

Ann Huber
U.S. Department of Education
400 Maryland Avenue, SW, Room 3W219
Washington, DC 20202

Re: ED-2020-OESE-0091

Dear Ms. Huber:

I am submitting comments from the Council of Chief State School Officers (CCSSO) regarding the Interim Final Rule (IFR), published in the July 1 Federal Register, on provision of equitable services to students and teachers in non-public schools under the Coronavirus Aid, Relief, and Economic Security (CARES) Act. CCSSO is the nonpartisan, nationwide, nonprofit organization of public officials who head departments of elementary and secondary education in the states, the District of Columbia, the Department of Defense Education Activity, the Bureau of Indian Education, and the five U.S. extra-state jurisdictions.

CCSSO and the state education agencies (SEAs) we represent are extremely grateful for Congress' provision of the CARES Act funding and for the actions of the U.S. Department of Education (ED or the Department) in making that funding available to states on a timely basis. Because of the challenges that schools have faced, and continue to face, in addressing the coronavirus emergency, and the reductions in state and local resources that schools in all our states are experiencing, the CARES Act funds are critical at this time. However, the guidance and subsequent IFR on the CARES Act "equitable services" provisions have led to widespread confusion in states and school districts and greatly complicated and slowed the administration of these much-needed relief funds.

CCSSO and our members recognize the important role the equitable services provisions play in supporting the most vulnerable student populations who attend non-public schools, and appreciate Congress including this provision in the CARES Act. However, the Department's procedures outlined in the initial guidance published April 30, 2020 for calculating the amount of funding to be provided for services to non-public school students and teachers is counter to the CARES Act statute and the Department's longstanding interpretations of the Elementary and Secondary Education Act of 1965 (ESEA). The changes made by the IFR, including the incorporation of additional options, do not resolve this issue. In fact, the IFR has led to additional confusion. CCSSO respectfully urges the Department to withdraw the IFR in order to allow states and districts to implement the statute consistent with congressional intent and longstanding interpretations of ESEA. A more detailed description of this rationale follows.

The IFR policy is inconsistent with the statute and with congressional intent.

Section 18005(a) of the CARES Act, by its terms, requires that local educational agencies (LEAs) provide equitable services “in the same manner as provided under section 1117 of the ESEA of 1965.” ESEA section 1117, in turn, calls for LEAs to calculate the non-public-school share of funding on the basis of counts of students from low-income families enrolled in public and private schools. Had the Congress intended to require a calculation based on counts of all students, it would have instead referenced ESEA section 8501, which bases equitable services calculations for certain programs on a total student count. But the Congress did not include that reference.

In the preamble section of the IFR, the Department argues that Congress had a different objective in mind, in that the drafters used the words “in the same manner as” rather than “as provided in” and because the law includes additional language on consultation and public control of funds. However, we find no indication that the authors had any such intent. On June 25, a bipartisan coalition of 74 Members of the U.S. House of Representatives, led by Representatives Seth Moulton (D-MA) and Pete Stauber (R-MN), sent a letter to the Department stating that the interpretation contained within its nonregulatory guidance “runs counter to the intent of Congress.”¹ In a May 20 letter to ED², leaders of the House and Senate authorizing and appropriations committees asserted that “the Department broke with statutory requirements of the CARES Act and longstanding precedent of the equitable services provision in section 1117” by issuing the instructions in the nonregulatory guidance and that “The statutory language and congressional intent is clear: LEAs should use these emergency relief funds to provide equitable services only based on the number of low-income students attending private schools in their LEA, not all students attending private schools in the LEA.” In a May 21 press interview³, Senate HELP Committee Chairman Lamar Alexander explained that his own understanding was that the funding would be calculated as under ESEA Title I.

Further, in a July 1 legal analysis⁴ the nonpartisan Congressional Research Service concluded that “section 18005(a)’s text and context suggest that the most straightforward reading of the provision is that it requires LEAs to follow section 1117’s method for determining the proportional share and thus to allocate funding for services for private school students and teachers based on the number of low-income children attending private schools.”

¹<https://moulton.house.gov/imo/media/doc/Moulton%20Stauber%20Coalition%20Letter%20to%20Protect%20CARES%20Act%20Funding%20for%20Public%20School%20Students.pdf>

² <https://edlabor.house.gov/imo/media/doc/2020-5-20%20Ltr%20to%20DeVos%20re%20Equitable%20Services.pdf>

³ <https://blogs.edweek.org/edweek/campaign-k-12/2020/05/alexander-devos-COVID-aid-private-schools-CDC-reopening.html>

⁴ <https://blogs.edweek.org/edweek/campaign-k-12/CRS%20Analysis%20of%20CARES%20Act%27s%20Equitable%20Services%20Provision%20%282%29.pdf>

The IFR adds new language, not reflective of the statute, that causes additional confusion.

The IFR repeats the flawed language on calculating the equitable share as originally put forth in the nonregulatory guidance and adds new provisions that fall outside the statute and congressional intent, leading to further confusion.

First, if an LEA calculates the equitable services share based on poverty consistent with 1117 as Congress intended, the IFR requires the LEA to limit its CARES Act spending. While Congress authorized LEAs to spend CARES Act funds in any school and districtwide, the IFR would require LEAs to limit their spending only to schools that currently participate in the Title I program. This is inconsistent with congressional intent and could prevent this critical funding from going to those students who need it most, if students in poverty do not attend a Title I school.

Second, the IFR effectively applies Title I's supplement, not supplant rules to the CARES Act even though Congress specifically did not include any supplement, not supplant requirements for these federal funds. Congress chose not to impose a supplement, not supplant requirement for Education Stabilization Fund funds (while requiring it for other CARES funds) in order to provide flexibility to local leaders to use funds to meet the most pressing of their school communities.

The IFR policy leads to inequities.

In enacting the CARES Act programs, Congress recognized the disproportionate impact of COVID-19 on schools, both public and private, that educate concentrations of children from low-income families. Thus, Congress elected to drive the Elementary and Secondary School Emergency Relief Fund allocations to LEAs on the basis of their shares of Title I, Part A, which are based on counts of low-income children, and to use the section 1117, rather than the section 8501, equitable services procedures. Yet if an LEA adopts ED's original nonregulatory guidance (34 CFR § 76.665 (c)(1)(ii) in the IFR), funds will flow to all interested private schools in a district, including those that educate few or even no low-income children, at the expense of high-need public and private school children located in that district.

Further, if an LEA opts to calculate the equitable services share based on poverty under the IFR, it would be able to use the CARES Act money only to benefit its Title I schools but would have to serve all interested private school in the LEA regardless of poverty. Likewise, public schools that enroll large concentrations of low-income students but did not participate in Title I last year could not benefit (note that some districts concentrate Title I funding only in schools with poverty rates of 75% and higher). Yet under the IFR, private schools that do not enroll any low-income children would be entitled to receive funding. For these reasons, even under the revised IFR, the policy remains inequitable and misaligned with congressