teaching during the pandemic, but many of California's classroom schools continue to
15 utilize distance learning. While school districts had broadly planned to resume some level of normal
16 classroom learning in the coming school year, the recent surge of COVID-19 cases in California
17 jeopardizes these plans.

18
19 14. CDE continues to monitor the COVID-19 pandemic and is working closely with
20 school districts and other state agency partners to meet the challenges of the moment. Every week,
21 CDE has been issuing new updates and guidance to school districts to respond to a rapidly changing
22 situation. Among other activities, CDE has published guidance documents and conducted webinars
23 to aid other education partners in addressing subjects like providing distance learning, providing
24 internet access to students, providing special education in a distance learning setting, and providing
25 mental health in response to the crisis.
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1 15. California’s fiscal year begins on July 1 of each year, and the State must prepare a
2 budget for its operations in advance of the fiscal year. Typically, the budget process begins with a
3 proposal by the Governor in January, a revision in May, and a budget enacted by July 1. The budget
4 is developed in negotiation with the Legislature.

5
6 16. The COVID-19 pandemic has severely impacted the state’s economy and reduced
7 the California’s General Fund revenues, which are derived from income tax and sales tax. Section 8
8 of Article XVI of the California constitution sets forth rules calculating a minimum annual funding
9 level for K-12 and community college education in California, based on a number of factors
10 including state tax revenues. Reflecting the sudden economic decline brought about by the COVID-
11 19 pandemic, the funding provided by this formula dropped \$13.9 billion. The Governor and the
12 Legislature developed a budget to protect local K-12 LEAs by, in part, allocating flexible federal
13 funding from the CARES Act, including substantial funding not specifically directed to education by
14 the CARES Act.

15
16 **CARES Act Funds Received by California For K-12 Education**

17 **A. Elementary and Secondary School Emergency Relief (ESSER) Funds**

18 17. In order to receive the ESSER funds designated for California and as required by the
19 Department, Dr. Linda Darling-Hammond, President of the California State Board of Education
20 (SBE) executed a Certification and Agreement form which was jointly submitted by CDE and SBE
21 to the Department on April 28, 2020.¹ A true and correct copy of the Certification and Agreement is
22 attached hereto as Exhibit A.

23
24 18. Within this Certification and Agreement, SBE agreed to the following terms:

25
26 ¹ U.S. Dep’t of Educ., Certification and Agreement for Funding under the Education
27 Stabilization Fund Program Elementary and Secondary School Emergency Relief Fund (ESSER
28 Fund), CFDA Number 84.425D, April 24, 2020, available at
<https://oese.ed.gov/files/2020/04/ESSERF-Certification-and-Agreement-2.pdf>.

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I acknowledge and agree that the failure to comply with all Assurances and Certifications in this Agreement, all relevant provisions and requirements of the CARES Act, Pub. L. No. 116-136 (March 27, 2020), or any other applicable law or regulation may result in liability under the False Claims Act, 31 U.S.C. § 3729, et seq.; OMB Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement) in 2 CFR part 180, as adopted and amended as regulations of the Department in 2 CFR part 3485; and 18 USC § 1001, as appropriate.

...

4. LEAs receiving ESSER funds will provide equitable services to students and teachers in non-public schools as required under 18005 of Division B of the CARES Act.

...

5. LEA receiving ESSER funds will provide equitable services to students and teachers in non-public schools located within the LEA in the same manner as provided under section 1117 of the ESEA, as determined through timely and meaningful consultation with representatives of non-public schools.

[Ex. A at pp. 1-2.]

19. At the time that the SBE President executed the Certification and Agreement form, the Department had not yet published its Guidance Document or the Rule. Accordingly, California was unaware that the Department would subsequently issue rules to change the required proportional share calculation for equitable services required under the CARES Act and the private school students eligible to receive equitable services under the CARES Act.

20. The Department awarded \$1,647,306,127 from the ESSER Fund to California on May 1, 2020. Under Cal. Education Code sections 12033 and 12034, the State Treasurer is the custodian of federal grant funds, which are paid out on warrants drawn by the State Controller. Cal. Const., Article 16, § 7 provides that "[m]oney may be drawn from the Treasury only through an appropriation made by law and upon a Controller's duly drawn warrant." Therefore, the CDE lacked authority to expend or distribute any ESSER funds, including subgrants to LEAs, until the

1 Legislature enacted a specific appropriation and authorization for that purpose in the budget for the
2 fiscal year beginning July 1, 2020.

3 21. In California, of the ten percent of ESSER funds not distributed to the local entities
4 by the formula described in section 18003(c) of the CARES Act (“State Reserved ESSER Fund”),
5 approximately \$112.2 million is budgeted to provide up to \$0.75 for each breakfast and lunch
6 provided by LEAs to eligible children due to unanticipated school closures related to COVID-19.
7 California LEAs participating in the National School Lunch Program, School Breakfast Program,
8 Summer Seamless Option or Summer Food Service Program that continue to serve meals between
9 March and August of 2020 are eligible for this funding to help ensure access to nutritious meals.
10 The federal Child Nutrition Programs provide free and reduce-priced, nutritionally sound meals to
11 students from low-income families. These funds will enable LEAs to address food insecurity in their
12 communities due to unanticipated school closures. During the pandemic, some LEAs consolidated
13 operations within their school districts and with other LEAs to better support their community in
14 providing meals.
15

16 22. About \$45 million of the State Reserved ESSER Fund is budgeted to provide LEAs
17 with grants to coordinate or expand community schools to increase access to health, mental, health,
18 and social support for high-need students. These funds will enable improved delivery of mental
19 health and social-emotionally supportive services for students experiencing the stress, anxiety, and
20 trauma caused by the COVID-19 pandemic.
21

22 23. About \$6 million of the State Reserved ESSER Fund is budgeted to provide educator
23 professional development for providing high-quality distance learning and addressing learning loss
24 in mathematics, science, and English language arts due to the COVID-19 pandemic.
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1 24. Per section 18003(e) of the CARES Act, up to one-half of one-percent of the ESSER
2 funds may be retained by CDE to administer the CARES Act education funds. CDE will retain
3 about one-tenth of one-percent for this purpose.

4 25. Specific to Section 18003(c) ESSER funds, as part of California’s Certification and
5 Agreement for Funding under the Education Stabilization Fund Program Elementary and Secondary
6 School Emergency Relief Fund, California made assurances that funds will be used for “allowable
7 purposes in accordance with cash management principals”. In addition, prior to receiving Section
8 18003(c) ESSER funds, LEAs were required to submit assurances to CDE and the application
9 deadline to be included in the first apportionment of ESSER was July 15, 2020. To comply with
10 federal cash management principals, LEAs that submit assurances by July 15, 2020 to the CDE will
11 receive funding equal to 25 percent of the LEA’s allocation. CDE estimates that LEAs should
12 receive funds around early September 2020. Thereafter funds will be released consistent with cash
13 management principals to LEAs as expenditure data is reported to CDE. LEAs that didn’t apply by
14 July 15, 2020 or newly operational charter schools commencing instruction in the 2020-21 school
15 year may apply after the initial deadline and will receive funding consistent with the apportionment
16 methodology outlined previously.

17 26. Using the proportional share calculation set forth in Section 1117 of the Elementary
18 and Secondary Education Act (ESEA), LEAs in California would reserve approximately \$5,449,992
19 in ESSER funds to provide equitable services to private school students.

20 27. However, using the proportional share calculation set forth in the Department’s
21 Guidance Document and in Option #2 in the Rule, LEAs in California would reserve approximately
22 \$60,249,538 in ESSER funds to provide equitable services to private school students. Thus, under
23 the Department’s proportional share calculation, private school students in California would have
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1 access to an additional \$54,799,545 in services, and public schools would lose this same amount of
2 funds.

3 B. GEER Funds

4 28. California was awarded \$355,227,235 from the GEER Fund on May 13, 2020.

5
6 29. In response to the expected negative impact of learning loss from the COVID-19
7 pandemic and associate school closures, the Governor and Legislature combined the GEER funds
8 with more than \$4.4 billion in Coronavirus Relief Funds provided under section 5001 of the CARES
9 Act, and \$540 million from the State’s general fund, to establish Learning Loss Mitigation Block
10 Grants. These grants are intended to be distributed to LEAs based on a formula that prioritizes
11 students expected to be the most heavily impacted by school closures and the pandemic, and are to
12 be used in a way that is expected to mitigate the negative impact of the pandemic on learning. The
13 grants may be used to provide instructional support, increase instructional minutes or days, provide
14 additional academic services for pupils, and provide other integrated supports to address barriers to
15 learning. A large portion of these funds will be allocated to LEAs based on the number of students
16 with disabilities requiring instruction outside a regular school program, and another large portion
17 will be allocated to LEAs based on the concentration of students from low-income families, English
18 learners, and foster youth. While these funds are directed to LEAs based on a critical need, some of
19 the students that are intended to be served by the grants may not attend Title I-A eligible schools. As
20 part of California’s Certification and Agreement for Funding under the Education Stabilization Fund
21 Program Governor’s Emergency Education Relief Fund, California made assurances that funds will
22 be used for “allowable purposes in accordance with cash management principals”. In addition, LEAs
23 will be required to submit assurances to CDE in order to receive an apportionment from the GEER
24 fund. The assurances are still under development but when available the apportionment process will
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1 follow a similar structure as the ESSER, Section 18003(c) funding to comply with federal cash
2 management principals.

3
4 **The Department’s Rule Significantly Harms California**

5 30. The Department’s Guidance Document and Rule place California in legal jeopardy.
6 California was required to certify in its ESSER Fund application that California LEAs will comply
7 with the equitable service provision of the CARES Act (§ 18005) and “any other applicable law or
8 regulation.” (Ex. A at p. 1.) Because the Guidance Document and the Rule require LEAs to
9 calculate the proportional share for equitable services and determine eligibility of private school
10 students for equitable services contrary to the proportional share calculation and eligibility
11 requirements in the CARES Act, California (and its LEAs) cannot satisfy both the Rule and the
12 CARES Act. Accordingly, the Department’s Rule forces California to violate Section 18005 of the
13 CARES Act, placing California in breach of the certification in the Certification and Agreement and
14 subjecting California to “liability under the False Claims Act, . . . [and the] OMB Guidelines to
15 agencies on Governmentwide Debarment and Suspension (Nonprocurement).” (Ex. A at p. 1.)

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17 31. As the LEAs in California may wish to use the ESSER and GEER funds as soon as
18 possible to assist with the numerous pandemic-related challenges, this legal jeopardy will impact
19 California schools immediately.

20
21 **The Department’s Rule Significantly Harms California’s K-12 Students**

22 32. The Department’s Guidance and Rule will result in less funding being allocated to
23 public K-12 schools in California.

24 33. If LEAs in California calculate the proportional share of CARES Act funds for
25 private school students under Option #1 in the Rule, non-Title I schools in LEAs receiving CARES
26 Act funds will receive no funds. In California, there are approximately 3,057 non-Title I schools in
27 LEAs that are eligible to receive CARES Act funds that would receive no funding. Like all schools
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1 in California, these schools are equally impacted by the COVID-19 pandemic and would greatly
2 benefit from the influx of CARES Act funds to assist them through the pandemic. In addition, there
3 are approximately 7,043 Title I schools in California that would be prohibited from using CARES
4 Act funds to respond to and prepare for the pandemic as the schools cannot supplant State and local
5 funding sources under the Rule. This would significantly impact the Title I schools as many are in
6 desperate need of additional funding to cope with the pandemic, and to assist students with online,
7 distance learning tools that students often cannot afford within these Title I schools.

9 34. California has allocated a portion of the ESSER program fund retained by the state to
10 be directed to supplement school meal programs operated during the pandemic. Some of these
11 moneys will be directed towards supporting school meal programs that support students attending
12 non-Title I schools.


13 35. If LEAs in California calculate the proportional share of CARES Act funds for
14 private school students under Option #2 in the Rule, approximately \$54,799,545 will be diverted
15 from public schools to private school students.

16 36. Regardless of how LEAs proportion the CARES Act funds in California, the Rule
17 requires that all private school students receive equitable services. In California, during the 2019-
18 2020 school year, approximately 14,296 private school students were eligible to receive equitable
19 services under Title I-A as they were at-risk students within a LEA receiving Title I-A funds. As the
20 Rule requires all private school students receiving equitable services, the approximately 14,296
21 private school students who received equitable services under Title I-A last year will receive fewer
22 services as the CARES Act funds proportioned for equitable services will be spread amongst all
23 private school students.
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I declare under penalty of perjury under the laws of the United States and the State of California that the foregoing is true and correct and of my own personal knowledge.

Executed on this 17th day of July, 2020, at Sacramento, California



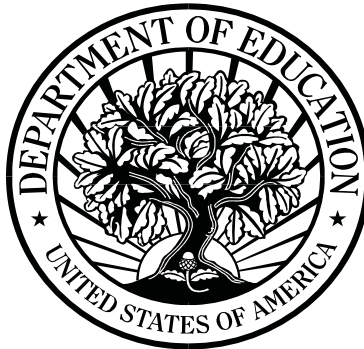
Lisa Constancio
Deputy Superintendent of Public Instruction

EXHIBIT A

U.S. Department of Education

Certification and Agreement for Funding under the Education Stabilization Fund Program Elementary and Secondary School Emergency Relief Fund (ESSER Fund)

CFDA Number: 84.425D



OMB Number: 1810-0743
Expiration Date: 10/31/2020

Paperwork Burden Statement

According to the Paperwork Reduction Act of 1995, no persons are required to respond to a collection of information unless such collection displays a valid OMB control number. The OMB control number for this information collection is 1810-0743. The time required to complete this information collection is estimated to average 5 hours per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. The obligation to respond to this collection is required to obtain benefit under the Coronavirus Aid, Relief, and Economic Security Act. If you have any comments concerning the accuracy of the time estimate, suggestions for improving this individual collection, or if you have comments or concerns regarding the status of your individual form, application or survey, please contact Christopher Tate, Office of Elementary and Secondary Education, U.S. Department of Education, 400 Maryland Ave., S.W., Room 3E229, Washington, D.C. 20202 directly.

PROGRAM BACKGROUND INFORMATION

Purpose

Under the Elementary and Secondary School Emergency Relief Fund (ESSER Fund), the Department awards grants to State educational agencies (SEAs) for the purpose of providing local educational agencies (LEAs), including charter schools that are LEAs, with emergency relief funds to address the impact that Novel Coronavirus Disease 2019 (COVID-19) has had, and continues to have, on elementary and secondary schools across the nation. LEAs must provide equitable services to students and teachers in non-public schools as required under the Coronavirus Aid, Relief, and Economic Security Act (CARES Act).

Eligibility

SEAs in any of the 50 States, the District of Columbia, and the Commonwealth of Puerto Rico.

Timeline

The SEA will have one year, from the date of its ESSER award, to award funds. Any funds not awarded by the SEA within one year of receiving its award will be returned to the Department to be reallocated to other States consistent with the CARES Act.

Uses of Funds

SEAs:

The SEA must use no less than 90 percent of its allocation to make subgrants to LEAs, including charter schools that are LEAs, based on each LEA's share of funds received under part A of title I of the ESEA in fiscal year 2019. With the funds not subgranted to LEAs, the SEA may reserve up to an amount equal to $\frac{1}{2}$ of 1 percent of the total allocation for administrative costs, and the remaining funds may be used for emergency needs as determined by the SEA to address issues responding to COVID-19. These emergency needs may be addressed through the use of grants or contracts.

LEAs:

LEAs may use funds for any purposes listed in section 18003(d) of the CARES Act. (See Appendix A.)

Program Contact

For additional information, please contact Christopher Tate by telephone at (202) 453-6047 or by email at ESSERF@ed.gov.

CERTIFICATION AND AGREEMENT INSTRUCTIONS

To receive an ESSER Fund allocation, SEAs must submit to the Department the following information:

- A completed cover sheet that includes the signature of the Chief State School Officer or authorized representative. *(Part A of the Certification and Agreement)*
- Programmatic, fiscal, and reporting assurances. *(Part B of the Certification and Agreement)*
- Information on the uses of ESSER funds. *(Part C of the Certification and Agreement)*
- Other assurances and certifications. *(Part D of the Certification and Agreement)*

For purposes of this document, the term “Certification and Agreement” is the application that an SEA is required to file under section 18003(a) of Division B of the CARES Act.

Certification and Agreement Submission Information

An SEA must submit a Certification and Agreement to the Department no later than July 1, 2020.

Please submit your Certification and Agreement to the Department as follows:

Email an electronic version of the ESSER Fund Certification and Agreement in .PDF (Portable Document Format) to ESSERF@ed.gov.

APPENDICES

- Appendix A – Authorizing Statute
- Appendix B – State Allocation Table

ELEMENTARY AND SECONDARY SCHOOL EMERGENCY RELIEF FUND (ESSER FUND)


STATE EDUCATIONAL AGENCY

PART A: CERTIFICATION AND AGREEMENT COVER SHEET

State: California CFDA Number: 84.425D
Legal Name: California Department of Education DUNS Number: 807480843
Chief State School Officer: Mailing Address:
Dr. Linda Darling-Hammond 1430 N Street, Room 5111 Sacramento, CA 95814

State Contact for Elementary and Secondary School Emergency Relief Fund: Joseph Saenz
Position and Office: Federal Policy Liaison/ California Department of Education/Government Affairs
Mailing Address: 1430 N Street, Suite 5602
Sacramento, CA 95814
Telephone: (916) 591-6391
Email address: jsaenz@cde.ca.gov

To the best of my knowledge and belief, all the information and data in this agreement are true and correct. I acknowledge and agree that the failure to comply with all Assurances and Certifications in this Agreement, all relevant provisions and requirements of the CARES Act, Pub. L. No. 116-136 (March 27, 2020), or any other applicable law or regulation may result in liability under the False Claims Act, 31 U.S.C. § 3729, *et seq.*; OMB Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement) in 2 CFR part 180, as adopted and amended as regulations of the Department in 2 CFR part 3485; and 18 USC § 1001, as appropriate.

Chief State School Officer or Authorized Representative (Typed Name): Telephone:
Dr. Linda Darling-Hammond (916) 319-0827
Signature of Chief State School Officer or Authorized Representative: Date:
 04/28/2020

PART B: PROGRAMMATIC, FISCAL, AND REPORTING ASSURANCES


The [Chief State School Officer or his/her authorized representative] assures the following:

1. The SEA will allocate no less than 90 percent of the grant funds under this program to local educational agencies (LEAs) (including charter schools that are LEAs) in the State. Under the ESSER Fund, the SEA will award grants by formula to State educational agencies (SEAs) for the purpose of providing LEAs, including charter schools that are LEAs, with emergency relief funds to address the impact that the Novel Coronavirus Disease 2019 (COVID-19) has had, and continues to have, on elementary and secondary schools across the Nation. This includes both continuing to provide educational services, such as remote learning, while schools and campuses are closed, and developing and implementing plans for the return to normal operations. The SEA will allocate these funds to LEAs on the basis of their respective shares of funds received under title I, part A of the Elementary and Secondary Education Act of 1965 in fiscal year 2019.
2. The SEA will use the remaining funds (hereafter SEA reserve) for emergency needs as determined by the SEA to address issues related to COVID-19, which may be addressed through the use of grants or contracts. From an SEA's reserve, the SEA may use not more than 1/2 of 1 percent of the SEA's total grant for administrative costs.
3. The SEA will ensure that LEAs use ESSER funds for activities allowable under section 18003(d) of Division B of the CARES Act. (See Appendix A.)
The Department generally does not consider the following to be an allowable use of ESSER funds, under any part of 18003: 1) subsidizing or offsetting executive salaries and benefits of individuals who are not employees of the SEA or LEAs or 2) expenditures related to state or local teacher or faculty unions or associations.
4. The SEA will ensure that LEAs receiving ESSER funds will provide equitable services to students and teachers in non-public schools as required under 18005 of Division B of the CARES Act.
5. The SEA will ensure that an LEA receiving ESSER funds will provide equitable services to students and teachers in non-public schools located within the LEA in the same manner as provided under section 1117 of the ESEA, as determined through timely and meaningful consultation with representatives of non-public schools.
 - The SEA will ensure that a public agency will maintain control of funds for the services and assistance provided to a non-public school under the ESSER Fund.
 - The SEA will ensure that a public agency will have title to materials, equipment, and property purchased with ESSER funds.
 - The SEA will ensure that services to a non-public school with ESSER funds will be provided by a public agency directly, or through contract with, another public or private entity.
6. The SEA will comply with the maintenance of effort provision in Section 18008(a) of Division B of the CARES Act absent waiver by the Secretary pursuant to Section 18008(b) thereof.
7. The SEA and each LEA and any other entity that receives ESSER funds will, to the greatest extent practicable, continue to compensate its employees and contractors during the period of

any disruptions or closures related to COVID-19 in compliance with Section 18006 of Division B of the CARES Act. In addition, each entity that accepts funds will continue to pay employees and contractors to the greatest extent practicable based on the unique financial circumstances of the entity. CARES Act funds generally will not be used for bonuses, merit pay, or similar expenditures, unless related to disruptions or closures resulting from COVID-19.

8. The SEA must assure that, when applicable, it will provide technical assistance to LEAs on the use of ESSER funds for remote learning, which includes both distance education as defined in section 103(7) of the HEA and distance learning as defined in ESEA section 8101(14), so that students can continue learning during school closures.
9. The SEA will comply with all reporting requirements, including those in Section 15011(b)(2) of Division B of the CARES Act, and submit required quarterly reports to the Secretary at such time and in such manner and containing such information as the Secretary may subsequently require. (See also 2 CFR 200.327-200.329). The Secretary may require additional reporting in the future, which may include: the methodology LEAs will use to provide services or assistance to students and staff in both public and non-public schools, the uses of funds by the LEAs or other entities and demonstration of their compliance with Section 18003(d), such as any use of funds addressing the digital divide, including securing access to home-based connectivity and remote-use devices, related issues in supporting remote learning for all students, including disadvantaged populations.
10. The SEA will submit to the Department, within 60 days of receiving ESSER funds, a report that will include:
 - A budget for the SEA’s reserve that includes information about the up to 1/2 of 1 percent of the SEA’s total grant for administrative costs and the uses of funds for emergency needs to address issues related to COVID-19; and
 - An Internal Control and Subrecipient Monitoring Plan to ensure that funds are used for allowable purposes in accordance with cash management principles.
11. The SEA will ensure that every recipient and subrecipient of ESSER funds will cooperate with any examination of records with respect to such funds by making records available for inspection, production, and examination, and authorized individuals available for interview and examination, upon the request of (i) the Department and/or its Inspector General; or (ii) any other federal agency, commission, or department in the lawful exercise of its jurisdiction and authority.
12. The SEA will return to the Secretary any funds received under the ESSER Fund that the SEA does not award within 1 year of receiving such funds.

Chief State School Officer or Authorized Representative (Printed Name):

Signature: 	Date: 4/28/2020
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PART C: USES OF ELEMENTARY AND SECONDARY SCHOOL EMERGENCY RELIEF FUNDS

Section 18003 of Division B of the CARES Act provides in relevant part that grants awarded under the Elementary and Secondary School Emergency Relief Fund be used to support the ability of local educational agencies (LEAs) to continue to provide educational services to their students. The Department requests the following:

1. Information that the SEA may request LEAs to include in their subgrant applications to the SEA. For example, an SEA might propose to include the following in developing its subgrant application:
 - How the LEA will determine its most important educational needs as a result of COVID-19.
 - The LEA's proposed timeline for providing services and assistance to students and staff in both public and non-public schools.
 - The extent to which the LEA intends to use ESSER funds to promote remote learning.
 - How the LEA intends to assess and address student learning gaps resulting from the disruption in educational services.

The above considerations are in addition to the application information requirements from sections 442 and 427 of the General Education Provisions Act (GEPA) (20 U.S.C. § 1232e and § 1228a).

Given the pressing needs our LEAs face in light of COVID-19, we intend to use a streamlined application process.

We will collect assurances that LEAs will comply with all applicable federal requirements, including allowable uses of funds, reporting, financial management, and recordkeeping requirements.

2. The extent to which the SEA intends to use any portion of its SEA reserve (up to 10 percent of its ESSER Fund award) to support:
- technological capacity and access – including hardware and software, connectivity, and instructional expertise – to support remote learning. If so, please describe the strategies the SEA intends to use to serve disadvantaged populations listed in Sec. 18003(d)(4) of the CARES Act; and
 - remote learning by developing new informational and academic resources and expanding awareness of, and access to, best practices and innovations in remote learning and support for students, families, and educators.

We are still working with stakeholders, the Governor, and the Legislature to determine how best to deploy our state-level activities funds given the emergency needs in in our state.

PART D: OTHER ASSURANCES AND CERTIFICATIONS

The [Chief State School Officer or his/her authorized representative] assures or certifies the following:

1. The SEA will comply with all applicable assurances in OMB Standard Forms 424B and D (Assurances for Non-Construction and Construction Programs), including the assurances relating to the legal authority to apply for assistance; access to records; conflict of interest; merit systems; nondiscrimination; Hatch Act provisions; labor standards; flood hazards; historic preservation; protection of human subjects; animal welfare; lead-based paint; Single Audit Act; and the general agreement to comply with all applicable Federal laws, executive orders and regulations.
2. With respect to the certification regarding lobbying in Department Form 80-0013, no Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the making or renewal of Federal grants under this program; the SEAE will complete and submit Standard Form-LLL, “Disclosure Form to Report Lobbying,” when required (34 C.F.R. Part 82, Appendix B); and the SEA will require the full certification, as set forth in 34 C.F.R. Part 82, Appendix A, in the award documents for all subawards at all tiers.
3. Any LEA receiving funding under this program will have on file with the SEA a set of assurances that meets the requirements of section 442 of the General Education Provisions Act (GEPA) (20 U.S.C. 1232e).
4. To the extent applicable, an LEA will include in its local application a description of how the LEA will comply with the requirements of section 427 of GEPA (20 U.S.C. 1228a). The description must include information on the steps the LEA proposes to take to permit students, teachers, and other program beneficiaries to overcome barriers (including barriers based on gender, race, color, national origin, disability, and age) that impede equal access to, or participation in, the program.
5. The SEA will comply with the *Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards* (Uniform Guidance) requirements in Subpart D—Post Federal Award Requirements (2 CFR §§200.300-345) and Subpart E—Cost Principles (2 CFR §§200.400-475) to ensure that LEAs, including charter schools that are LEAs, are using ESSER funds for purposes that are reasonable, necessary, and allocable under the CARES Act.
6. The SEA and other entities will comply with the provisions of all applicable acts, regulations and assurances; the following provisions of Education Department General Administrative Regulations (EDGAR) 34 CFR parts 76, 77, 81, 82, 84, 97, 98, and 99; the OMB Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement) in 2 CFR part 180, as adopted and amended as regulations of the Department in 2 CFR part 3485; and the Uniform Guidance in 2 CFR part 200, as adopted and amended as regulations of the Department in 2 CFR part 3474.

Chief State School Officer or Authorized Representative (Printed Name):

Signature: 	Date: 04/28/2020
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Appendix A: Relevant Excerpts from Title VIII of Division B of the CARES Act, the Emergency Appropriations for Coronavirus Health Response and Agency Operations

DEPARTMENT OF EDUCATION EDUCATION STABILIZATION FUND

For an additional amount for “Education Stabilization Fund”, \$30,750,000,000, to remain available through September 30, 2021, to prevent, prepare for, and respond to coronavirus, domestically or internationally: Provided, That such amount is designated by the Congress as being for an emergency requirement pursuant to section 251(b)(2)(A)(i) of the Balanced Budget and Emergency Deficit Control Act of 1985.

GENERAL PROVISIONS EDUCATION STABILIZATION FUND

SEC. 18001. (a) ALLOCATIONS.—From the amount made available under this heading in this Act to carry out the Education Stabilization Fund, the Secretary shall first allocate—

- (1) not more than 1/2 of 1 percent to the outlying areas on the basis of their respective needs, as determined by the Secretary, in consultation with the Secretary of the Interior;
- (2) one-half of 1 percent for the Secretary of Interior, in consultation with the Secretary of Education, for programs operated or funded by the Bureau of Indian Education; and
- (3) 1 percent for grants to States with the highest coronavirus burden to support activities under this heading in this Act, for which the Secretary shall issue a notice inviting applications not later than 30 days of enactment of this Act and approve or deny applications not later than 30 days after receipt.

(b) RESERVATIONS.—After carrying out subsection (a), the Secretary shall reserve the remaining funds made available as follows:

- (1) 9.8 percent to carry out section 18002 of this title.
- (2) 43.9 percent to carry out section 18003 of this title.
- (3) 46.3 percent to carry out section 18004 of this title.

ELEMENTARY AND SECONDARY SCHOOL EMERGENCY RELIEF FUND

SEC. 18003. (a) GRANTS.—From funds reserved under section 18001(b)(2) of this title, the Secretary shall make elementary and secondary school emergency relief grants to each State educational agency with an approved application. The Secretary shall issue a notice inviting applications not later than 30 days of enactment of this Act and approve or deny applications not later than 30 days after receipt.

(b) ALLOCATIONS TO STATES.—The amount of each grant under subsection (a) shall be allocated by the Secretary to each State in the same proportion as each State received under part A of title I of the ESEA of 1965 in the most recent fiscal year.

(c) SUBGRANTS TO LOCAL EDUCATIONAL AGENCIES.—Each State shall allocate not less than 90 percent of the grant funds awarded to the State under this section as subgrants to local educational agencies (including charter schools that are local educational agencies) in the State in proportion to the amount of funds such local educational agencies and charter schools that are local educational agencies received under part A of title I of the ESEA of 1965 in the most recent fiscal year.

(d) USES OF FUNDS.—A local educational agency that receives funds under this title may use the funds for any of the following:

(1) Any activity authorized by the ESEA of 1965, including the Native Hawaiian Education Act and the Alaska Native Educational Equity, Support, and Assistance Act (20 U.S.C. 6301 et seq.), the Individuals with Disabilities Education Act (20 U.S.C. 1400 et seq.) (“IDEA”), the Adult Education and Family Literacy Act (20 U.S.C. 1400 et seq.), the Carl D. Perkins Career and Technical Education Act of 2006 (20 U.S.C. 2301 et seq.) (“the Perkins Act”), or subtitle B of title VII of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11431 et seq.).

(2) Coordination of preparedness and response efforts of local educational agencies with State, local, Tribal, and territorial public health departments, and other relevant agencies, to improve coordinated responses among such entities to prevent, prepare for, and respond to coronavirus.

(3) Providing principals and other school leaders with the resources necessary to address the needs of their individual schools.

(4) Activities to address the unique needs of low-income children or students, children with disabilities, English learners, racial and ethnic minorities, students experiencing homelessness, and foster care youth, including how outreach and service delivery will meet the needs of each population.

(5) Developing and implementing procedures and systems to improve the preparedness and response efforts of local educational agencies.

(6) Training and professional development for staff of the local educational agency on sanitation and minimizing the spread of infectious diseases.

(7) Purchasing supplies to sanitize and clean the facilities of a local educational agency, including buildings operated by such agency.

(8) Planning for and coordinating during long-term closures, including for how to provide meals to eligible students, how to provide technology for online learning to all students, how to provide guidance for carrying out requirements under the Individuals with Disabilities Education Act (20 U.S.C. 1401 et seq.) and how to ensure other educational services can continue to be provided consistent with all Federal, State, and local requirements.

(9) Purchasing educational technology (including hardware, software, and connectivity) for students who are served by the local educational agency that aids in regular and substantive educational interaction between students and their classroom instructors, including low-income students and students with disabilities, which may include assistive technology or adaptive equipment.

(10) Providing mental health services and supports.

(11) Planning and implementing activities related to summer learning and supplemental afterschool programs, including providing classroom instruction or online learning during the summer months and addressing the needs of low-income students, students with disabilities, English learners, migrant students, students experiencing homelessness, and children in foster care.

(12) Other activities that are necessary to maintain the operation of and continuity of services in local educational agencies and continuing to employ existing staff of the local educational agency.

(e) STATE FUNDING.—With funds not otherwise allocated under subsection (c), a State may reserve not more than 1/2 of 1 percent for administrative costs and the remainder for emergency needs as determined by the state educational agency to address issues responding to coronavirus, which may be addressed through the use of grants or contracts.

(f) REALLOCATION.—A State shall return to the Secretary any funds received under this section that the State does not award within 1 year of receiving such funds and the Secretary shall reallocate such funds to the remaining States in accordance with subsection (b).

ASSISTANCE TO NON-PUBLIC SCHOOLS

SEC. 18005. (a) IN GENERAL.—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, as determined in consultation with representatives of non-public schools.

(b) PUBLIC CONTROL OF FUNDS.—The control of funds for the services and assistance provided to a non-public school under subsection (a), and title to materials, equipment, and property purchased with such funds, shall be in a public agency, and a public agency shall administer such funds, materials, equipment, and property and shall provide such services (or may contract for the provision of such services with a public or private entity).

CONTINUED PAYMENT TO EMPLOYEES

SEC. 18006. A local educational agency, State, institution of higher education, or other entity that receives funds under “Education Stabilization Fund”, shall to the greatest extent practicable, continue to pay its employees and contractors during the period of any disruptions or closures related to coronavirus.

DEFINITIONS

SEC. 18007. Except as otherwise provided in sections 18001– 18006 of this title, as used in such sections—

- (1) the terms “elementary education” and “secondary education” have the meaning given such terms under State law;
- (2) the term “institution of higher education” has the meaning given such term in title I of the Higher Education Act of 1965 (20 U.S.C. 1001 et seq.);
- (3) the term “Secretary” means the Secretary of Education;
- (4) the term “State” means each of the 50 States, the District of Columbia, and the Commonwealth of Puerto Rico;
- (5) the term “cost of attendance” has the meaning given such term in section 472 of the Higher Education Act of 1965.
- (6) the term “Non-public school” means a non-public elementary and secondary school that (A) is accredited, licensed, or otherwise operates in accordance with State law; and (B) was in existence prior to the date of the qualifying emergency for which grants are awarded under this section;
- (7) the term “public school” means a public elementary or secondary school; and
- (8) any other term used that is defined in section 8101 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 7801) shall have the meaning given the term in such section.

MAINTENANCE OF EFFORT

SEC. 18008. (a) A State’s application for funds to carry out sections 18002 or 18003 of this title shall include assurances that the State will maintain support for elementary and secondary education, and State support for higher education (which shall include State funding to institutions of higher education and state need based financial aid, and shall not include support for capital projects or for research and development or tuition and fees paid by students) in fiscal years 2020 and 2021 at least at the levels of such support that is the average of such State’s support for elementary and secondary education and for higher education provided in the 3 fiscal years preceding the date of enactment of this Act.

(b) The secretary may waive the requirement in subsection (a) for the purpose of relieving fiscal burdens on States that have experienced a precipitous decline in financial resources.

REPORTING ON USE OF FUNDS SEC. 15011.

(a) In this section—

- (1) the terms “agency”, “appropriate congressional committees”, “Committee”, “covered funds”, and “Coronavirus response” have the meanings given those terms in section 15010;
- (2) the term “covered recipient” (A) means any entity that receives large covered funds; and (B) includes any State, the District of Columbia, and any territory or possession of the United States; and
- (3) the term “large covered funds” means covered funds that amount to more than \$150,000.

...

(b)(2) Not later than 10 days after the end of each calendar quarter, each covered recipient shall submit to the agency and the Committee a report that contains—

- (A) the total amount of large covered funds received from the agency;
- (B) the amount of large covered funds received that were expended or obligated for each project or activity;
- (C) a detailed list of all projects or activities for which large covered funds were expended or obligated, including—
 - (i) the name of the project or activity;
 - (ii) a description of the project or activity; and
 - (iii) the estimated number of jobs created or retained by the project or activity, where applicable;and
- (D) detailed information on any level of subcontracts or subgrants awarded by the covered recipient or its subcontractors or subgrantees, to include the data elements required to comply with the Federal Funding Accountability and Transparency Act of 2006 (31 U.S.C. 6101 note) allowing aggregate reporting on awards below \$50,000 or to individuals, as prescribed by the Director of the Office of Management and Budget.

(3) Not later than 30 days after the end of each calendar quarter, the Committee, in consultation with the agency that made large covered funds available to any covered recipient shall make the information in reports submitted under paragraph (2) publicly available by posting the information on the website established under section 15010(g).

(4)(A) Each agency, in coordination with the Committee and the Director of the Office of Management and Budget shall provide user-friendly means for covered recipients to meet requirements of this subsection.

(B) Federal agencies may use existing mechanisms to ensure that information under this subsection is reported accurately.

(c)(1) The Director of the Office of Management and Budget, in consultation with the Secretary of the Treasury, the Administrator of the Small Business Administration, and the Chairperson of the Council of Economic Advisors, shall submit to the appropriate congressional committees and publicly release on the website established under section 15010(g) quarterly reports that detail the impact of programs funded through large covered funds on employment, estimated economic growth, and other key economic indicators, including information about impacted industries.

(2)(A) The first report submitted under paragraph (1) shall be submitted not later than 45 days after the end of the first full quarter following the date of enactment of this Act.

(B) The last report required to be submitted under paragraph (1) shall apply to the quarter in which the Committee terminates.

APPENDIX B: STATE ALLOCATION TABLE**Elementary and Secondary School Emergency Relief Fund**

STATE	STATE TOTAL	Minimum LEA Distribution¹	Maximum SEA Reservation	Maximum for SEA Administration²
TOTAL	13,229,265,000	11,906,338,500	1,322,926,500	66,146,325
ALABAMA	216,947,540	195,252,786	21,694,754	1,084,738
ALASKA	38,407,914	34,567,123	3,840,791	192,040
ARIZONA	277,422,944	249,680,650	27,742,294	1,387,115
ARKANSAS	128,758,638	115,882,774	12,875,864	643,793
CALIFORNIA	1,647,306,127	1,482,575,514	164,730,613	8,236,531
COLORADO	120,993,782	108,894,404	12,099,378	604,969
CONNECTICUT	111,068,059	99,961,253	11,106,806	555,340
DELAWARE	43,492,753	39,143,478	4,349,275	217,464
DISTRICT OF COLUMBIA	42,006,354	37,805,719	4,200,635	210,032
FLORIDA	770,247,851	693,223,066	77,024,785	3,851,239
GEORGIA	457,169,852	411,452,867	45,716,985	2,285,849
HAWAII	43,385,229	39,046,706	4,338,523	216,926
IDAHO	47,854,695	43,069,226	4,785,470	239,273
ILLINOIS	569,467,218	512,520,496	56,946,722	2,847,336
INDIANA	214,472,770	193,025,493	21,447,277	1,072,364
IOWA	71,625,561	64,463,005	7,162,556	358,128
KANSAS	84,529,061	76,076,155	8,452,906	422,645
KENTUCKY	193,186,874	173,868,187	19,318,687	965,934
LOUISIANA	286,980,175	258,282,158	28,698,018	1,434,901
MAINE	43,793,319	39,413,987	4,379,332	218,967
MARYLAND	207,834,058	187,050,652	20,783,406	1,039,170
MASSACHUSETTS	214,894,317	193,404,885	21,489,432	1,074,472
MICHIGAN	389,796,984	350,817,286	38,979,698	1,948,985
MINNESOTA	140,137,253	126,123,528	14,013,725	700,686
MISSISSIPPI	169,883,002	152,894,702	16,988,300	849,415
MISSOURI	208,443,300	187,598,970	20,844,330	1,042,217
MONTANA	41,295,230	37,165,707	4,129,523	206,476
NEBRASKA	65,085,085	58,576,577	6,508,509	325,425
NEVADA	117,185,045	105,466,541	11,718,505	585,925
NEW HAMPSHIRE	37,641,372	33,877,235	3,764,137	188,207
NEW JERSEY	310,371,213	279,334,092	31,037,121	1,551,856
NEW MEXICO	108,574,786	97,717,307	10,857,479	542,874
NEW YORK	1,037,045,603	933,341,043	103,704,560	5,185,228
NORTH CAROLINA	396,311,607	356,680,446	39,631,161	1,981,558
NORTH DAKOTA	33,297,699	29,967,929	3,329,770	166,489
OHIO	489,205,200	440,284,680	48,920,520	2,446,026
OKLAHOMA	160,950,476	144,855,428	16,095,048	804,752

¹ The totals in the Minimum LEA Distribution, Maximum SEA Reservation, and Maximum for SEA Administration columns have been rounded to the nearest whole dollar.

² With the funds not subgranted to LEAs, the SEA may reserve up to an amount equal to ½ of 1 percent of the total allocation for administrative costs.

STATE	STATE TOTAL	Minimum LEA Distribution ³	Maximum SEA Reservation	Maximum for SEA Administration ⁴
OREGON	121,099,019	108,989,117	12,109,902	605,495
PENNSYLVANIA	523,807,198	471,426,478	52,380,720	2,619,036
RHODE ISLAND	46,350,444	41,715,400	4,635,044	231,752
SOUTH CAROLINA	216,311,158	194,680,042	21,631,116	1,081,556
SOUTH DAKOTA	41,295,230	37,165,707	4,129,523	206,476
TENNESSEE	259,891,154	233,902,039	25,989,115	1,299,456
TEXAS	1,285,886,064	1,157,297,458	128,588,606	6,429,430
UTAH	67,821,787	61,039,608	6,782,179	339,109
VERMONT	31,148,360	28,033,524	3,114,836	155,742
VIRGINIA	238,599,192	214,739,273	23,859,919	1,192,996
WASHINGTON	216,892,447	195,203,202	21,689,245	1,084,462
WEST VIRGINIA	86,640,471	77,976,424	8,664,047	433,202
WISCONSIN	174,777,774	157,299,997	17,477,777	873,889
WYOMING	32,562,651	29,306,386	3,256,265	162,813
PUERTO RICO	349,113,105	314,201,795	34,911,311	1,745,566

³ The totals in the Minimum LEA Distribution, Maximum SEA Reservation, and Maximum for SEA Administration columns have been rounded to the nearest whole dollar.

⁴ With the funds not subgranted to LEAs, the SEA may reserve up to an amount equal to ½ of 1 percent of the total allocation for administrative costs.



California Department of Education

Tony Thurmond, *State Superintendent of Public Instruction*
1430 N Street, Sacramento, CA 95814-5901
916-319-0800

California State Board of Education

Linda Darling-Hammond, *State Board President*
1430 N Street, Room 5111, Sacramento, CA 95814
916-319-0827

April 28, 2020

The Honorable Betsy DeVos
Secretary of Education
U.S. Department of Education
400 Maryland Avenue, SW
Washington, D.C. 20202-6100

Dear Secretary DeVos:

RE: Elementary and Secondary School Emergency Relief Fund Grant

On behalf of the California State Board of Education and the California Department of Education (CDE), we respectfully request grant funding under the Elementary and Secondary School Emergency Relief Fund (ESSER Fund) for the purpose of providing local educational agencies (LEAs), including charter schools that are LEAs, with emergency relief funds to address the impact of the Novel Coronavirus Disease 2019 (COVID-19).

On March 19, 2020, California Governor Gavin Newsom issued Executive Order N-33-20, a statewide "shelter in place" to protect the health and well-being of all Californians and to establish consistency across the state in order to slow the spread of COVID-19. Since then, the CDE and SBE have worked tirelessly to ensure that we are giving our schools as many resources as possible in order to guarantee the success of all California students.

California is appreciative of the grant application and awards being released by the U.S. Department of Education in such a streamlined manner. The State will comply with all Assurances and Certifications listed in the ESSER Fund Certification and Agreement application. The \$1,647,306,127 grant award will be used to give much needed relief to our students, families, and schools.

The current public health crisis is unprecedented in scale and scope. We look forward to working with your staff to ensure that California's future needs can be addressed.

If additional information regarding this request is needed, please contact Joseph Saenz, Federal Policy Liaison, Government Affairs Division, by telephone at 916-591-6391 or by email at jsaenz@cde.ca.gov.

Sincerely,

April 28, 2020
Page 2

Handwritten signature of Tony Thurmond in blue ink.

Tony Thurmond
State Superintendent of Public Instruction
California Department of Education

Handwritten signature of Linda Darling-Hammond in black ink.

Linda Darling-Hammond
President
California State Board of Education

TT/LDH:js

EXHIBIT A

PART II

EXHIBIT 3

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 8 *Attorneys for Plaintiff State of California*

9
 10 IN THE UNITED STATES DISTRICT COURT
 11 FOR THE NORTHERN DISTRICT OF CALIFORNIA
 12

13
 14 **STATE OF MICHIGAN, STATE OF
 CALIFORNIA, et al.,**

15 Plaintiffs,

16 v.

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 18 **ELISABETH D. DEVOS, in her official
 capacity as the United States Secretary of
 19 Education, and UNITED STATES
 DEPARTMENT OF EDUCATION,**

20 Defendants.
 21
 22

Civil Case No. 3:20-cv-04478-SK

**DECLARATION OF JOHANNA
 HOFFMANN**

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DECLARATION OF JOHANNA HOFFMANN

I, Johanna Hoffmann, pursuant to 28 U.S.C. § 1746, hereby declare that the following is true and correct:

1. I am a resident of California and over the age of 18, competent to testify as to the matters herein, and make this declaration based on my personal knowledge and information.

2. I submit this declaration in support of a motion for preliminary injunction against enforcement by the United States Department of Education (the “Department”) of its interim final rule issued on July 1, 2020 (the “IFR” or “Rule”), which changes how funding is distributed under the Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”). I have compiled the information in the statements below through my personal knowledge or based on documents that I have reviewed. In the course of my work, I have attempted to become familiar with the information contained in the CARES Act sections regarding elementary school, secondary school and non-public school funding, the Department’s written guidance pre-dating the IFR (“Guidance Document”), and the IFR.

3. I have served as a Strategic Resource Planning Specialist for the middle school network and private school equitable services within the Oakland Unified School District (OUSD) since September 2019. My responsibilities include preparation and oversight of OUSD’s provision of services to private schools funded by federal money under Title I of the Elementary and Secondary Education Act of 1965, as amended most recently in December 2015 as the Every Student Succeeds Act. I survey private schools to determine their intention to seek to participate in OUSD’s equitable services program and oversee the determination of which schools will participate and how many students in those schools meet the criteria for eligibility. I am involved in calculating the amount of funds that OUSD allocates for equitable services to private schools. I participate in communications with the California Department of Education (CDE) and the United States Department of Education on equitable services to private schools as well as training provided by the same.

GENERAL OVERVIEW OF DISTRICT

4. OUSD serves approximately 35,865 K-12 public school students at approximately 83 district-run public schools.

5. Of that number, 31,043 students (including students who were themselves Title I eligible and other students) attended 71 schools that received Title I-A funds. OUSD received \$17,598,916 in Title I-A funds received for 2019-20 school year. The number of students who met the eligibility criteria for Title I-A was 24,461.

6. According to information submitted by private schools in their annual affidavit to the CDE and published by the CDE, in 2019-20 there were 5,948 private school students attending 29 non-profit private schools within the OUSD boundary.

7. OUSD supports eligible Title I students with Programs through the central office and at school sites. Centrally, OUSD programs include Summer School, Saturday School, and Early Childhood Education Programs during the 2019-20 school year. Each school operating a Schoolwide Title I Program receives an allocation of grant funds with which to design programs. The School Site Council guides and approves the programs at the school site on an annual basis.

EFFECTS OF THE COVID-19 PANDEMIC ON EDUCATION IN OUSD

8. The COVID-19 pandemic has drastically affected K-12 education in OUSD.

9. The transition to distance learning has been particularly challenging for OUSD’s lower income students and, because of the high percentage of low-income students within our district, OUSD is significantly impacted by these challenges. Low-income students lack technology access, which prevents them from accessing remote learning materials. OUSD serves a large number of students that lack access to devices and high-speed internet at home, leaving the students unable to learn remotely without the District or a District-partner providing them with the necessary devices and internet access. From what we have seen, private school students are more likely to live in homes with good internet access and computers. That is supported by survey information such as at <https://parents-together.org/parentstogether-survey-reveals-remote-learning-is-failing-our-most-vulnerable->

1 [students/?referringSource=articleShare](#). Additionally, of the 24 private schools interested in
2 participating in CARES-related equitable services, two schools listed technology purchases
3 related to supporting distance learning as their lowest need and seven schools did not indicate
4 a need to technology purchases whatsoever.

5 10. Because of COVID-19, distance learning began with the closure of all OUSD
6 schools on March 16. One of the biggest challenges faced by our students and families has
7 been the inequitable access to technology and the internet. OUSD schools loaned out more
8 than 18,000 Chromebooks to students who need them at home, along with hotspots to give
9 them access to the internet and their education. The majority of students who received these
10 devices were lower income students.

11 11. Since the shelter in place began, and so many families lost jobs, another major
12 challenge for them has been access to food. OUSD Nutrition Services team has been
13 supplying meals to OUSD students and their families as well as children in Oakland since
14 day one. In the past four months, the team has distributed more than 3.5 million student
15 meals, 450,000 adult meals, nearly 900,000 pounds of groceries, more than 400,000 diapers,
16 and 13 tons of pet food, among many other things. Here are details from a June press
17 release: <https://t.e2ma.net/message/9due5c/hkkxog>.

18 12. To make the impact of the pandemic more concrete, I have obtained
19 information about one public school in the district, Oakland International High School. It
20 serves Newcomer Immigrant and Refugee students, which is a population of students who
21 are much more densely situated in Oakland public schools than in neighboring private
22 schools. Currently, 1 in 7 high school students in Oakland Unified School district is a
23 Newcomer who has arrived in the United States in the last 3 years. There are virtually no
24 Newcomer students who are being served by local private schools.

25 **Technology Access Inequities:** At the onset of shelter in place, 94% of
26 OIHS's students either lacked internet connectivity at home, lacked a computer or
27 tablet, or both. Three staff members worked throughout shelter in place to ensure that
28 students got donated computers, loaner computers, and hotspots. Once the supply

1 chain for internet hotspots was disrupted/overloaded, OIHS supported families with
2 direct cash assistance in order to upgrade their phones to serve as internet hotspots.

3 **Food Insecurity:** 152 OIHS families requested additional emergency food
4 from Oakland International High School, citing that the food provided by the district's
5 federal food program was not sufficient to meet their needs, and they could not afford
6 to buy food due to job losses.

7 **Transportation Access:** OIHS conducted 118 individual food dropoffs for
8 families who had no reliable or safe transportation access during shelter in place.
9 Because public transportation is limited to 25% capacity for safety reasons, our
10 families have a very limited ability to access school, work, food, and social services.

11 **Income Insecurity:** Of OIHS's 387 enrolled students, 188 families (many of
12 whom had two or more students at our school), were referred for income insecurity
13 support during the Spring Semester because they had lost their jobs. These families
14 were in immediate need of money to buy food, pay their phone bills, and pay rent
15 (until the rent moratorium was issued. OIHS devoted a tremendous amount of human
16 resources to fundraise and manage a direct-assistance fund to ensure that students
17 could eat and had a roof over their head.

18 13. The disruption of California's economy has caused a contraction of the State's
19 budget, and the State's funding for K-12 public schools will be reduced by a substantial
20 amount that remains to be determined. The disruption is expected to last for the foreseeable
21 future. Because State funding will be reduced and the cost of providing an education to
22 students in public schools has substantially increased, the COVID-19 crisis has magnified the
23 impact of the reduction in the federal funding for public schools that would occur if OUSD
24 distributes equitable services to private schools based on total student enrollment.

25 **CARES ACT FUNDS ALLOCATED TO OUSD FOR K-12 EDUCATION**

26 A Elementary and Secondary School Emergency Relief (ESSER) Funds

27 14. OUSD applied for money from the California Department of Education (CDE)
28 for all ESSER funds available on July 13, 2020.

1 15. CDE has provided a preliminary ESSER fund allocation of \$14,493,191.00 to
2 OUSD based upon the proportional share of our Title I award for the 2019-20 school year.

3 16. According to the proportional share calculation set forth in Section 1117 of
4 the Elementary and Secondary Education Act (ESEA), using 2019-20 enrollment for both
5 OUSD district schools (24,461 eligible students) and eligible private schools (268 eligible
6 students at 4 schools), the proportional share for equitable services for the 2019-2020 school
7 year was 1.08% or \$190,068.00. Applying this share to OUSD's anticipated ESSER fund
8 allocation, the allocation for ESSER equitable services is \$156,526.46.

9 17. However, the above number does not include consideration of the private
10 school students (435 at 8 schools) that want to participate in Title I, Part A equitable services
11 during the 2020-21 school year that did not participate in 2019-2020 nor does it include
12 private school students (936 at 24 schools) interested in participating only in CARES-related
13 equitable services.

14 18. OUSD had already completed the notification and scheduled initial
15 consultation with private schools for the 2020-21 school year by the time the CARES Act
16 became effective. Consequently, we notified private schools within our boundary of the
17 CARES-related equitable services opportunity after we determined which private schools
18 would participate during the 2020-21 school year.

19 19. As part of my role as Specialist, I initiated the notification and consultation
20 process with private schools within our district boundary, receiving confirmation from 24
21 private schools interested in receiving ESSER fund-related equitable services. The estimated
22 enrollment of low-income students at these 24 schools is 936 for the 2020-21 school year.
23 We have not yet verified enrollment or low-income eligibility with the 24 private schools
24 interested in CARES-related equitable services.

25 20. OUSD's ESSER allocation is based upon our 2019-20 Title I award. It would
26 be consistent for CARES-related equitable services to be based on 2019-20 data, meaning
27 that OUSD would provide equitable services in the amount of \$156,526.46.

28 21. OUSD would reserve \$156,526.46 in ESSER funds to provide equitable

1 services to private school students.

2 22. However, using the proportional share calculation set forth in the Department's
3 Guidance Document and in Option #2 in the Rule, OUSD would reserve \$2.160 million in
4 ESSER funds to provide equitable services to private school students. Thus, under the
5 Department's preferred proportional share calculation, private school students within OUSD
6 boundary would have access to services amounting to an additional \$2.160M; an amount that
7 would be diverted from district schools. I do not believe this was the intent of Congress and
8 public schools would lose this same amount of funds.

9 **B Governor's Emergency Education Relief (GEER) Funds**

10 23. OUSD has not yet received the amount of its allocation from the Learning
11 Loss Mitigation Block Grant Fund/GEER Fund. It is my understanding that OUSD's
12 allocation of GEER funds would be subject to the same rules as ESSER funds, meaning that
13 if OUSD is bound by the Department's guidance and interim rule, a greater portion of our
14 allocation would be diverted to private school students than would be if OUSD followed the
15 language in the CARES Act.

16 **USE OF TITLE I FUNDS TO EQUITABLE SERVICES FOR NON-PUBLIC**
17 **SCHOOLS**

18 24. Before the IFR, it was my responsibility to plan for OUSD's allocation and use
19 of Title I funding for equitable services to private schools.

20 25. When I started working at OUSD, the funding allocations for the 2019 school
21 year were completed and my role was to assist with management of equitable services. As part
22 of my role, I began preparing the equitable services program for the 2020-21 school year. To do
23 so, OUSD sent out notices to eligible private schools. We identified schools by looking at a
24 directory annually distributed by the State of California and identifying schools within and
25 bordering our district. Of the 80 schools that received notices, around 8 schools opted to
26 participate in Title I and 11 total schools opted to participate in at least one of the programs
27 offered through Titles I-IV.

28 26. As part of OUSD's annual budget development process, which begins in the

1 early Spring, I assist with determining the equitable services allocation. The allocation
2 calculation is determined once a year and is based on the number of eligible Title I private
3 school students as a percentage of Title I public and private school combined enrollment of
4 eligible students. We use the enrollment data from the previous year and apply the percentage
5 to total Title I funding. For example, for the 2020-21 school year, around \$300,000 was set
6 aside for equitable services under Title I. However, administration expenses of around \$45,000
7 were deducted from this amount, so approximately \$255,000 was available for Title I equitable
8 services for the 2020-21 school year.

9 27. In order to receive their allocated equitable services, individuals at a private
10 school (staff and/or teachers) submit requests seeking reimbursement or funding for activities
11 identified in their needs assessments. Title I private schools must seek approval from OUSD
12 prior to engaging in the activity and submit verification of participation and/or expenditures
13 within 10 days after its completion in order to be reimbursed. As the fiscal agent for equitable
14 services, OUSD cannot provide public funds to any private schools, but rather OUSD
15 contracts directly with service providers and is only able to reimburse individual teachers
16 and/or staff for pre-approved and allowable expenditures.

17 28. When my colleagues and I initially read the CARES Act, we thought we could
18 use CARES Act funding to serve any district schools, and that the portion of funding available
19 for equitable services would be based on Title I eligible students attending private schools in
20 OUSD's boundary. We envisioned distributing CARES Act funding to private schools as
21 described above. Given that our budget development process had already begun, myself and
22 others planning for the 2020-21 school year relied on the language in the CARES Act for
23 approximately a month until the Department's written guidance pre-dating the IFR and the IFR
24 drastically changed our initial understanding.

25 29. In the IFR the Department appears to be giving us additional options for
26 distributing CARES Act funding between private and public schools, when in fact, the
27 restrictions in Option 2 essentially swallow any benefit it may purport to provide. The
28 Department gives us the option to choose to distribute funds either based on Title I low-income

1 student proportion (“Option 1”) or in proportion to total student enrollment (“Option 2”) as
2 long as all CARES funds are used to serve only students and teachers in public schools
3 participating under Title I. However, if we use any portion of the Act’s funding for non-Title I
4 schools, then we must distribute funds based on enrollment, irrespective of income. If we elect
5 to distribute funds based on Title I proportional share, we must comply with supplement not
6 supplant requirements, which imposes additional restrictions on how we spend the funds.

7 30. One example of how the supplement not supplant restriction swallows the Title I
8 distribution option can be illustrated by OUSD’s efforts to purchase PPE supplies. Under
9 Option #1 of the IFR, OUSD could use Elementary and Secondary School Emergency Relief
10 (“ESSER”) funds at our Title I schools only, and we would be unable to use them for the same
11 materials at our non-Title I schools. Additionally, if anything was paid for with state and/or
12 local funds during the 2020-21 school year, we cannot then pay for the same thing with Title I
13 funds during the 2021-22 school year. That the Department waited until April 30, 2020 to issue
14 guidance and until July 2, 2020 to publish the IFR significantly burdens OUSD since our
15 budget development process for the 2020-21 school year was complete by that time.

16 31. The election to distribute CARES Act funding based on Title I low-income
17 student proportion also affects our ESSER and GEER funding as it imposes supplement not
18 supplant restrictions that would not otherwise exist. ESSER and GEERS funds help us assist all
19 public schools not just Title I schools. Under the Department’s restrictions, low-income
20 students that are not at a Title I school would be not able to access this funding. Alternatively,
21 if we elect to distribute equitable services based on total student enrollment, then ESSER and
22 GEER funding will be diverted from low-income public schools to private school students to
23 the tune of approximately \$2 million. Moreover, the application of the supplement not supplant
24 restriction in the IFR is in direct contradiction to the Department’s own guidance documents.

25 **ENFORCEMENT OF THE IFR WOULD CAUSE SUBSTANTIAL HARM TO**
26 **OUSD**

27 32. If we were to distribute the CARES Act funds based on low-income private
28 school pupils, each pupil would receive around \$452; however, if we were to distribute the

1 CARES Act funds to all private school pupils, then each pupil would receive around \$24. Low-
2 income private school students would receive significantly less funding, which simply cannot
3 be the result that Congress intended.

4 33. Because of the restrictions imposed by the Department in its written guidance
5 pre-dating the IFR, and the IFR, OUSD has set aside approximately \$2.2 million dollars of
6 ESSER funds for equitable services. Whereas for the 2019-20 school year, 268 of a total of
7 5,136 pupils from private schools participated in Title I-A, under the restrictions imposed by
8 the Department, we must allocate equitable services based on total private school pupil
9 enrollment. This means funding will be diverted from public schools and the distribution per
10 pupil at private schools will be diluted leaving, the most vulnerable pupils with less assistance.

11 34. For every dollar that is diverted from public schools in OUSD as a result of the
12 Department's Guidance Document and IFR, OUSD will have fewer dollars to serve district
13 schools.

14 35. The Department's Guidance and IFR interpretation of the equitable service
15 requirements represent such a departure from OUSD's interpretation as well as the guidance
16 OUSD has received from the CDE and Alameda County Office of Education, we are unsure
17 how to proceed. While setting aside the \$2.2 million difference between two enrollment counts
18 of eligible private school students participating in equitable services with ESSER funds is an
19 attempt to ensure we are able to comply with the grant provisions should a final determination
20 be made that the total private school enrollment count be used, the impact on OUSD students is
21 immediate. With access to the full amount of the ESSER funds we believe Congress intended
22 to distribute, OUSD would be able to support our schools and students by immediately having
23 access to \$2.2 million rather than holding those funds in limbo for an undetermined amount of
24 time.

25 36. Enforcement of the IFR also would impose substantial harm on OUSD in the
26 form of increased effort and expense for administration. Servicing a greater number of private
27 schools is an administrative burden, which takes time away from servicing public schools.
28 Similarly, ensuring compliance with supplement not supplant restrictions is administratively

1 burdensome and costly. This is time that is being taken away from securing resources and
2 aiding students. Although the administrative burdens have increased, we are uncertain as to
3 what percentage of the CARES Act funding we are entitled to set aside to cover administrative
4 fees.

5 37. Administrative fees are not the only aspect of the Department's guidance that
6 lacks clarity. In fact, the Department is constantly changing the restrictions on CARES Act
7 funding to address what they claim to be ambiguities, but instead of addressing actual
8 ambiguities, the Department has confused what was otherwise clear direction. Doing so is
9 creating even more uncertainties. We are concerned that auditors will fine us for spending Title
10 I time on CARES Act funding issues. Instead of addressing issues related to the pandemic, we
11 are wasting even more time attempting to address auditing concerns.

12 38. The Department's Guidance and IFR will result in less funding being distributed
13 to public K-12 schools in OUSD.

14 39. If OUSD calculates the proportional share of CARES Act funds for private
15 school students under Option #1 in the IFR, non-Title I schools in OUSD receiving CARES
16 Act funds will receive no funds. In OUSD, there are approximately 10 non-Title I schools that
17 are eligible to receive CARES Act funds that would not receive any funding. Like all schools
18 in OUSD, these schools are affected by the COVID-19 pandemic and would greatly benefit
19 from the influx of CARES Act funds to assist them through the pandemic.

20 40. In addition, there are 71 schools in OUSD receiving Title I-A funding that
21 would be prohibited under the IFR from using CARES Act funds to respond to and prepare for
22 the pandemic in ways that would supplant State and local funding sources. For example,
23 OUSD has relied on other funds and philanthropic gifts for part of the funding for COVI-19
24 technology response. Supplement not supplant restrictions might be interpreted to apply to
25 such uses of CARES-Act funding. This would significantly reduce the flexibility of the Title I
26 schools to meet the specific need created by COVID-19.

27 41. The new supplement not supplant requirement of Option #1 has created
28 significant confusion and administrative burdens for the OUSD, as prior to issuing the IFR, the

1 Department had explicitly communicated that supplement not supplant rules did not apply to
2 CARES Act funds.¹ The OUSD budget developed without this requirement in mind will need
3 to be revamped, and the flexibility in how school districts may use these funds to address
4 COVID-19 has been significantly curtailed.

5 42. For example, if we wanted to buy disinfecting wipes for our schools, we fear that
6 supplement not supplant restrictions could be interpreted to only be able to spend out of the
7 ESSER funds and for the other non-Title I schools we would need to look elsewhere for funding.

8 43. If OUSD calculates the proportional share of CARES Act funds for private
9 school students under Option #2 in the IFR, approximately \$2.2 million will be diverted from
10 public schools to private school students, which represents 14.9% of OUSD's total CARES Act
11 funding for education.

12 **SUBSTANTIAL CARES ACT FUNDING IS AVAILABLE TO PRIVATE**
13 **SCHOOLS BUT NOT TO PUBLIC SCHOOLS**

14 44. The Department's stated purpose for equally apportioning CARES Act funding
15 between public and private schools is that it would be unfair to exclude private schools who
16 have also been affected by the pandemic. However, non-public entities, including private
17 schools, are eligible for a range of support under the CARES Act, including the Paycheck
18 Protection Program (PPP) loans OUSD cannot benefit from many of the provisions of the
19 CARES Act that private schools are able to receive. It is my belief that private schools already
20 receive a greater benefit through PPP loans and various tax credits than OUSD receives via
21 ESSER and GEER. The scales are already tipped in favor of private schools with the
22 previously referenced support and would be further and significantly tipped in favor of private
23 schools should OUSD be required to provide equitable services based on the total number of
24 students enrolled at private schools within our boundary. Nine of the private schools within
25 OUSD that are interested in equitable services from CARES Act applied for PPP loans. These

26 ¹ U.S. Dep't of Educ., Elementary and Secondary School Emergency Relief Fund, Frequently
27 Asked Questions about the Elementary and Secondary School Emergency Relief Fund (ESSER
28 Fund), available at <https://oese.ed.gov/files/2020/05/ESSER-Fund-Frequently-Asked-Questions.pdf>.

1 nine schools are eligible to receive between 5.5M and 13.7M in PPP loans. Importantly, these 9
2 schools serve a total of around 2,500 students, which means that they are receiving almost as
3 much money as OUSD was allocated in its ESSER fund (\$14M) to serve less than a tenth of
4 the students OUSD serves.

5 45. I have read the published IFR, including the Department's statement that
6 "Nothing in the CARES Act suggests Congress intended to differentiate between students
7 based upon the public or non-public nature of their school with respect to eligibility for relief."
8 If this statement is understood to suggest that without the IFR's diversion of money, the non-
9 public schools would receive too little CARES Act relief compared with public schools, it
10 cannot be accepted as true. Major categories of CARES ACT relief are available to non-public
11 schools and denied to public schools. One example is that private schools in OUSD's
12 geographic area have obtained loans, which may be forgiven based on meeting requirements
13 aimed at maintaining employment, under the Payroll Protection Program (PPP).

14 46. The United States Department of the Treasury maintains a website at
15 [https://home.treasury.gov/policy-issues/cares-act/assistance-for-small-businesses/sba-](https://home.treasury.gov/policy-issues/cares-act/assistance-for-small-businesses/sba-paycheck-protection-program-loan-level-data)
16 [paycheck-protection-program-loan-level-data](https://home.treasury.gov/policy-issues/cares-act/assistance-for-small-businesses/sba-paycheck-protection-program-loan-level-data). It contains listings of the recipients of PPP loans
17 to date, including one list of recipients of loans less than \$150,000 and one of recipients of
18 loans over \$150,000. For loans of over \$150,000, the names of the borrowers are disclosed,
19 along with their NAICS industry codes, locations, and other descriptive information. The
20 specific loan amounts are not disclosed. Instead, each loan is classified as within a range of
21 amounts: \$150,000-350,000; \$350,000-1 million; \$1-2 million; \$2-5 million; and \$5-10
22 million.

23 47. I have reviewed both lists, paying particular attention to recipients of PPP loans
24 of \$150,000 or more located in Oakland, California and classified as NAICS code 611110,
25 which designates "Elementary and Secondary Schools." (See [https://www.naics.com/naics-](https://www.naics.com/naics-code-description/?code=611110)
26 [code-description/?code=611110](https://www.naics.com/naics-code-description/?code=611110)). Public schools are not eligible for PPP loans, so the loan
27 recipients listed are private schools in Oakland, California. Twenty-seven entities in Oakland
28 are listed. I have checked the names on the list to remove charter schools and three entities that

1 are not primary or secondary schools. The remaining PPP recipients are private (including
2 parochial and religious) primary and secondary schools that have received at least \$7,850,000
3 in PPP loans. That is the total of the low-end amounts of each reported range for a private, non-
4 charter school in Oakland that received a loan over \$150,000 in NAICS code 611110. Using
5 the amount in the middle of each reported range, the total would be \$13,300,000. The total of
6 the high-end amounts from the ranges would be \$18,750,000. As a reminder, OUSD
7 anticipates receiving a total of just over \$14 million dollars in ESSER funds *before* equitable
8 services are calculated and a portion is allocated to private schools.

9 48. I have checked for the names of the 24 private schools that have applied for
10 CARES-funded equitable services on the list of names of recipients of PPP loans of \$150,000
11 or more. Nine of the schools that wish to receive CARES-funded equitable services are listed
12 as having received a minimum of \$5,700,000 in PPP funding. If the actual loan amounts
13 averaged the midpoint of the reported ranges, the total is \$9,700,000. At the top end of the
14 reported ranges, the PPP funding to these private schools would have been \$13,700,000.

15 49. For comparison, the entire amount of CARES-Act ESSER funding that OUSD
16 will receive — for both public and private schools — is \$14,492,191. As I have explained
17 above, under the formula of Section 1117 private schools would receive \$157,000 of that
18 funding, but if the full enrollment of participating private schools is used, we estimate that the
19 amount would be \$2,160,000 —resulting in a diversion of \$2 million from funds for OUSD
20 public schools.

21 50. These amounts demonstrate that there is no basis for contending that Congress
22 made not distinctions between public and non-public schools, and no basis to say that the
23 proportion of equitable services to private schools pursuant to Section 1117 would leave
24 private schools with too little relief under the CARES Act, compared with private schools.

25
26 I declare under penalty of perjury pursuant to 28 U.S. Code § 1746 that the foregoing
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is true and correct. This Declaration was executed this 16th day of July, 2020 in Oakland,
California.



Johanna Hoffmann
Strategic Resource Planning Specialist
Oakland Unified School District

EXHIBIT 4

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 10 IN THE UNITED STATES DISTRICT COURT
 11 FOR THE NORTHERN DISTRICT OF CALIFORNIA
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 14 **STATE OF MICHIGAN, STATE OF
 CALIFORNIA, et al.,**

15
 16 Plaintiffs,

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 18 v.

19 **ELISABETH D. DEVOS, in her official
 capacity as the United States Secretary of
 Education, and UNITED STATES
 DEPARTMENT OF EDUCATION,**

20
 21 Defendants.
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Civil Case No. 3:20-cv-04478-SK

DECLARATION OF NIKKI STEWART

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DECLARATION OF NIKKI STEWART

I, Nikki Stewart, pursuant to 28 U.S.C. § 1746, hereby declare that the following is true and correct:

1. I am the Assistant Superintendent of the Division of Systems and Supports, K-12 (SSK12) at the Office of the State Superintendent of Education (OSSE) located in the District of Columbia. My educational background includes a Bachelor of Arts from Spelman College, a Master of Arts from the University of Maryland, a Master of Science from Full Sail University, and a Certification in Public Management from the George Washington University. I have been employed as Assistant Superintendent of the Division of K-12 Systems and Support since September 2019. I am an education leader in the District of Columbia, having previously served as a master teacher, local education agency leader, and statewide assessment developer.

2. As the Assistant Superintendent of Division of Systems and Supports, K-12 (SSK12), I manage a diverse portfolio of work streams in K-12, overseeing all K-12 federal education programs and related grants administered in the District of Columbia including the Title programs under the Elementary and Secondary Education Act, and the Individuals with Disabilities in Education Act.

3. I submit this Declaration in support of the District of Columbia’s litigation against Elisabeth D. DeVos, in her official capacity as Secretary of Education, and the United States Department of Education (the “Department”); and the United States of America regarding the recently issued Rule entitled *Providing Equitable Services to Students and Teachers in Non-public Schools*, 85 Fed. Reg. 39,479 (July 1, 2020) (the “Equitable Services Rule” or the “Rule”). I have compiled the information in the statements set forth below through personal knowledge, through OSSE personnel who have assisted me in gathering this information from our institution, and on the basis of documents that have been provided to and/or reviewed by me. I have also familiarized myself with the Rule in order to understand its immediate impact on the Office of the State Superintendent of Education and public schools in the District of Columbia.

4. Historically, the District of Columbia Board of Education was the central policymaking entity on education matters for traditional public schools in DC. The DC School

1 Reform Act of 1995 (SRA) established public charter schools in the District of Columbia,
2 authorized by the DC Public Charter School Board (PSCB), an independent body governed by the
3 SRA. The State Education Office Establishment Act of 2000 created the office of the State
4 Superintendent of Education, a state level education agency serving as the District's liaison to the
5 U.S. Department of Education and working closely with the District's traditional and public
6 charter schools to ensure compliance with local and federal law. In 2007, the Public Education
7 Reform Amendment Act of 2007 (PERAA) effectuated mayoral control of the District of
8 Columbia public school system, including the District of Columbia Public Schools (DCPS) and
9 OSSE. Under the PERAA, DCPS and OSSE are cabinet-level, subordinate agencies under the
10 Mayor. At the executive level, the Deputy Mayor for Education (DME) provides additional
11 oversight and partnership for the education sector by working closely with DCPS, PCSB and
12 OSSE to promote equity and implement District-wide education program goals.

13 5. OSSE is the state education agency (SEA) for the District of Columbia charged with
14 raising the quality of education for all DC residents. As DC's SEA, OSSE works urgently and
15 purposefully, in partnership with education and related systems, to sustain, accelerate, and deepen
16 progress for DC students. OSSE's vision is to close the achievement gap and ensure people of all
17 ages and backgrounds are prepared to succeed in school and in life. OSSE's functions include:
18 overseeing all federal education programs and related grants administered in the District of
19 Columbia; developing state-level standards aligned with school, college, and workforce readiness
20 expectations; ensuring access to high-quality child care and universal pre-kindergarten for eligible
21 District families; providing resources and support to assist the District's most vulnerable student
22 populations; administering the annual Partnership for Assessment of Readiness for College and
23 Careers (PARCC), the statewide student academic achievement exam; providing regional, door-to-
24 door transportation to school for District children with special needs; awarding higher education
25 financial assistance to eligible District students at public and private colleges and universities in DC
26 and across the country; increasing health and physical education awareness as well as ensuring
27 access to free meals year-round; providing common, comparable information for families and
28 educators about all public schools in the District of Columbia through the DC School Report Card.

1 6. The FY 2020 budget for DCPS is \$918 million. The FY 2020 budget for public
2 charter schools is \$905 million. School funding starts with a base amount per student, which varies
3 by grade. Schools receive additional resources for students who are English Language Learners,
4 special education students, or students at risk of academic failure. The school funding formula—
5 known as the Uniform Per Student Funding Formula (UPSFF)—applies both to DCPS and public
6 charter schools.

7 7. The District of Columbia has 67 local education agencies (LEAs), including the
8 DCPS and 66 public charter LEAs serving 93,708 students in 240 schools. 17 percent of students
9 receive specialized education services; 11 percent of students receive English learner services; and
10 52.8 percent of students attend DCPS. DCPS served approximately 47,100 pre-kindergarten to
11 grade 12 students across 108 schools. About half of D.C.'s public school students were considered
12 to be "at-risk" for academic failure (a local statutory designation covering students receiving public
13 benefits, experiencing homelessness, being in the foster care system, or being over-age in high
14 school).

15 8. Title I is the largest source of federal funding for public education. Schools
16 receive Title I funds as part of the Elementary and Secondary Education Act, as amended by
17 Every Student Succeeds Act (ESSA). Title I funds are used solely to help ensure that children,
18 regardless of family income, can acquire an equitable and quality education that will allow
19 students to become academically proficient. A DCPS school is eligible to become a Title I
20 School-wide Program if 40% or more of the students qualify for free or reduced lunch. Eligible
21 schools are permitted to use Title I, Part A funds in combination with state and local resources
22 and other federal education program funds to enhance the educational program of the school and
23 raise the academic achievement of all students. A DCPS school is eligible to become a Title I
24 Targeted Assistance Program if 35-40% of the students qualify for free or reduced lunch. The
25 term "targeted assistance" means that services are provided to a select group of children,
26 identified as academically failing or most at risk of failing, rather than to all students for overall
27 school improvement. Schools with fewer than 35% of students eligible for free or reduced lunch
28

1 are considered Non-Title I. DCPS has 87 Title I Schools (86 schoolwide and 1 Targeted
2 Assistance) and 26 Non-Title I Schools.

3 9. The District of Columbia is a unique jurisdiction due to its political status as a
4 District as opposed to a state. In terms of its relationship with the U.S. Department of Education,
5 DC is a state but unlike most other states, DC only has one LEA that has an obligation to provide
6 equitable services to private schools, as the school reform act exempts public charter schools from
7 this requirement.

8 10. DC received \$45,198,598.00 of Title I-A funds received for 2019-20 school year.
9 43 LEAs in DC received Title I-A funds in school year 2019-20 (with 79,587 K-12 students at
10 those schools, including 52,232 low-income K-12 students).

11 11. For the 2020 school year, there were 108 private schools in Washington, District
12 of Columbia, serving 19,305 students.

13 **Effects of the COVID-19 Pandemic on Education in the District of Columbia**

14 12. The COVID-19 pandemic has drastically impacted K-12 education in the District
15 of Columbia.

16 13. Due to the COVID-19 pandemic, OSSE has effectuated remote operations, with a
17 majority of staff moving to telework, as schools also shifted to distance learning. OSSE has
18 worked closely with DCPS, PSCB, and DME to engage in robust stakeholder engagement to
19 ensure continued public education service delivery, even in the remote learning environment,
20 including promulgating emergency regulations, developing policy guidance, and establishing new
21 health and safety requirements in response to the public health emergency.

22 14. The COVID-19 pandemic has had a significant impact on K-12 schools in DC.
23 School buildings were closed and transportation services discontinued. DCPS deployed distance
24 learning, and DC public charter schools followed suit. OSSE waived the requirements for in-seat
25 attendance for the 2019-20 school year by requiring schools to submit distance learning plans that
26 outlined how schools intended to provide for students' educational needs in a remote learning
27 environment, including serving students who may be experiencing challenges with access to
28 technology, students with disabilities, English language learners and other vulnerable populations.

1 15. OSSE is working closely with the DME, DCPS and the charter sector on
2 developing policies and plans to support the safe re-opening of schools, with a focus on recovery
3 of learning loss, which poses a significant risk to vulnerable student populations. OSSE has
4 issued guiding principles for continuous education that will provide LEAs with resources to
5 create a coherent academic foundation within their continuous education model in order to uphold
6 existing academic standards across all grade levels and core content areas while ensuring
7 continuous use of rigorous curricula and ongoing assessment of student progress.

8 16. Due to the economic impact of the pandemic, many of the risk factors experienced
9 by students and families (employment, poverty, homelessness, etc.) have increased. As of July 6,
10 2020, DC has 44,312 at risk students, which is nearly a 4% increase since April 6, 2020. This
11 means that many DCPS students are more vulnerable than ever and any funding intended to
12 support these students is critical to support their educational stability and success and should be
13 made available without restriction.

14 **CARES Act Funds Received by District of Columbia for K-12 Education**

15 17. In order to receive the ESSER funds designated for the District of Columbia and as
16 required by the Department, the Office of the State Superintendent of Education executed a
17 Certification and Agreement form and submitted it to the Department on May 6, 2020.¹ A true
18 and correct copy of the Certification and Agreement completed by OSSE and submitted to the
19 Department is attached hereto as Exhibit A.

20 18. Within this Certification and Agreement, the Office of the State Superintendent of
21 Education agreed to the following terms:

22 I acknowledge and agree that the failure to comply with all Assurances and
23 Certifications in this Agreement, all relevant provisions and requirements of
24 the CARES Act, Pub. L. No. 116-136 (March 27, 2020), or any other
25 applicable law or regulation may result in liability under the False Claims Act,
26 31 U.S.C. § 3729, et seq.; OMB Guidelines to Agencies on Governmentwide
Debarment and Suspension (Nonprocurement) in 2 CFR part 180, as adopted
and amended as regulations of the Department in 2 CFR part 3485; and 18
USC § 1001, as appropriate.

27 ¹ U.S. Dep't of Educ., Certification and Agreement for Funding under the Education
28 Stabilization Fund Program Elementary and Secondary School Emergency Relief Fund (ESSER
Fund), CFDA Number 84.425D, April 24, 2020, *available at*
<https://oese.ed.gov/files/2020/04/ESSERF-Certification-and-Agreement-2.pdf>.

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4. LEAs receiving ESSER funds will provide equitable services to students and teachers in non-public schools as required under 18005 of Division B of the CARES Act.

...

5. LEA receiving ESSER funds will provide equitable services to students and teachers in non-public schools located within the LEA in the same manner as provided under section 1117 of the ESEA, as determined through timely and meaningful consultation with representatives of non-public schools.

[Ex. A at pp. 1-2.].

19. At the time that OSSE executed the Certification and Agreement form, the Department had not yet published its Guidance Document or the Rule. Accordingly, OSSE was unaware that the Department would subsequently issue rules to change the required proportional share calculation for equitable services required under the CARES Act and the private school students eligible to receive equitable services under the CARES Act.

20. The Department distributed \$42,006,354.00. from the ESSER Fund to OSSE on May 7, 2020.

21. Of the ESSER funds received by OSSE, 10% is available for the state to award at its discretion, based on locally determined needs. For D.C., this is \$4,200,635.40. OSSE intends to use 9.95% of these funds contractual needs to be determined in the 2020-21 school year to support recovery learning in accordance with OSSE’s principles for continuous education. The remainder, a 0.05% administrative set aside permitted by the CARES Act, will be used for data systems and informational technology infrastructure development.

22. OSSE provided all eligible LEAs with preliminary CARES-ESSER allocations by May 14, 2020. DCPS is the only DC LEA subject to equitable services. DCPS’s preliminary allocation is \$21,749,742.49. On July 9, 2020, OSSE awarded DCPS 30 percent of its total award, \$6,524,922.75. Later this summer, OSSE will provide LEAs with final allocations based

1 on updates for new and expanding charter schools. LEAs will complete an application later this
2 summer for FY2021 funds and then in summer 2021 for FY2022 funds, if applicable.

3 23. Using the proportional share calculation set forth in Section 1117 of the
4 Elementary and Secondary Education Act (ESEA), the DCPS would reserve \$1,435,483 in
5 ESSER funds to provide equitable services to private school students.

6 24. However, using the proportional share calculation set forth in the Department's
7 Guidance Document and in Option #2 in the Rule, DCPS would reserve \$5,002,440.77 in ESSER
8 funds to provide equitable services to private school students. Thus, under the Department's
9 preferred proportional share calculation, private school students in DC would have access to an
10 additional \$3,566,957.77 and public schools would lose this same amount of funds.

11 **The Department's Rule Significantly Harms the District of Columbia**

12 25. COVID-19 places unprecedented operational and fiscal strain on DCPS, and an
13 effective government response that prioritizes student health and safety, as well as maintains our
14 academic gains, is required. The \$3.6M loss of funding exacerbates that problem at a time when
15 there is a growing number of at-risk students who are in need of additional educational,
16 technological, and social/emotional supports. This will require increased resources, including
17 funding, being directed toward programs supporting vulnerable students and families in the
18 District. This loss of funding due to the Department's proposed rule will significantly reduce
19 DCPS's ability to adequately serve these students. Even if DCPS followed Option #1 (Title I-
20 schools only Option) in proportioning the CARES Act funds for equitable services, DC will be
21 required to provide significant funding to the 26 non-Title I schools in District of Columbia that
22 were expecting to receive CARES Act funds. In addition, the District would have to identify
23 local funding to Title I schools impacted by the pandemic that are not allowed to use the CARES
24 Act funds to supplant their budget.

25 26. This increase in funding for public schools will be required immediately. As DC
26 remains in the throes of the pandemic, public schools remain desperate for funding as they
27 continue to transition to remote learning and prepare for next school year. Policies and
28 procedures must be developed for remote learning; teachers must be trained to use remote

1 learning techniques; school buildings must be thoroughly sanitized, protective equipment must be
2 procured, and physical changes to school buildings must be implemented. The costs of reacting
3 to this pandemic are drastic for public schools and without the funds the CARES Act was
4 intended to provide, OSSE must immediately assist LEAs to adjust to the new realities presented
5 by the pandemic.

6 27. Beyond the additional funding that the District will be required to expend in lieu of
7 the designated CARES Act funds, the Department's Guidance Document and Rule have imposed
8 significant administrative burdens on OSSE directly.

9 28. OSSE staff have collectively spent hundreds of hours navigating communications,
10 discussing programmatic effects, considering legal implications and participating in inter-agency
11 engagement regarding CARES Act funding, and the confusing and shifting equitable services
12 guidance in particular. DCPS has looked to OSSE for clarification and guidance and OSSE SSK-
13 12 leadership has coordinated closely with the Office of the General Counsel to develop a rational
14 and legally defensible position that could be communicated to DCPS and discussed with DCPS,
15 DME and other education stakeholders.

16 29. Staff time is a limited, non-renewable resource particularly in the face of staff
17 shortages due to the hiring freeze imposed because of the pandemic-related budget shortfalls. Thus,
18 the hours of OSSE staff time that has been dedicated to navigating the equitable services issue thus
19 far has diverted this precious resource from other pandemic-related challenges including
20 developing policies for childcare, issuing school re-opening guidance, and finalizing emergency
21 regulations for other subject matter areas.

22 30. As the SEA for the District of Columbia, OSSE is responsible for the distribution
23 and oversight of state-administered federal education funds. As such, OSSE is responsible for
24 providing sub-grantees with clear guidance, policies, and technical assistance related to the local
25 and federal statutes, regulations, and non-regulatory guidance governing its federal education
26 funds.

27 31. As the oversight agency for federal education programs, OSSE uses a risk-based
28 monitoring process to ensure that LEAs or other sub-recipients meet the requirements of federal

1 and local laws and regulations, as applicable and in alignment with OSSE's Sub-recipient
2 Monitoring Policy. Each year, OSSE conducts on-site and desktop compliance monitoring for a
3 select group of sub-recipients, based on a calculation of risk as aligned with OSSE's Sub-
4 recipient Monitoring Policy. This process includes record reviews, document reviews, and
5 interviews which are intended to identify any noncompliance, assess progress toward federal and
6 local targets, and provide recommendations intended to support continuous improvement.
7 OSSE's risk-based monitoring takes two forms: 1) on-site monitoring and 2) desktop monitoring.
8 OSSE's monitoring of Title I, Part A includes monitoring for the provision of equitable services,
9 which involves collecting evidence that DCPS consulted with appropriate private school officials
10 during the design and development of the program to deliver equitable services on topics
11 including: (A) how the children's needs will be identified; (B) what services will be offered; (C)
12 how, where, and by whom the services will be provided; (D) how the services will be
13 academically assessed and how the results of that assessment will be used to improve those
14 services; (E) the size and scope of the equitable services to be provided to the eligible private
15 school children, and the proportion of funds that is allocated under subsection (a)(4) for such
16 services; (F) the method or sources of data that are used under subsection (c) and section
17 1113(c)(1) of Title I, Part A to determine the number of children from low-income families in
18 participating school attendance areas who attend private schools; (G) how and when the agency
19 will make decisions about the delivery of services to such children, including a thorough
20 consideration and analysis of the views of the private school officials on the provision of services
21 through a contract with potential third-party providers; and (H) how, if the agency disagrees with
22 the views of the private school officials on the provision of services through a contract, the local
23 educational agency will provide in writing to such private school officials an analysis of the
24 reasons why the local educational agency has chosen not to use a contractor. In addition to
25 compliance, OSSE's monitoring process is designed to provide sub-grantees with meaningful
26 feedback to improve the quality and implementation of their educational programs and to
27 ultimately raise student achievement in the District of Columbia.
28

1 32. OSSE will be required to develop and deploy a monitoring tool for CARES Act
2 funding that will also include equitable services similar to the Title I, Part A monitoring protocol.
3 Because a greater number of private schools are eligible for funding under the Department’s rule
4 than would be otherwise, DCPS will be obligated to engage in increased consultation with private
5 schools that have not participated in Title I, Part A, and OSSE will be required to monitor DCPS
6 for compliance.

7 33. Finally, the Department’s Guidance Document and Rule place OSSE in legal
8 jeopardy. OSSE was required to certify in its ESSER Fund application that the SEAs and the
9 LEAs will comply with the equitable service provision of the CARES Act (§ 18005) and “any
10 other applicable law or regulation.” (Ex. A at p. 1.) Because the Guidance Document and the
11 Rule require LEAs to calculate the proportional share for equitable services and determine
12 eligibility of private school students for equitable services contrary to the proportional share
13 calculation and eligibility requirements in the CARES Act, OSSE and DCPS cannot satisfy both
14 the Rule and the CARES Act. Accordingly, the Department’s Rule forces OSSE to violate
15 Section 18005 of the CARES Act, placing OSSE in breach of the certification in the Certification
16 and Agreement and subjecting OSSE to “liability under the False Claims Act, . . . [and the] OMB
17 Guidelines to Agencies on Government wide Debarment and Suspension (Nonprocurement).”
18 (Ex. A at p. 1.)

19 34. As DCPS needs to use the ESSER funds as soon as possible to assist with the
20 numerous pandemic-related challenges, this legal jeopardy will impact OSSE immediately.

21 **The Department’s Rule Significantly Harms the District of Columbia’s K-12 Students**

22 35. Due to the confusion created by the Department’s interpretation of the equitable
23 services requirement, DCPS could not immediately plan for CARES-ESSER funds or submit its
24 application for FY20 funding, which creates pressure and risk for spending funds in fiscal year
25 2020.

26 36. The Department’s Guidance and Rule will result in less funding being distributed
27 to DCPS.

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1 37. If LEAs in the District of Columbia calculate the proportional share of CARES
2 Act funds for private school students under Option #1 in the Rule, non-Title I schools in LEAs
3 receiving CARES Act funds will receive no funds. In the District of Columbia, there are
4 approximately 26 non-Title I schools in LEAs that are eligible to receive CARES Act funds that
5 would not receive any funding. Like all public schools in DC, these schools are equally impacted
6 by the COVID-19 pandemic and would greatly benefit from the influx of CARES Act funds to
7 assist them through the pandemic. In addition, there are approximately 87 Title I DCPS schools
8 that would be prohibited from using CARES Act funds to respond to and prepare for the
9 pandemic as the schools cannot supplant State and local funding sources under the Rule. This
10 would significantly impact the Title I schools as many are in desperate need of additional funding
11 to cope with the pandemic, and to assist students with online, remote learning tools that students
12 often cannot afford within these Title I schools.

13 38. If DCPS is forced to follow Option #2 in the Rule for proportioning CARES Act
14 funds, approximately \$3,566,957.77 in ESSER funds would be diverted from public school funds in
15 order to provide equitable services to all private school students. If DCPS distribute the ESSER
16 moneys in the same manner that Title I-A funds are usually distributed for equitable services based
17 on low-income private school students, as the plain language of the CARES Act requires, then only
18 \$1,435,483 will be distributed for equitable services to eligible private school students. Thus, if the
19 Department's Rule stands and LEAs used Option #2 to proportion their CARES Act funds, a total of
20 \$3,566,957.77 in ESSER moneys will be diverted from low-income public schools to private
21 school students that are not qualified for Title I-A funds - 12% of the total ESSER moneys that
22 DC received.

23 39. Regardless of how LEAs proportion the CARES Act funds in the District of Columbia,
24 the Rule requires that all private school students receive equitable services. In DC, during the 2019-
25 2020 school year, approximately 2,142 private school students were eligible to receive equitable
26 services under Title I-A as they were at-risk students within a LEA receiving Title I-A funds. As the
27 Rule requires all private school students receiving equitable services, the approximately 2,142 private
28

1 school students who received equitable services under Title I-A last year will receive less services as
2 the CARES Act funds proportioned for equitable services will be spread amongst all private school
3 students.

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6 I declare under penalty of perjury that, to the best of my knowledge, the foregoing is true and
7 correct.

8
9 Executed on this 15th day of July, 2020, at Washington, DC

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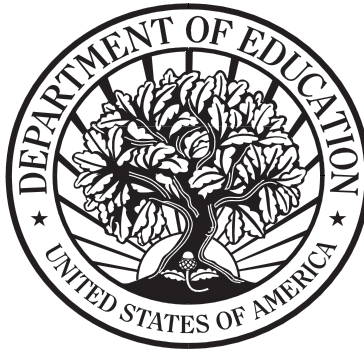
11 _____
12 Nikki Stewart
13 Assistant Superintendent
14 Division of Systems and Supports, K-12
15 Office of the State Superintendent of Education
16 District of Columbia
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EXHIBIT A

U.S. Department of Education

Certification and Agreement for Funding under the Education Stabilization Fund Program Elementary and Secondary School Emergency Relief Fund (ESSER Fund)

CFDA Number: 84.425D



OMB Number: 1810-0743
Expiration Date: 10/31/2020

Paperwork Burden Statement

According to the Paperwork Reduction Act of 1995, no persons are required to respond to a collection of information unless such collection displays a valid OMB control number. The OMB control number for this information collection is 1810-0743. The time required to complete this information collection is estimated to average 5 hours per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. The obligation to respond to this collection is required to obtain benefit under the Coronavirus Aid, Relief, and Economic Security Act. If you have any comments concerning the accuracy of the time estimate, suggestions for improving this individual collection, or if you have comments or concerns regarding the status of your individual form, application or survey, please contact Christopher Tate, Office of Elementary and Secondary Education, U.S. Department of Education, 400 Maryland Ave., S.W., Room 3E229, Washington, D.C. 20202 directly.

PROGRAM BACKGROUND INFORMATION

Purpose

Under the Elementary and Secondary School Emergency Relief Fund (ESSER Fund), the Department awards grants to State educational agencies (SEAs) for the purpose of providing local educational agencies (LEAs), including charter schools that are LEAs, with emergency relief funds to address the impact that Novel Coronavirus Disease 2019 (COVID-19) has had, and continues to have, on elementary and secondary schools across the nation. LEAs must provide equitable services to students and teachers in non-public schools as required under the Coronavirus Aid, Relief, and Economic Security Act (CARES Act).

Eligibility

SEAs in any of the 50 States, the District of Columbia, and the Commonwealth of Puerto Rico.

Timeline

The SEA will have one year, from the date of its ESSER award, to award funds. Any funds not awarded by the SEA within one year of receiving its award will be returned to the Department to be reallocated to other States consistent with the CARES Act.

Uses of Funds

SEAs:

The SEA must use no less than 90 percent of its allocation to make subgrants to LEAs, including charter schools that are LEAs, based on each LEA's share of funds received under part A of title I of the ESEA in fiscal year 2019. With the funds not subgranted to LEAs, the SEA may reserve up to an amount equal to $\frac{1}{2}$ of 1 percent of the total allocation for administrative costs, and the remaining funds may be used for emergency needs as determined by the SEA to address issues responding to COVID-19. These emergency needs may be addressed through the use of grants or contracts.

LEAs:

LEAs may use funds for any purposes listed in section 18003(d) of the CARES Act. (See Appendix A.)

Program Contact

For additional information, please contact Christopher Tate by telephone at (202) 453-6047 or by email at ESSERF@ed.gov.

CERTIFICATION AND AGREEMENT INSTRUCTIONS

To receive an ESSER Fund allocation, SEAs must submit to the Department the following information:

- A completed cover sheet that includes the signature of the Chief State School Officer or authorized representative. (*Part A of the Certification and Agreement*)
- Programmatic, fiscal, and reporting assurances. (*Part B of the Certification and Agreement*)
- Information on the uses of ESSER funds. (*Part C of the Certification and Agreement*)
- Other assurances and certifications. (*Part D of the Certification and Agreement*)

For purposes of this document, the term “Certification and Agreement” is the application that an SEA is required to file under section 18003(a) of Division B of the CARES Act.

Certification and Agreement Submission Information

An SEA must submit a Certification and Agreement to the Department no later than July 1, 2020.

Please submit your Certification and Agreement to the Department as follows:

Email an electronic version of the ESSER Fund Certification and Agreement in .PDF (Portable Document Format) to ESSERF@ed.gov.

APPENDICES

- Appendix A – Authorizing Statute
- Appendix B – State Allocation Table

ELEMENTARY AND SECONDARY SCHOOL EMERGENCY RELIEF FUND (ESSER FUND)

STATE EDUCATIONAL AGENCY

PART A: CERTIFICATION AND AGREEMENT COVER SHEET

State: District of Columbia

CFDA Number: 84.425D

Legal Name: Office of the State Superintendent of Education DUNS Number: 603893657

Chief State School Officer:

Mailing Address:

Hanseul Kang

1050 First St. NE, Washington DC 20002

State Contact for Elementary and Secondary School Emergency Relief Fund: Nikki Stewart

Position and Office: Assistant Superintendent, Systems and Supports, K-12

Mailing Address: 1050 First St. NE, Washington, DC 20002

Telephone: (202) 899-6142

Email address: nikki.stewart@dc.gov

To the best of my knowledge and belief, all the information and data in this agreement are true and correct. I acknowledge and agree that the failure to comply with all Assurances and Certifications in this Agreement, all relevant provisions and requirements of the CARES Act, Pub. L. No. 116-136 (March 27, 2020), or any other applicable law or regulation may result in liability under the False Claims Act, 31 U.S.C. § 3729, *et seq.*; OMB Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement) in 2 CFR part 180, as adopted and amended as regulations of the Department in 2 CFR part 3485; and 18 USC § 1001, as appropriate.

Chief State School Officer or Authorized Representative (Typed Name):

Telephone:

Hanseul Kang

(202) 355-8088

Signature of Chief State School Officer or Authorized Representative:

Date:

Hanseul Kang

05/06/2020

PART B: PROGRAMMATIC, FISCAL, AND REPORTING ASSURANCES

The [Chief State School Officer or his/her authorized representative] assures the following:

1. The SEA will allocate no less than 90 percent of the grant funds under this program to local educational agencies (LEAs) (including charter schools that are LEAs) in the State. Under the ESSER Fund, the SEA will award grants by formula to State educational agencies (SEAs) for the purpose of providing LEAs, including charter schools that are LEAs, with emergency relief funds to address the impact that the Novel Coronavirus Disease 2019 (COVID-19) has had, and continues to have, on elementary and secondary schools across the Nation. This includes both continuing to provide educational services, such as remote learning, while schools and campuses are closed, and developing and implementing plans for the return to normal operations. The SEA will allocate these funds to LEAs on the basis of their respective shares of funds received under title I, part A of the Elementary and Secondary Education Act of 1965 in fiscal year 2019.
2. The SEA will use the remaining funds (hereafter SEA reserve) for emergency needs as determined by the SEA to address issues related to COVID-19, which may be addressed through the use of grants or contracts. From an SEA's reserve, the SEA may use not more than 1/2 of 1 percent of the SEA's total grant for administrative costs.
3. The SEA will ensure that LEAs use ESSER funds for activities allowable under section 18003(d) of Division B of the CARES Act. (See Appendix A.)
The Department generally does not consider the following to be an allowable use of ESSER funds, under any part of 18003: 1) subsidizing or offsetting executive salaries and benefits of individuals who are not employees of the SEA or LEAs or 2) expenditures related to state or local teacher or faculty unions or associations.
4. The SEA will ensure that LEAs receiving ESSER funds will provide equitable services to students and teachers in non-public schools as required under 18005 of Division B of the CARES Act.
5. The SEA will ensure that an LEA receiving ESSER funds will provide equitable services to students and teachers in non-public schools located within the LEA in the same manner as provided under section 1117 of the ESEA, as determined through timely and meaningful consultation with representatives of non-public schools.
 - The SEA will ensure that a public agency will maintain control of funds for the services and assistance provided to a non-public school under the ESSER Fund.
 - The SEA will ensure that a public agency will have title to materials, equipment, and property purchased with ESSER funds.
 - The SEA will ensure that services to a non-public school with ESSER funds will be provided by a public agency directly, or through contract with, another public or private entity.
6. The SEA will comply with the maintenance of effort provision in Section 18008(a) of Division B of the CARES Act absent waiver by the Secretary pursuant to Section 18008(b) thereof.
7. The SEA and each LEA and any other entity that receives ESSER funds will, to the greatest extent practicable, continue to compensate its employees and contractors during the period of

any disruptions or closures related to COVID-19 in compliance with Section 18006 of Division B of the CARES Act. In addition, each entity that accepts funds will continue to pay employees and contractors to the greatest extent practicable based on the unique financial circumstances of the entity. CARES Act funds generally will not be used for bonuses, merit pay, or similar expenditures, unless related to disruptions or closures resulting from COVID-19.

8. The SEA must assure that, when applicable, it will provide technical assistance to LEAs on the use of ESSER funds for remote learning, which includes both distance education as defined in section 103(7) of the HEA and distance learning as defined in ESEA section 8101(14), so that students can continue learning during school closures.
9. The SEA will comply with all reporting requirements, including those in Section 15011(b)(2) of Division B of the CARES Act, and submit required quarterly reports to the Secretary at such time and in such manner and containing such information as the Secretary may subsequently require. (See also 2 CFR 200.327-200.329). The Secretary may require additional reporting in the future, which may include: the methodology LEAs will use to provide services or assistance to students and staff in both public and non-public schools, the uses of funds by the LEAs or other entities and demonstration of their compliance with Section 18003(d), such as any use of funds addressing the digital divide, including securing access to home-based connectivity and remote-use devices, related issues in supporting remote learning for all students, including disadvantaged populations.
10. The SEA will submit to the Department, within 60 days of receiving ESSER funds, a report that will include:
 - A budget for the SEA's reserve that includes information about the up to 1/2 of 1 percent of the SEA's total grant for administrative costs and the uses of funds for emergency needs to address issues related to COVID-19; and
 - An Internal Control and Subrecipient Monitoring Plan to ensure that funds are used for allowable purposes in accordance with cash management principles.
11. The SEA will ensure that every recipient and subrecipient of ESSER funds will cooperate with any examination of records with respect to such funds by making records available for inspection, production, and examination, and authorized individuals available for interview and examination, upon the request of (i) the Department and/or its Inspector General; or (ii) any other federal agency, commission, or department in the lawful exercise of its jurisdiction and authority.
12. The SEA will return to the Secretary any funds received under the ESSER Fund that the SEA does not award within 1 year of receiving such funds.

Chief State School Officer or Authorized Representative (Printed Name):

Signature: <i>Hanseul Kang</i>	Date: 05/06/2020
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PART C: USES OF ELEMENTARY AND SECONDARY SCHOOL EMERGENCY RELIEF FUNDS

Section 18003 of Division B of the CARES Act provides in relevant part that grants awarded under the Elementary and Secondary School Emergency Relief Fund be used to support the ability of local educational agencies (LEAs) to continue to provide educational services to their students. The Department requests the following:

1. Information that the SEA may request LEAs to include in their subgrant applications to the SEA. For example, an SEA might propose to include the following in developing its subgrant application:
 - How the LEA will determine its most important educational needs as a result of COVID-19.
 - The LEA's proposed timeline for providing services and assistance to students and staff in both public and non-public schools.
 - The extent to which the LEA intends to use ESSER funds to promote remote learning.
 - How the LEA intends to assess and address student learning gaps resulting from the disruption in educational services.

The above considerations are in addition to the application information requirements from sections 442 and 427 of the General Education Provisions Act (GEPA) (20 U.S.C. § 1232e and § 1228a).

We are developing a streamlined application to allow LEAs to access funds quickly and developing coordinated resources to support LEAs in planning for their current needs as well as projected needs for the 2020-21 school year and into the future.

In our ESSER application, we will ask LEAs to describe how they plan to spend ESSER funds and categorize their budgets to allow for tracking and reporting based on state priorities and allowable costs (e.g., distance learning, recovery learning, support for students with disabilities, wrap-around services, organizational capacity building, infrastructure, academic interventions, talent).

We will also collect assurances that LEAs will comply with all applicable federal requirements, including allowable uses of funds, reporting, financial management, equitable services, and recordkeeping requirements.

2. The extent to which the SEA intends to use any portion of its SEA reserve (up to 10 percent of its ESSER Fund award) to support:
- technological capacity and access – including hardware and software, connectivity, and instructional expertise – to support remote learning. If so, please describe the strategies the SEA intends to use to serve disadvantaged populations listed in Sec. 18003(d)(4) of the CARES Act; and
 - remote learning by developing new informational and academic resources and expanding awareness of, and access to, best practices and innovations in remote learning and support for students, families, and educators.

OSSE is currently collecting plans from LEAs that describe their approaches to distance learning implementation during school closures during the 2019-20 school year. These plans serve as an important input into assessing needs, including those around instructional continuity, supporting special populations, and continuing to support students after the emergency. OSSE plans to use these plans and continue to engage stakeholders to finalize how best to deploy our ESSER state-level activities funds given the emergency needs in in our state.

Based on engagement to date, these plans may include additional strategic investments to pilot innovative models to maximize teaching and learning in this new and challenging environment; support educator effectiveness; provide instructional supports to students with disabilities; partner with families and communities; and create and manage secure technology infrastructure for learning outside the school building.

PART D: OTHER ASSURANCES AND CERTIFICATIONS

The [Chief State School Officer or his/her authorized representative] assures or certifies the following:

1. The SEA will comply with all applicable assurances in OMB Standard Forms 424B and D (Assurances for Non-Construction and Construction Programs), including the assurances relating to the legal authority to apply for assistance; access to records; conflict of interest; merit systems; nondiscrimination; Hatch Act provisions; labor standards; flood hazards; historic preservation; protection of human subjects; animal welfare; lead-based paint; Single Audit Act; and the general agreement to comply with all applicable Federal laws, executive orders and regulations.
2. With respect to the certification regarding lobbying in Department Form 80-0013, no Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the making or renewal of Federal grants under this program; the SEAE will complete and submit Standard Form-LLL, "Disclosure Form to Report Lobbying," when required (34 C.F.R. Part 82, Appendix B); and the SEA will require the full certification, as set forth in 34 C.F.R. Part 82, Appendix A, in the award documents for all subawards at all tiers.
3. Any LEA receiving funding under this program will have on file with the SEA a set of assurances that meets the requirements of section 442 of the General Education Provisions Act (GEPA) (20 U.S.C. 1232e).
4. To the extent applicable, an LEA will include in its local application a description of how the LEA will comply with the requirements of section 427 of GEPA (20 U.S.C. 1228a). The description must include information on the steps the LEA proposes to take to permit students, teachers, and other program beneficiaries to overcome barriers (including barriers based on gender, race, color, national origin, disability, and age) that impede equal access to, or participation in, the program.
5. The SEA will comply with the *Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards* (Uniform Guidance) requirements in Subpart D—Post Federal Award Requirements (2 CFR §§200.300-345) and Subpart E—Cost Principles (2 CFR §§200.400-475) to ensure that LEAs, including charter schools that are LEAs, are using ESSER funds for purposes that are reasonable, necessary, and allocable under the CARES Act.
6. The SEA and other entities will comply with the provisions of all applicable acts, regulations and assurances; the following provisions of Education Department General Administrative Regulations (EDGAR) 34 CFR parts 76, 77, 81, 82, 84, 97, 98, and 99; the OMB Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement) in 2 CFR part 180, as adopted and amended as regulations of the Department in 2 CFR part 3485; and the Uniform Guidance in 2 CFR part 200, as adopted and amended as regulations of the Department in 2 CFR part 3474.

Chief State School Officer or Authorized Representative (Printed Name):

Signature: <i>Hanseul Kang</i>	Date: 05/06/2020
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Appendix A: Relevant Excerpts from Title VIII of Division B of the CARES Act, the Emergency Appropriations for Coronavirus Health Response and Agency Operations

DEPARTMENT OF EDUCATION EDUCATION STABILIZATION FUND

For an additional amount for “Education Stabilization Fund”, \$30,750,000,000, to remain available through September 30, 2021, to prevent, prepare for, and respond to coronavirus, domestically or internationally: Provided, That such amount is designated by the Congress as being for an emergency requirement pursuant to section 251(b)(2)(A)(i) of the Balanced Budget and Emergency Deficit Control Act of 1985.

GENERAL PROVISIONS EDUCATION STABILIZATION FUND

SEC. 18001. (a) ALLOCATIONS.—From the amount made available under this heading in this Act to carry out the Education Stabilization Fund, the Secretary shall first allocate—

- (1) not more than 1/2 of 1 percent to the outlying areas on the basis of their respective needs, as determined by the Secretary, in consultation with the Secretary of the Interior;
- (2) one-half of 1 percent for the Secretary of Interior, in consultation with the Secretary of Education, for programs operated or funded by the Bureau of Indian Education; and
- (3) 1 percent for grants to States with the highest coronavirus burden to support activities under this heading in this Act, for which the Secretary shall issue a notice inviting applications not later than 30 days of enactment of this Act and approve or deny applications not later than 30 days after receipt.

(b) RESERVATIONS.—After carrying out subsection (a), the Secretary shall reserve the remaining funds made available as follows:

- (1) 9.8 percent to carry out section 18002 of this title.
- (2) 43.9 percent to carry out section 18003 of this title.
- (3) 46.3 percent to carry out section 18004 of this title.

ELEMENTARY AND SECONDARY SCHOOL EMERGENCY RELIEF FUND

SEC. 18003. (a) GRANTS.—From funds reserved under section 18001(b)(2) of this title, the Secretary shall make elementary and secondary school emergency relief grants to each State educational agency with an approved application. The Secretary shall issue a notice inviting applications not later than 30 days of enactment of this Act and approve or deny applications not later than 30 days after receipt.

(b) ALLOCATIONS TO STATES.—The amount of each grant under subsection (a) shall be allocated by the Secretary to each State in the same proportion as each State received under part A of title I of the ESEA of 1965 in the most recent fiscal year.

(c) SUBGRANTS TO LOCAL EDUCATIONAL AGENCIES.—Each State shall allocate not less than 90 percent of the grant funds awarded to the State under this section as subgrants to local educational agencies (including charter schools that are local educational agencies) in the State in proportion to the amount of funds such local educational agencies and charter schools that are local educational agencies received under part A of title I of the ESEA of 1965 in the most recent fiscal year.

(d) USES OF FUNDS.—A local educational agency that receives funds under this title may use the funds for any of the following:

(1) Any activity authorized by the ESEA of 1965, including the Native Hawaiian Education Act and the Alaska Native Educational Equity, Support, and Assistance Act (20 U.S.C. 6301 et seq.), the Individuals with Disabilities Education Act (20 U.S.C. 1400 et seq.) (“IDEA”), the Adult Education and Family Literacy Act (20 U.S.C. 1400 et seq.), the Carl D. Perkins Career and Technical Education Act of 2006 (20 U.S.C. 2301 et seq.) (“the Perkins Act”), or subtitle B of title VII of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11431 et seq.).

(2) Coordination of preparedness and response efforts of local educational agencies with State, local, Tribal, and territorial public health departments, and other relevant agencies, to improve coordinated responses among such entities to prevent, prepare for, and respond to coronavirus.

(3) Providing principals and other school leaders with the resources necessary to address the needs of their individual schools.

(4) Activities to address the unique needs of low-income children or students, children with disabilities, English learners, racial and ethnic minorities, students experiencing homelessness, and foster care youth, including how outreach and service delivery will meet the needs of each population.

(5) Developing and implementing procedures and systems to improve the preparedness and response efforts of local educational agencies.

(6) Training and professional development for staff of the local educational agency on sanitation and minimizing the spread of infectious diseases.

(7) Purchasing supplies to sanitize and clean the facilities of a local educational agency, including buildings operated by such agency.

(8) Planning for and coordinating during long-term closures, including for how to provide meals to eligible students, how to provide technology for online learning to all students, how to provide guidance for carrying out requirements under the Individuals with Disabilities Education Act (20 U.S.C. 1401 et seq.) and how to ensure other educational services can continue to be provided consistent with all Federal, State, and local requirements.

(9) Purchasing educational technology (including hardware, software, and connectivity) for students who are served by the local educational agency that aids in regular and substantive educational interaction between students and their classroom instructors, including low-income students and students with disabilities, which may include assistive technology or adaptive equipment.

(10) Providing mental health services and supports.

(11) Planning and implementing activities related to summer learning and supplemental afterschool programs, including providing classroom instruction or online learning during the summer months and addressing the needs of low-income students, students with disabilities, English learners, migrant students, students experiencing homelessness, and children in foster care.

(12) Other activities that are necessary to maintain the operation of and continuity of services in local educational agencies and continuing to employ existing staff of the local educational agency.

(e) STATE FUNDING.—With funds not otherwise allocated under subsection (c), a State may reserve not more than 1/2 of 1 percent for administrative costs and the remainder for emergency needs as determined by the state educational agency to address issues responding to coronavirus, which may be addressed through the use of grants or contracts.

(f) REALLOCATION.—A State shall return to the Secretary any funds received under this section that the State does not award within 1 year of receiving such funds and the Secretary shall reallocate such funds to the remaining States in accordance with subsection (b).

ASSISTANCE TO NON-PUBLIC SCHOOLS

SEC. 18005. (a) IN GENERAL.—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, as determined in consultation with representatives of non-public schools.

(b) PUBLIC CONTROL OF FUNDS.—The control of funds for the services and assistance provided to a non-public school under subsection (a), and title to materials, equipment, and property purchased with such funds, shall be in a public agency, and a public agency shall administer such funds, materials, equipment, and property and shall provide such services (or may contract for the provision of such services with a public or private entity).

CONTINUED PAYMENT TO EMPLOYEES

SEC. 18006. A local educational agency, State, institution of higher education, or other entity that receives funds under “Education Stabilization Fund”, shall to the greatest extent practicable, continue to pay its employees and contractors during the period of any disruptions or closures related to coronavirus.

DEFINITIONS

SEC. 18007. Except as otherwise provided in sections 18001– 18006 of this title, as used in such sections—

- (1) the terms “elementary education” and “secondary education” have the meaning given such terms under State law;
- (2) the term “institution of higher education” has the meaning given such term in title I of the Higher Education Act of 1965 (20 U.S.C. 1001 et seq.);
- (3) the term “Secretary” means the Secretary of Education;
- (4) the term “State” means each of the 50 States, the District of Columbia, and the Commonwealth of Puerto Rico;
- (5) the term “cost of attendance” has the meaning given such term in section 472 of the Higher Education Act of 1965.
- (6) the term “Non-public school” means a non-public elementary and secondary school that (A) is accredited, licensed, or otherwise operates in accordance with State law; and (B) was in existence prior to the date of the qualifying emergency for which grants are awarded under this section;
- (7) the term “public school” means a public elementary or secondary school; and
- (8) any other term used that is defined in section 8101 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 7801) shall have the meaning given the term in such section.

MAINTENANCE OF EFFORT

SEC. 18008. (a) A State’s application for funds to carry out sections 18002 or 18003 of this title shall include assurances that the State will maintain support for elementary and secondary education, and State support for higher education (which shall include State funding to institutions of higher education and state need based financial aid, and shall not include support for capital projects or for research and development or tuition and fees paid by students) in fiscal years 2020 and 2021 at least at the levels of such support that is the average of such State’s support for elementary and secondary education and for higher education provided in the 3 fiscal years preceding the date of enactment of this Act.

(b) The secretary may waive the requirement in subsection (a) for the purpose of relieving fiscal burdens on States that have experienced a precipitous decline in financial resources.

REPORTING ON USE OF FUNDS SEC. 15011.

(a) In this section—

- (1) the terms “agency”, “appropriate congressional committees”, “Committee”, “covered funds”, and “Coronavirus response” have the meanings given those terms in section 15010;
- (2) the term “covered recipient” (A) means any entity that receives large covered funds; and (B) includes any State, the District of Columbia, and any territory or possession of the United States; and
- (3) the term “large covered funds” means covered funds that amount to more than \$150,000.

...

(b)(2) Not later than 10 days after the end of each calendar quarter, each covered recipient shall submit to the agency and the Committee a report that contains—

- (A) the total amount of large covered funds received from the agency;
- (B) the amount of large covered funds received that were expended or obligated for each project or activity;
- (C) a detailed list of all projects or activities for which large covered funds were expended or obligated, including—
 - (i) the name of the project or activity;
 - (ii) a description of the project or activity; and
 - (iii) the estimated number of jobs created or retained by the project or activity, where applicable;and
- (D) detailed information on any level of subcontracts or subgrants awarded by the covered recipient or its subcontractors or subgrantees, to include the data elements required to comply with the Federal Funding Accountability and Transparency Act of 2006 (31 U.S.C. 6101 note) allowing aggregate reporting on awards below \$50,000 or to individuals, as prescribed by the Director of the Office of Management and Budget.

(3) Not later than 30 days after the end of each calendar quarter, the Committee, in consultation with the agency that made large covered funds available to any covered recipient shall make the information in reports submitted under paragraph (2) publicly available by posting the information on the website established under section 15010(g).

(4)(A) Each agency, in coordination with the Committee and the Director of the Office of Management and Budget shall provide user-friendly means for covered recipients to meet requirements of this subsection.

(B) Federal agencies may use existing mechanisms to ensure that information under this subsection is reported accurately.

(c)(1) The Director of the Office of Management and Budget, in consultation with the Secretary of the Treasury, the Administrator of the Small Business Administration, and the Chairperson of the Council of Economic Advisors, shall submit to the appropriate congressional committees and publicly release on the website established under section 15010(g) quarterly reports that detail the impact of programs funded through large covered funds on employment, estimated economic growth, and other key economic indicators, including information about impacted industries.

(2)(A) The first report submitted under paragraph (1) shall be submitted not later than 45 days after the end of the first full quarter following the date of enactment of this Act.

(B) The last report required to be submitted under paragraph (1) shall apply to the quarter in which the Committee terminates.

APPENDIX B: STATE ALLOCATION TABLE**Elementary and Secondary School Emergency Relief Fund**

STATE	STATE TOTAL	Minimum LEA Distribution ¹	Maximum SEA Reservation	Maximum for SEA Administration ²
TOTAL	13,229,265,000	11,906,338,500	1,322,926,500	66,146,325
ALABAMA	216,947,540	195,252,786	21,694,754	1,084,738
ALASKA	38,407,914	34,567,123	3,840,791	192,040
ARIZONA	277,422,944	249,680,650	27,742,294	1,387,115
ARKANSAS	128,758,638	115,882,774	12,875,864	643,793
CALIFORNIA	1,647,306,127	1,482,575,514	164,730,613	8,236,531
COLORADO	120,993,782	108,894,404	12,099,378	604,969
CONNECTICUT	111,068,059	99,961,253	11,106,806	555,340
DELAWARE	43,492,753	39,143,478	4,349,275	217,464
DISTRICT OF COLUMBIA	42,006,354	37,805,719	4,200,635	210,032
FLORIDA	770,247,851	693,223,066	77,024,785	3,851,239
GEORGIA	457,169,852	411,452,867	45,716,985	2,285,849
HAWAII	43,385,229	39,046,706	4,338,523	216,926
IDAHO	47,854,695	43,069,226	4,785,470	239,273
ILLINOIS	569,467,218	512,520,496	56,946,722	2,847,336
INDIANA	214,472,770	193,025,493	21,447,277	1,072,364
IOWA	71,625,561	64,463,005	7,162,556	358,128
KANSAS	84,529,061	76,076,155	8,452,906	422,645
KENTUCKY	193,186,874	173,868,187	19,318,687	965,934
LOUISIANA	286,980,175	258,282,158	28,698,018	1,434,901
MAINE	43,793,319	39,413,987	4,379,332	218,967
MARYLAND	207,834,058	187,050,652	20,783,406	1,039,170
MASSACHUSETTS	214,894,317	193,404,885	21,489,432	1,074,472
MICHIGAN	389,796,984	350,817,286	38,979,698	1,948,985
MINNESOTA	140,137,253	126,123,528	14,013,725	700,686
MISSISSIPPI	169,883,002	152,894,702	16,988,300	849,415
MISSOURI	208,443,300	187,598,970	20,844,330	1,042,217
MONTANA	41,295,230	37,165,707	4,129,523	206,476
NEBRASKA	65,085,085	58,576,577	6,508,509	325,425
NEVADA	117,185,045	105,466,541	11,718,505	585,925
NEW HAMPSHIRE	37,641,372	33,877,235	3,764,137	188,207
NEW JERSEY	310,371,213	279,334,092	31,037,121	1,551,856
NEW MEXICO	108,574,786	97,717,307	10,857,479	542,874
NEW YORK	1,037,045,603	933,341,043	103,704,560	5,185,228
NORTH CAROLINA	396,311,607	356,680,446	39,631,161	1,981,558
NORTH DAKOTA	33,297,699	29,967,929	3,329,770	166,489
OHIO	489,205,200	440,284,680	48,920,520	2,446,026
OKLAHOMA	160,950,476	144,855,428	16,095,048	804,752

¹ The totals in the Minimum LEA Distribution, Maximum SEA Reservation, and Maximum for SEA Administration columns have been rounded to the nearest whole dollar.

² With the funds not subgranted to LEAs, the SEA may reserve up to an amount equal to ½ of 1 percent of the total allocation for administrative costs.

STATE	STATE TOTAL	Minimum LEA Distribution ³	Maximum SEA Reservation	Maximum for SEA Administration ⁴
OREGON	121,099,019	108,989,117	12,109,902	605,495
PENNSYLVANIA	523,807,198	471,426,478	52,380,720	2,619,036
RHODE ISLAND	46,350,444	41,715,400	4,635,044	231,752
SOUTH CAROLINA	216,311,158	194,680,042	21,631,116	1,081,556
SOUTH DAKOTA	41,295,230	37,165,707	4,129,523	206,476
TENNESSEE	259,891,154	233,902,039	25,989,115	1,299,456
TEXAS	1,285,886,064	1,157,297,458	128,588,606	6,429,430
UTAH	67,821,787	61,039,608	6,782,179	339,109
VERMONT	31,148,360	28,033,524	3,114,836	155,742
VIRGINIA	238,599,192	214,739,273	23,859,919	1,192,996
WASHINGTON	216,892,447	195,203,202	21,689,245	1,084,462
WEST VIRGINIA	86,640,471	77,976,424	8,664,047	433,202
WISCONSIN	174,777,774	157,299,997	17,477,777	873,889
WYOMING	32,562,651	29,306,386	3,256,265	162,813
PUERTO RICO	349,113,105	314,201,795	34,911,311	1,745,566

³ The totals in the Minimum LEA Distribution, Maximum SEA Reservation, and Maximum for SEA Administration columns have been rounded to the nearest whole dollar.

⁴ With the funds not subgranted to LEAs, the SEA may reserve up to an amount equal to ½ of 1 percent of the total allocation for administrative costs.

EXHIBIT 5

1 XAVIER BECERRA
 Attorney General of California
 2 MICHAEL NEWMAN
 Senior Assistant Attorney General
 3 SARAH E. BELTON
 Supervising Deputy Attorney General
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 8 *Attorneys for Plaintiff State of California*

9
 10 IN THE UNITED STATES DISTRICT COURT
 11 FOR THE NORTHERN DISTRICT OF CALIFORNIA
 12

13
 14 **STATE OF MICHIGAN, STATE OF
 CALIFORNIA, et al.,**

Civil Case No. 3:20-cv-04478-SK

15 Plaintiffs,

16 v.

**DECLARATION OF WANELLE
 KANESHIRO-ERDMANN**

17
 18 **ELISABETH D. DEVOS, in her official
 capacity as the United States Secretary of
 19 Education, and UNITED STATES
 DEPARTMENT OF EDUCATION,**

20 Defendants.
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DECLARATION OF WANELLE KANESHIRO-ERDMANN

1
2 I, Wanelle Kaneshiro-Erdmann, pursuant to 28 U.S.C. § 1746, hereby declare that the following
3 is true and correct:

4 1. I am an official with the Hawaii Department of Education (HIDOE) and my duties
5 are with its Policy, Innovation, Planning and Evaluation Branch, Office of Strategy Innovation
6 and Performance. I have been employed with the HIDOE in this current position since June 10,
7 2019.

8 2. My duties include ensuring compliance with federal and state laws involving the
9 HIDOE.

10 3. I submit this Declaration in support of the State of Hawaii’s litigation against
11 Elisabeth D. DeVos, in her official capacity as Secretary of Education and the United States
12 Department of Education (the “Department”) regarding the recently issued Rule entitled
13 *Providing Equitable Services to Students and Teachers in Non-public Schools*, 85 Fed. Reg.
14 39,479 (July 1, 2020) (the “Equitable Services Rule” or the “Rule”). I have compiled the
15 information in the statements set forth below through personal knowledge, through HIDOE
16 personnel who have assisted me in gathering this information from our institution, on the basis of
17 documents that have been provided to and/or reviewed by me. I have also familiarized myself
18 with the Rule in order to understand its immediate impact on HIDOE and public schools in
19 Hawaii.

20 4. The HIDOE is an executive branch agency of the State of Hawaii. Under article
21 X, section 1 of the Hawaii Constitution and chapter 302A of the Hawaii Revised Statutes, the
22 HIDOE, under the supervision of its superintendent, Dr. Christina M. Kishimoto, has jurisdiction
23 over the internal organization, operation, and management of the public school system, as
24 provided by law, and administers programs of education and public instruction throughout the
25 State, including education at the preschool, primary, and secondary school levels. Article X,
26 section 3 of the Hawaii Constitution provides that a board of education is established to have
27 powers, as provided by law, to formulate statewide educational policy and appoint the
28 superintendent of education as the chief executive officer of the public school system.

1 5. The HIDOE is a single statewide system of education that performs the functions
2 of the State Educational Agency (SEA) and the Local Educational Agency (LEA) and is
3 responsible for managing, regulating, supporting and overseeing the provision of student
4 educational programs, support programs, the provision of guidance, the applying for and
5 managing of deferral grants, and the overall day-to-day activities of its public schools. The
6 HIDOE manages a statewide public school system of over 22,000 employees, with responsibility
7 for recruiting, hiring, training and providing professional development of its staff to meet the
8 needs of its public school students. It is involved in all phases of operations from managing the
9 HIDOE's budget, seeking federal and state appropriations, compliance with all grants and other
10 federal and state requirements.

11 6. The state funding of K-12 education for the State of Hawaii is accomplished by
12 annual appropriations made by the Hawaii State Legislature. For fiscal year 2019-2020, the State
13 appropriated 1.7 billion dollars to the HIDOE.

14 7. The HIDOE consists of 294 public schools, organized into 15 complex areas and
15 the Hawaii State Public Charter School Commission. There are approximately 180,000 students
16 served by the HIDOE.

17 8. The HIDOE constitutes one singular SEA/LEA and receives Title I-A funds for
18 62,451 students and 181 schools for fiscal year 2019-2020. For school year 2019-2020 that
19 amount was \$51,229,565.

20 9. There are 120 private schools within Title I-A LEAs.

21 10. The COVID-19 pandemic has drastically impacted K-12 education in Hawaii. It
22 has caused the premature closure of the 2019-2020 school year and the emergency provision of
23 alternative educational services. It has required changes to the educational environment in
24 response to the Governor's emergency proclamations requiring stay at home-work at home
25 requirements. Providing distance learning to all students required expenditures of resources to
26 address students who do not have Internet and other telecommunication capabilities. Planning for
27 the reopening of schools on August 4, 2020, includes modification of teaching modalities to
28 include face-to-face, blended and online (virtual) education.

1 11. The COVID-19 pandemic has required the diversion of resources to support
2 statewide remote distance learning, an unanticipated additional cost.

3 12. As a result of the pandemic, all schools were closed on March 30, 2020.

4 13. Because HIDOE is a unitary SEA and LEA, the impacts mentioned above to the
5 SEA affected the HIDOE as a LEA, similarly.

6 14. The HIDOE as the SEA, provided transition services to its LEA by providing
7 equipment, training, professional development, and continues to provide meals to all students,
8 public and private, during this pandemic.

9 15. HIDOE is expecting a budget shortfall of state general fund and a probable
10 restriction of funds imposed by the Governor of Hawaii.

11 **CARES Act Funds Received by HIDOE For K-12 Education**

12 A. Elementary and Secondary School Emergency Relief (ESSER) Funds

13 16. In order to receive the ESSER funds designated for Hawaii and as required by the
14 Department, HIDOE executed a Certification and Agreement form and submitted it to the Department
15 on May 13, 2020.¹ A true and correct copy of the Certification and Agreement completed by HIDOE
16 and submitted to the Department is attached hereto as Exhibit A.

17 17. Within this Certification and Agreement, HIDOE agreed to the following terms:

18 I acknowledge and agree that the failure to comply with all Assurances and
19 Certifications in this Agreement, all relevant provisions and requirements of
20 the CARES Act, Pub. L. No. 116-136 (March 27, 2020), or any other
21 applicable law or regulation may result in liability under the False Claims
22 Act, 31 U.S.C. § 3729, et seq.; OMB Guidelines to Agencies on
Governmentwide Debarment and Suspension (Nonprocurement) in 2 CFR
part 180, as adopted and amended as regulations of the Department in 2 CFR
part 3485; and 18 USC § 1001, as appropriate.

23 ...

24 4. LEAs receiving ESSER funds will provide equitable services to students
25 and teachers in non-public schools as required under 18005 of Division B
of the CARES Act.

26 _____
27 ¹ U.S. Dep't of Educ., Certification and Agreement for Funding under the Education
28 Stabilization Fund Program Elementary and Secondary School Emergency Relief Fund (ESSER
Fund), CFDA Number 84.425D, April 24, 2020, *available at*
<https://oese.ed.gov/files/2020/04/ESSERF-Certification-and-Agreement-2.pdf>.

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5. LEA receiving ESSER funds will provide equitable services to students and teachers in non-public schools located within the LEA in the same manner as provided under section 1117 of the ESEA, as determined through timely and meaningful consultation with representatives of non-public schools.

[Ex. A at pp. 1-2.].

18. At the time that HIDOE executed the Certification and Agreement form, the Department had not yet published its Guidance Document or the Rule. Accordingly, HIDOE was unaware that the Department would subsequently issue rules to change the required proportional share calculation for equitable services required under the CARES Act and the private school students eligible to receive equitable services under the CARES Act.

19. The Department distributed \$43,385,229 from the ESSER Fund to HIDOE on May 14, 2020.

20. Of the ESSER funds received by HIDOE, HIDOE will not be reserving funds for administrative costs.

21. Using the proportional share calculation set forth in Section 1117 of the Elementary and Secondary Education Act (ESEA), Hawaii would reserve \$1,555,931 in ESSER funds to provide equitable services to private school students.

22. However, using the proportional share calculation set forth in the Department's Guidance Document and in Option #2 in the Rule, Hawaii would reserve \$2,003,428 in ESSER funds to provide equitable services to private school students. Thus, under the Department's preferred proportional share calculation, private school students in Hawaii would have access to an additional \$447,797 and public schools would lose this same amount of funds.

B. Governor's Emergency Education Relief (GEER) Funds

23. Hawaii received \$9,993,387 from the GEER Fund on May 5, 2020.

24. To this date, HIDOE has not received any GEER funds.

The Department's Rule Significantly Harms HIDEOE

1
2 25. For every dollar that is diverted from public schools as a result of the
3 Department's Guidance Document and Rule, HIDEOE will be required to backfill these dollars in
4 the HIDEOE's budget. At a time when Hawaii faces a \$100.2 million deficit in its education
5 budget as a result of the pandemic, HIDEOE will be required to find \$100.2 million to fill the
6 budgets of public schools that the CARES Act funds were supposed to fill. This increase in
7 funding for public schools will be required immediately. As Hawaii remains in the throes of the
8 pandemic, and its main revenue stream, tourism, closed, public schools remain desperate for
9 funding as they continue to prepare for the opening of schools. Policies and procedures must be
10 developed for multiple learning options; teachers must be trained to use remote learning
11 techniques; and school buildings must be inspected and sanitized. All of these initiatives require
12 moneys not available by present appropriations. The costs of reacting to this pandemic are drastic
13 for public schools and without the funds the CARES Act was intended to provide the HIDEOE will
14 not be able to provide appropriate educational services for its students.

15 26. HIDEOE will be required to provide significant funding to the 113 non-Title I
16 schools in Hawaii that were expecting to receive CARES act funds. In addition, the HIDEOE will
17 be required to provide significant funding to Title I schools that are not allowed to use the
18 CARES Act funds to supplant their budgets, which have been slashed due to the pandemic.

19 27. The Department's Guidance Document and Rule places the HIDEOE in legal
20 jeopardy. HIDEOE was required to certify in its ESSER Fund application that the HIDEOE, as the
21 States SEA and LEA will comply with the equitable service provision of the CARES Act (
22 Section 18005) and "any other applicable law or regulation." (Ex. A at pg. 1.) Because the
23 Guidance Document and the Rule require LEAs to calculate the proportional share for equitable
24 services and determine eligibility of private school student for equitable services contrary to the
25 proportional share calculation and eligibility requirements in the CARES Act, HIDEOE, as the
26 SEA and LEA, cannot satisfy both the Rule and the CARES Ac. Accordingly the Department's
27 Rule forces the HIDEOE to violate Section 18005 of the CARES Act, placing the HIDEOE in
28 breach of the certification in the Certification and Agreement and subjecting the HIDEOE to

1 “liability under the False Claims Act and the OMB Guidelines to agencies on Governmentwide
2 Debarment and Suspension (Nonprocurement).” (Ex. A at p. 1.)

3 28. If HIDOE calculate the proportional share of CARES Act funds for private school
4 students under Option #1 in the Rule, non-Title I schools in LEAs receiving CARES Act funds
5 will receive no funds. In Hawaii, there are approximately 113 non-Title I schools in the LEA that
6 are eligible to receive CARES Act funds that would not receive any funding. Like all schools in
7 Hawaii, these schools are equally impacted by the COVID-19 pandemic and would greatly
8 benefit from the influx of CARES Act funds to assist them through the pandemic. In addition,
9 there are approximately 164 Title I schools that would be prohibited from using CARES Act
10 funds to respond to and prepare for the pandemic as the schools cannot supplant State and local
11 funding sources under the Rule. This would significantly impact the Title I schools as many are
12 in desperate need of additional funding to cope with the pandemic and to assist students with
13 online, remote learning tools that students often cannot afford within these Title I schools.

14 29. Regardless of how LEAs proportion the CARES Act funds in Hawaii, the Rule
15 requires that all private school students receive equitable services. In Hawaii, during the 2019-
16 2020 school year, approximately 2,323 private school students were eligible to receive equitable
17 services under Title I-A as they were at-risk students within the LEA receiving Title I-A funds. As
18 the Rule requires all private school students receiving equitable services, the approximately 2,323
19 private school students received equitable services under Title I-A last year will receive less
20 services as the CARES Act funds proportioned for equitable services will be spread amongst all
21 private school students.

22 30. HIDOE has received a letter from the Hawaii Association of Independent Schools
23 demanding their fair share of the CARES Act funds.

24 31. Beyond the additional funding that Hawaii will be required to expend in lieu of the
25 designated CARES Act funds, the Department’s Guidance Document and Rule have imposed
26 significant unbudgeted administrative burdens on HIDOE directly.

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The Department's Rule Significantly Harms Hawaii's K-12 Students

32. The Department's Guidance and Rule will result in less funding being distributed to public K-12 schools in Hawaii.

I declare under penalty of perjury that, to the best of my knowledge, the foregoing is true and correct.

Executed on this 16 day of July, 2020



Wanelle Kaneshiro-Erdmann
Director

EXHIBIT A

U.S. Department of Education

Certification and Agreement for Funding under the Education Stabilization Fund Program Elementary and Secondary School Emergency Relief Fund (ESSER Fund)

CFDA Number: 84.425D



**OMB Number: 1810-0743
Expiration Date: 10/31/2020**

Paperwork Burden Statement

According to the Paperwork Reduction Act of 1995, no persons are required to respond to a collection of information unless such collection displays a valid OMB control number. The OMB control number for this information collection is 1810-0743. The time required to complete this information collection is estimated to average 5 hours per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. The obligation to respond to this collection is required to obtain benefit under the Coronavirus Aid, Relief, and Economic Security Act. If you have any comments concerning the accuracy of the time estimate, suggestions for improving this individual collection, or if you have comments or concerns regarding the status of your individual form, application or survey, please contact Christopher Tate, Office of Elementary and Secondary Education, U.S. Department of Education, 400 Maryland Ave., S.W., Room 3E229, Washington, D.C. 20202 directly.

PROGRAM BACKGROUND INFORMATION

Purpose

Under the Elementary and Secondary School Emergency Relief Fund (ESSER Fund), the Department awards grants to State educational agencies (SEAs) for the purpose of providing local educational agencies (LEAs), including charter schools that are LEAs, with emergency relief funds to address the impact that Novel Coronavirus Disease 2019 (COVID-19) has had, and continues to have, on elementary and secondary schools across the nation. LEAs must provide equitable services to students and teachers in non-public schools as required under the Coronavirus Aid, Relief, and Economic Security Act (CARES Act).

Eligibility

SEAs in any of the 50 States, the District of Columbia, and the Commonwealth of Puerto Rico.

Timeline

The SEA will have one year, from the date of its ESSER award, to award funds. Any funds not awarded by the SEA within one year of receiving its award will be returned to the Department to be reallocated to other States consistent with the CARES Act.

Uses of Funds

SEAs:

The SEA must use no less than 90 percent of its allocation to make subgrants to LEAs, including charter schools that are LEAs, based on each LEA's share of funds received under part A of title I of the ESEA in fiscal year 2019. With the funds not subgranted to LEAs, the SEA may reserve up to an amount equal to $\frac{1}{2}$ of 1 percent of the total allocation for administrative costs, and the remaining funds may be used for emergency needs as determined by the SEA to address issues responding to COVID-19. These emergency needs may be addressed through the use of grants or contracts.

LEAs:

LEAs may use funds for any purposes listed in section 18003(d) of the CARES Act. (See Appendix A.)

Program Contact

For additional information, please contact Christopher Tate by telephone at (202) 453-6047 or by email at ESSERF@ed.gov.

CERTIFICATION AND AGREEMENT INSTRUCTIONS

To receive an ESSER Fund allocation, SEAs must submit to the Department the following information:

- A completed cover sheet that includes the signature of the Chief State School Officer or authorized representative. *(Part A of the Certification and Agreement)*
- Programmatic, fiscal, and reporting assurances. *(Part B of the Certification and Agreement)*
- Information on the uses of ESSER funds. *(Part C of the Certification and Agreement)*
- Other assurances and certifications. *(Part D of the Certification and Agreement)*

For purposes of this document, the term “Certification and Agreement” is the application that an SEA is required to file under section 18003(a) of Division B of the CARES Act.

Certification and Agreement Submission Information

An SEA must submit a Certification and Agreement to the Department no later than July 1, 2020.

Please submit your Certification and Agreement to the Department as follows:

Email an electronic version of the ESSER Fund Certification and Agreement in .PDF (Portable Document Format) to ESSERF@ed.gov.

APPENDICES

- Appendix A – Authorizing Statute
- Appendix B – State Allocation Table

ELEMENTARY AND SECONDARY SCHOOL EMERGENCY RELIEF FUND (ESSER FUND)

STATE EDUCATIONAL AGENCY

PART A: CERTIFICATION AND AGREEMENT COVER SHEET

State: Hawaii

CFDA Number: 84.425D

Legal Name: Hawaii State Department of Education

DUNS Number: 809935513

Chief State School Officer:

Mailing Address:

Dr. Christina M. Kishimoto

P.O. Box 2360; Honolulu, HI 96804

State Contact for Elementary and Secondary School Emergency Relief Fund: Brian Hallett

Position and Office: Interim Assistant Superintendent and Chief Financial Officer, Office of Fiscal Services

Mailing Address:

P.O. Box 2360
Honolulu, HI 96804

Telephone:

(808) 586-3737

Email address:

brian.hallett@k12.hi.us

To the best of my knowledge and belief, all the information and data in this agreement are true and correct. I acknowledge and agree that the failure to comply with all Assurances and Certifications in this Agreement, all relevant provisions and requirements of the CARES Act, Pub. L. No. 116-136 (March 27, 2020), or any other applicable law or regulation may result in liability under the False Claims Act, 31 U.S.C. § 3729, *et seq.*; OMB Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement) in 2 CFR part 180, as adopted and amended as regulations of the Department in 2 CFR part 3485; and 18 USC § 1001, as appropriate.

Chief State School Officer or Authorized Representative (Typed Name):

Telephone:

Dr. Christina M. Kishimoto

(808) 784-6161

Signature of Chief State School Officer or Authorized Representative:

Date:



05/13/2020

PART B: PROGRAMMATIC, FISCAL, AND REPORTING ASSURANCES

The [Chief State School Officer or his/her authorized representative] assures the following:

1. The SEA will allocate no less than 90 percent of the grant funds under this program to local educational agencies (LEAs) (including charter schools that are LEAs) in the State. Under the ESSER Fund, the SEA will award grants by formula to State educational agencies (SEAs) for the purpose of providing LEAs, including charter schools that are LEAs, with emergency relief funds to address the impact that the Novel Coronavirus Disease 2019 (COVID-19) has had, and continues to have, on elementary and secondary schools across the Nation. This includes both continuing to provide educational services, such as remote learning, while schools and campuses are closed, and developing and implementing plans for the return to normal operations. The SEA will allocate these funds to LEAs on the basis of their respective shares of funds received under title I, part A of the Elementary and Secondary Education Act of 1965 in fiscal year 2019.
2. The SEA will use the remaining funds (hereafter SEA reserve) for emergency needs as determined by the SEA to address issues related to COVID-19, which may be addressed through the use of grants or contracts. From an SEA's reserve, the SEA may use not more than 1/2 of 1 percent of the SEA's total grant for administrative costs.
3. The SEA will ensure that LEAs use ESSER funds for activities allowable under section 18003(d) of Division B of the CARES Act. (See Appendix A.)
The Department generally does not consider the following to be an allowable use of ESSER funds, under any part of 18003: 1) subsidizing or offsetting executive salaries and benefits of individuals who are not employees of the SEA or LEAs or 2) expenditures related to state or local teacher or faculty unions or associations.
4. The SEA will ensure that LEAs receiving ESSER funds will provide equitable services to students and teachers in non-public schools as required under 18005 of Division B of the CARES Act.
5. The SEA will ensure that an LEA receiving ESSER funds will provide equitable services to students and teachers in non-public schools located within the LEA in the same manner as provided under section 1117 of the ESEA, as determined through timely and meaningful consultation with representatives of non-public schools.
 - The SEA will ensure that a public agency will maintain control of funds for the services and assistance provided to a non-public school under the ESSER Fund.
 - The SEA will ensure that a public agency will have title to materials, equipment, and property purchased with ESSER funds.
 - The SEA will ensure that services to a non-public school with ESSER funds will be provided by a public agency directly, or through contract with, another public or private entity.
6. The SEA will comply with the maintenance of effort provision in Section 18008(a) of Division B of the CARES Act absent waiver by the Secretary pursuant to Section 18008(b) thereof.
7. The SEA and each LEA and any other entity that receives ESSER funds will, to the greatest extent practicable, continue to compensate its employees and contractors during the period of

any disruptions or closures related to COVID-19 in compliance with Section 18006 of Division B of the CARES Act. In addition, each entity that accepts funds will continue to pay employees and contractors to the greatest extent practicable based on the unique financial circumstances of the entity. CARES Act funds generally will not be used for bonuses, merit pay, or similar expenditures, unless related to disruptions or closures resulting from COVID-19.

8. The SEA must assure that, when applicable, it will provide technical assistance to LEAs on the use of ESSER funds for remote learning, which includes both distance education as defined in section 103(7) of the HEA and distance learning as defined in ESEA section 8101(14), so that students can continue learning during school closures.
9. The SEA will comply with all reporting requirements, including those in Section 15011(b)(2) of Division B of the CARES Act, and submit required quarterly reports to the Secretary at such time and in such manner and containing such information as the Secretary may subsequently require. (See also 2 CFR 200.327-200.329). The Secretary may require additional reporting in the future, which may include: the methodology LEAs will use to provide services or assistance to students and staff in both public and non-public schools, the uses of funds by the LEAs or other entities and demonstration of their compliance with Section 18003(d), such as any use of funds addressing the digital divide, including securing access to home-based connectivity and remote-use devices, related issues in supporting remote learning for all students, including disadvantaged populations.
10. The SEA will submit to the Department, within 60 days of receiving ESSER funds, a report that will include:
 - A budget for the SEA's reserve that includes information about the up to 1/2 of 1 percent of the SEA's total grant for administrative costs and the uses of funds for emergency needs to address issues related to COVID-19; and
 - An Internal Control and Subrecipient Monitoring Plan to ensure that funds are used for allowable purposes in accordance with cash management principles.
11. The SEA will ensure that every recipient and subrecipient of ESSER funds will cooperate with any examination of records with respect to such funds by making records available for inspection, production, and examination, and authorized individuals available for interview and examination, upon the request of (i) the Department and/or its Inspector General; or (ii) any other federal agency, commission, or department in the lawful exercise of its jurisdiction and authority.
12. The SEA will return to the Secretary any funds received under the ESSER Fund that the SEA does not award within 1 year of receiving such funds.

Chief State School Officer or Authorized Representative (Printed Name):

Signature: 	Date: 05/13/2020
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PART C: USES OF ELEMENTARY AND SECONDARY SCHOOL EMERGENCY RELIEF FUNDS

Section 18003 of Division B of the CARES Act provides in relevant part that grants awarded under the Elementary and Secondary School Emergency Relief Fund be used to support the ability of local educational agencies (LEAs) to continue to provide educational services to their students. The Department requests the following:

1. Information that the SEA may request LEAs to include in their subgrant applications to the SEA. For example, an SEA might propose to include the following in developing its subgrant application:
 - How the LEA will determine its most important educational needs as a result of COVID-19.
 - The LEA's proposed timeline for providing services and assistance to students and staff in both public and non-public schools.
 - The extent to which the LEA intends to use ESSER funds to promote remote learning.
 - How the LEA intends to assess and address student learning gaps resulting from the disruption in educational services.

The above considerations are in addition to the application information requirements from sections 442 and 427 of the General Education Provisions Act (GEPA) (20 U.S.C. § 1232e and § 1228a).

As a unitary State Educational Agency (SEA) and Local Educational Agency (LEA), the Hawaii State Department of Education (HIDOE) intends to use the grant received under the Elementary and Secondary School Emergency Relief (ESSER) Fund to continue to provide educational services to all public and public charter school students statewide through targeted strategies that will mitigate the disruptive impact of the COVID-19 pandemic on educational programming and equitable access.

As an island state, one of our greatest challenges during the current COVID-19 pandemic has been providing enhanced learning activities for all students, particularly those who belong to a disadvantaged population or live in a remote area. HIDOE will leverage the funds received through this grant to ensure equity in access. HIDOE will provide (1) a robust statewide Summer 2020 learning program with learning opportunities for remediation, intervention, credit advancement, credit recovery, and access to early college credits; (2) an online learning management system statewide for blended and online learning, utilizing our recently-adopted Google suite to serve as an instructional tool for educators to employ a breadth of online courses that integrates opportunities for project-based learning, collaboration, and demonstrations for students whether schools continue to be closed or are reopened for in-class instruction; (3) devices and computer-based programs appropriate for our economically-disadvantaged students, Native Hawaiian students, English learners, students who are homeless, and students with disabilities (including assistive technology, adaptive equipment, and programs in the Hawaiian language); (4) better internet access to students in rural and remote areas; (5) training for parents and caregivers on how to support their child with distance learning; (6) professional development for educators on differentiated instructional strategies, including project-based designs through effective uses of technology, using asynchronous and synchronous distance learning approaches for educators and students; and (7) an internship program to allow high school students whose Career and Technical Education (CTE) coursework was disrupted due to the school closure an opportunity to obtain and refine their skills in a work-based setting to earn CTE and other applied learning career readiness credits and, for students who graduate on time but need career advice, to transition into college or the workplace.

This grant will also allow HIDOE to provide outreach and deliver services, such as mental health and other wraparound services, to our vulnerable students during the school closures to ensure these students are able to participate in the educational activities provided.

2. The extent to which the SEA intends to use any portion of its SEA reserve (up to 10 percent of its ESSER Fund award) to support:
 - technological capacity and access – including hardware and software, connectivity, and instructional expertise – to support remote learning. If so, please describe the strategies the SEA intends to use to serve disadvantaged populations listed in Sec. 18003(d)(4) of the CARES Act; and
 - remote learning by developing new informational and academic resources and expanding awareness of, and access to, best practices and innovations in remote learning and support for students, families, and educators.

As an SEA-LEA, HIDOE will use the funds received from the ESSER Fund to support statewide efforts to provide effective distance learning programs and to ensure access to education for all students enrolled in our public and public charter schools.

This grant will support the reopening of schools and HIDOE's transition to School Year 2020-2021, including the assessment of students as they return. HIDOE's intention is to protect the 180 days of instruction for School Year 2020-2021 by establishing the programs and infrastructure needed to provide uninterrupted educational services.

Finally, this grant will support HIDOE's efforts to coordinate with other state agencies, including the Hawaii State Department of Health and the Hawaii Emergency Management Agency, to ensure the health and safety of HIDOE's students, employees, and communities. This includes ensuring HIDOE has adequate cleaning supplies, personal protective equipment, and other materials and supplies needed to comply with the Centers for Disease Control and Prevention guidance as HIDOE prepares for the reopening of school facilities.

HIDOE will continue to provide equitable services to students and staff in non-public schools.

PART D: OTHER ASSURANCES AND CERTIFICATIONS

The [Chief State School Officer or his/her authorized representative] assures or certifies the following:

1. The SEA will comply with all applicable assurances in OMB Standard Forms 424B and D (Assurances for Non-Construction and Construction Programs), including the assurances relating to the legal authority to apply for assistance; access to records; conflict of interest; merit systems; nondiscrimination; Hatch Act provisions; labor standards; flood hazards; historic preservation; protection of human subjects; animal welfare; lead-based paint; Single Audit Act; and the general agreement to comply with all applicable Federal laws, executive orders and regulations.
2. With respect to the certification regarding lobbying in Department Form 80-0013, no Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the making or renewal of Federal grants under this program; the SEA will complete and submit Standard Form-LLL, "Disclosure Form to Report Lobbying," when required (34 C.F.R. Part 82, Appendix B); and the SEA will require the full certification, as set forth in 34 C.F.R. Part 82, Appendix A, in the award documents for all subawards at all tiers.
3. Any LEA receiving funding under this program will have on file with the SEA a set of assurances that meets the requirements of section 442 of the General Education Provisions Act (GEPA) (20 U.S.C. 1232e).
4. To the extent applicable, an LEA will include in its local application a description of how the LEA will comply with the requirements of section 427 of GEPA (20 U.S.C. 1228a). The description must include information on the steps the LEA proposes to take to permit students, teachers, and other program beneficiaries to overcome barriers (including barriers based on gender, race, color, national origin, disability, and age) that impede equal access to, or participation in, the program.
5. The SEA will comply with the *Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards* (Uniform Guidance) requirements in Subpart D—Post Federal Award Requirements (2 CFR §§200.300-345) and Subpart E—Cost Principles (2 CFR §§200.400-475) to ensure that LEAs, including charter schools that are LEAs, are using ESSER funds for purposes that are reasonable, necessary, and allocable under the CARES Act.
6. The SEA and other entities will comply with the provisions of all applicable acts, regulations and assurances; the following provisions of Education Department General Administrative Regulations (EDGAR) 34 CFR parts 76, 77, 81, 82, 84, 97, 98, and 99; the OMB Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement) in 2 CFR part 180, as adopted and amended as regulations of the Department in 2 CFR part 3485; and the Uniform Guidance in 2 CFR part 200, as adopted and amended as regulations of the Department in 2 CFR part 3474.

Chief State School Officer or Authorized Representative (Printed Name):

Signature: 	Date: 05/13/2020
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Appendix A: Relevant Excerpts from Title VIII of Division B of the CARES Act, the Emergency Appropriations for Coronavirus Health Response and Agency Operations

DEPARTMENT OF EDUCATION
EDUCATION STABILIZATION FUND

For an additional amount for “Education Stabilization Fund”, \$30,750,000,000, to remain available through September 30, 2021, to prevent, prepare for, and respond to coronavirus, domestically or internationally: Provided, That such amount is designated by the Congress as being for an emergency requirement pursuant to section 251(b)(2)(A)(i) of the Balanced Budget and Emergency Deficit Control Act of 1985.

GENERAL PROVISIONS
EDUCATION STABILIZATION FUND

SEC. 18001. (a) ALLOCATIONS.—From the amount made available under this heading in this Act to carry out the Education Stabilization Fund, the Secretary shall first allocate—

- (1) not more than 1/2 of 1 percent to the outlying areas on the basis of their respective needs, as determined by the Secretary, in consultation with the Secretary of the Interior;
- (2) one-half of 1 percent for the Secretary of Interior, in consultation with the Secretary of Education, for programs operated or funded by the Bureau of Indian Education; and
- (3) 1 percent for grants to States with the highest coronavirus burden to support activities under this heading in this Act, for which the Secretary shall issue a notice inviting applications not later than 30 days of enactment of this Act and approve or deny applications not later than 30 days after receipt.

(b) RESERVATIONS.—After carrying out subsection (a), the Secretary shall reserve the remaining funds made available as follows:

- (1) 9.8 percent to carry out section 18002 of this title.
- (2) 43.9 percent to carry out section 18003 of this title.
- (3) 46.3 percent to carry out section 18004 of this title.

ELEMENTARY AND SECONDARY SCHOOL EMERGENCY RELIEF FUND

SEC. 18003. (a) GRANTS.—From funds reserved under section 18001(b)(2) of this title, the Secretary shall make elementary and secondary school emergency relief grants to each State educational agency with an approved application. The Secretary shall issue a notice inviting applications not later than 30 days of enactment of this Act and approve or deny applications not later than 30 days after receipt.

(b) ALLOCATIONS TO STATES.—The amount of each grant under subsection (a) shall be allocated by the Secretary to each State in the same proportion as each State received under part A of title I of the ESEA of 1965 in the most recent fiscal year.

(c) SUBGRANTS TO LOCAL EDUCATIONAL AGENCIES.—Each State shall allocate not less than 90 percent of the grant funds awarded to the State under this section as subgrants to local educational agencies (including charter schools that are local educational agencies) in the State in proportion to the amount of funds such local educational agencies and charter schools that are local educational agencies received under part A of title I of the ESEA of 1965 in the most recent fiscal year.

(d) USES OF FUNDS.—A local educational agency that receives funds under this title may use the funds for any of the following:

- (1) Any activity authorized by the ESEA of 1965, including the Native Hawaiian Education Act and the Alaska Native Educational Equity, Support, and Assistance Act (20 U.S.C. 6301 et seq.), the Individuals with Disabilities Education Act (20 U.S.C. 1400 et seq.) (“IDEA”), the Adult Education and Family Literacy Act (20 U.S.C. 1400 et seq.), the Carl D. Perkins Career and Technical Education Act of 2006 (20 U.S.C. 2301 et seq.) (“the Perkins Act”), or subtitle B of title VII of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11431 et seq.).
 - (2) Coordination of preparedness and response efforts of local educational agencies with State, local, Tribal, and territorial public health departments, and other relevant agencies, to improve coordinated responses among such entities to prevent, prepare for, and respond to coronavirus.
 - (3) Providing principals and others school leaders with the resources necessary to address the needs of their individual schools.
 - (4) Activities to address the unique needs of low-income children or students, children with disabilities, English learners, racial and ethnic minorities, students experiencing homelessness, and foster care youth, including how outreach and service delivery will meet the needs of each population.
 - (5) Developing and implementing procedures and systems to improve the preparedness and response efforts of local educational agencies.
 - (6) Training and professional development for staff of the local educational agency on sanitation and minimizing the spread of infectious diseases.
 - (7) Purchasing supplies to sanitize and clean the facilities of a local educational agency, including buildings operated by such agency.
 - (8) Planning for and coordinating during long-term closures, including for how to provide meals to eligible students, how to provide technology for online learning to all students, how to provide guidance for carrying out requirements under the Individuals with Disabilities Education Act (20 U.S.C. 1401 et seq.) and how to ensure other educational services can continue to be provided consistent with all Federal, State, and local requirements.
 - (9) Purchasing educational technology (including hardware, software, and connectivity) for students who are served by the local educational agency that aids in regular and substantive educational interaction between students and their classroom instructors, including low-income students and students with disabilities, which may include assistive technology or adaptive equipment.
 - (10) Providing mental health services and supports.
 - (11) Planning and implementing activities related to summer learning and supplemental afterschool programs, including providing classroom instruction or online learning during the summer months and addressing the needs of low-income students, students with disabilities, English learners, migrant students, students experiencing homelessness, and children in foster care.
 - (12) Other activities that are necessary to maintain the operation of and continuity of services in local educational agencies and continuing to employ existing staff of the local educational agency.
- (e) **STATE FUNDING.**—With funds not otherwise allocated under subsection (c), a State may reserve not more than 1/2 of 1 percent for administrative costs and the remainder for emergency needs as determined by the state educational agency to address issues responding to coronavirus, which may be addressed through the use of grants or contracts.
- (f) **REALLOCATION.**—A State shall return to the Secretary any funds received under this section that the State does not award within 1 year of receiving such funds and the Secretary shall reallocate such funds to the remaining States in accordance with subsection (b).

ASSISTANCE TO NON-PUBLIC SCHOOLS

SEC. 18005. (a) IN GENERAL.—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, as determined in consultation with representatives of non-public schools.

(b) PUBLIC CONTROL OF FUNDS.—The control of funds for the services and assistance provided to a non-public school under subsection (a), and title to materials, equipment, and property purchased with such funds, shall be in a public agency, and a public agency shall administer such funds, materials, equipment, and property and shall provide such services (or may contract for the provision of such services with a public or private entity).

CONTINUED PAYMENT TO EMPLOYEES

SEC. 18006. A local educational agency, State, institution of higher education, or other entity that receives funds under “Education Stabilization Fund”, shall to the greatest extent practicable, continue to pay its employees and contractors during the period of any disruptions or closures related to coronavirus.

DEFINITIONS

SEC. 18007. Except as otherwise provided in sections 18001– 18006 of this title, as used in such sections—

(1) the terms “elementary education” and “secondary education” have the meaning given such terms under State law;

(2) the term “institution of higher education” has the meaning given such term in title I of the Higher Education Act of 1965 (20 U.S.C. 1001 et seq.);

(3) the term “Secretary” means the Secretary of Education;

(4) the term “State” means each of the 50 States, the District of Columbia, and the Commonwealth of Puerto Rico;

(5) the term “cost of attendance” has the meaning given such term in section 472 of the Higher Education Act of 1965.

(6) the term “Non-public school” means a non-public elementary and secondary school that (A) is accredited, licensed, or otherwise operates in accordance with State law; and

(B) was in existence prior to the date of the qualifying emergency for which grants are awarded under this section;

(7) the term “public school” means a public elementary or secondary school; and

(8) any other term used that is defined in section 8101 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 7801) shall have the meaning given the term in such section.

MAINTENANCE OF EFFORT

SEC. 18008. (a) A State’s application for funds to carry out sections 18002 or 18003 of this title shall include assurances that the State will maintain support for elementary and secondary education, and State support for higher education (which shall include State funding to institutions of higher education and state need based financial aid, and shall not include support for capital projects or for research and development or tuition and fees paid by students) in fiscal years 2020 and 2021 at least at the levels of such support that is the average of such State’s support for elementary and secondary education and for higher education provided in the 3 fiscal years preceding the date of enactment of this Act.

(b) The secretary may waive the requirement in subsection (a) for the purpose of relieving fiscal burdens on States that have experienced a precipitous decline in financial resources.

REPORTING ON USE OF FUNDS SEC. 15011.

(a) In this section—

- (1) the terms “agency”, “appropriate congressional committees”, “Committee”, “covered funds”, and “Coronavirus response” have the meanings given those terms in section 15010;
- (2) the term “covered recipient” (A) means any entity that receives large covered funds; and (B) includes any State, the District of Columbia, and any territory or possession of the United States; and
- (3) the term “large covered funds” means covered funds that amount to more than \$150,000.

...

(b)(2) Not later than 10 days after the end of each calendar quarter, each covered recipient shall submit to the agency and the Committee a report that contains—

- (A) the total amount of large covered funds received from the agency;
- (B) the amount of large covered funds received that were expended or obligated for each project or activity;
- (C) a detailed list of all projects or activities for which large covered funds were expended or obligated, including—
 - (i) the name of the project or activity;
 - (ii) a description of the project or activity; and
 - (iii) the estimated number of jobs created or retained by the project or activity, where applicable; and
- (D) detailed information on any level of subcontracts or subgrants awarded by the covered recipient or its subcontractors or subgrantees, to include the data elements required to comply with the Federal Funding Accountability and Transparency Act of 2006 (31 U.S.C. 6101 note) allowing aggregate reporting on awards below \$50,000 or to individuals, as prescribed by the Director of the Office of Management and Budget.

(3) Not later than 30 days after the end of each calendar quarter, the Committee, in consultation with the agency that made large covered funds available to any covered recipient shall make the information in reports submitted under paragraph (2) publicly available by posting the information on the website established under section 15010(g).

(4)(A) Each agency, in coordination with the Committee and the Director of the Office of Management and Budget shall provide user-friendly means for covered recipients to meet requirements of this subsection.

(B) Federal agencies may use existing mechanisms to ensure that information under this subsection is reported accurately.

(c)(1) The Director of the Office of Management and Budget, in consultation with the Secretary of the Treasury, the Administrator of the Small Business Administration, and the Chairperson of the Council of Economic Advisors, shall submit to the appropriate congressional committees and publicly release on the website established under section 15010(g) quarterly reports that detail the impact of programs funded through large covered funds on employment, estimated economic growth, and other key economic indicators, including information about impacted industries.

(2)(A) The first report submitted under paragraph (1) shall be submitted not later than 45 days after the end of the first full quarter following the date of enactment of this Act.

(B) The last report required to be submitted under paragraph (1) shall apply to the quarter in which the Committee terminates.

APPENDIX B: STATE ALLOCATION TABLE**Elementary and Secondary School Emergency Relief Fund**

STATE	STATE TOTAL	Minimum LEA Distribution ¹	Maximum SEA Reservation	Maximum for SEA Administration ²
TOTAL	13,229,265,000	11,906,338,500	1,322,926,500	66,146,325
ALABAMA	216,947,540	195,252,786	21,694,754	1,084,738
ALASKA	38,407,914	34,567,123	3,840,791	192,040
ARIZONA	277,422,944	249,680,650	27,742,294	1,387,115
ARKANSAS	128,758,638	115,882,774	12,875,864	643,793
CALIFORNIA	1,647,306,127	1,482,575,514	164,730,613	8,236,531
COLORADO	120,993,782	108,894,404	12,099,378	604,969
CONNECTICUT	111,068,059	99,961,253	11,106,806	555,340
DELAWARE	43,492,753	39,143,478	4,349,275	217,464
DISTRICT OF COLUMBIA	42,006,354	37,805,719	4,200,635	210,032
FLORIDA	770,247,851	693,223,066	77,024,785	3,851,239
GEORGIA	457,169,852	411,452,867	45,716,985	2,285,849
HAWAII	43,385,229	39,046,706	4,338,523	216,926
IDAHO	47,854,695	43,069,226	4,785,470	239,273
ILLINOIS	569,467,218	512,520,496	56,946,722	2,847,336
INDIANA	214,472,770	193,025,493	21,447,277	1,072,364
IOWA	71,625,561	64,463,005	7,162,556	358,128
KANSAS	84,529,061	76,076,155	8,452,906	422,645
KENTUCKY	193,186,874	173,868,187	19,318,687	965,934
LOUISIANA	286,980,175	258,282,158	28,698,018	1,434,901
MAINE	43,793,319	39,413,987	4,379,332	218,967
MARYLAND	207,834,058	187,050,652	20,783,406	1,039,170
MASSACHUSETTS	214,894,317	193,404,885	21,489,432	1,074,472
MICHIGAN	389,796,984	350,817,286	38,979,698	1,948,985
MINNESOTA	140,137,253	126,123,528	14,013,725	700,686
MISSISSIPPI	169,883,002	152,894,702	16,988,300	849,415
MISSOURI	208,443,300	187,598,970	20,844,330	1,042,217
MONTANA	41,295,230	37,165,707	4,129,523	206,476
NEBRASKA	65,085,085	58,576,577	6,508,509	325,425
NEVADA	117,185,045	105,466,541	11,718,505	585,925
NEW HAMPSHIRE	37,641,372	33,877,235	3,764,137	188,207
NEW JERSEY	310,371,213	279,334,092	31,037,121	1,551,856
NEW MEXICO	108,574,786	97,717,307	10,857,479	542,874
NEW YORK	1,037,045,603	933,341,043	103,704,560	5,185,228
NORTH CAROLINA	396,311,607	356,680,446	39,631,161	1,981,558
NORTH DAKOTA	33,297,699	29,967,929	3,329,770	166,489
OHIO	489,205,200	440,284,680	48,920,520	2,446,026
OKLAHOMA	160,950,476	144,855,428	16,095,048	804,752

¹ The totals in the Minimum LEA Distribution, Maximum SEA Reservation, and Maximum for SEA Administration columns have been rounded to the nearest whole dollar.

² With the funds not subgranted to LEAs, the SEA may reserve up to an amount equal to 1/2 of 1 percent of the total allocation for administrative costs.

STATE	STATE TOTAL	Minimum LEA Distribution ³	Maximum SEA Reservation	Maximum for SEA Administration ⁴
OREGON	121,099,019	108,989,117	12,109,902	605,495
PENNSYLVANIA	523,807,198	471,426,478	52,380,720	2,619,036
RHODE ISLAND	46,350,444	41,715,400	4,635,044	231,752
SOUTH CAROLINA	216,311,158	194,680,042	21,631,116	1,081,556
SOUTH DAKOTA	41,295,230	37,165,707	4,129,523	206,476
TENNESSEE	259,891,154	233,902,039	25,989,115	1,299,456
TEXAS	1,285,886,064	1,157,297,458	128,588,606	6,429,430
UTAH	67,821,787	61,039,608	6,782,179	339,109
VERMONT	31,148,360	28,033,524	3,114,836	155,742
VIRGINIA	238,599,192	214,739,273	23,859,919	1,192,996
WASHINGTON	216,892,447	195,203,202	21,689,245	1,084,462
WEST VIRGINIA	86,640,471	77,976,424	8,664,047	433,202
WISCONSIN	174,777,774	157,299,997	17,477,777	873,889
WYOMING	32,562,651	29,306,386	3,256,265	162,813
PUERTO RICO	349,113,105	314,201,795	34,911,311	1,745,566

³ The totals in the Minimum LEA Distribution, Maximum SEA Reservation, and Maximum for SEA Administration columns have been rounded to the nearest whole dollar.

⁴ With the funds not subgranted to LEAs, the SEA may reserve up to an amount equal to ½ of 1 percent of the total allocation for administrative costs.

DAVID Y. IGE
GOVERNOR



DR. CHRISTINA M. KISHIMOTO
SUPERINTENDENT

STATE OF HAWAII
DEPARTMENT OF EDUCATION
P.O. BOX 2360
HONOLULU, HAWAII 96804

OFFICE OF THE SUPERINTENDENT

May 13, 2020

The Honorable Frank T. Brogan
Assistant Secretary for Elementary and Secondary Education
Office of Elementary and Secondary Education
U.S. Department of Education
400 Maryland Avenue, SW
Washington, DC 20202

Dear Assistant Secretary Brogan:

Thank you for the assistance from the United States Department of Education during this unprecedented national crisis caused by the Coronavirus Disease 2019 (COVID-19).

Attached you will find Hawaii's Certification and Agreement for Funding under the Education Stabilization Fund Program Elementary and Secondary School Emergency Relief Fund.

Thank you very much for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "Christina M. Kishimoto".

Dr. Christina M. Kishimoto
Superintendent

CMK:wk

Attachment: Certification and Agreement for Funding under the Education Stabilization Fund Program Elementary and Secondary School Emergency Relief Fund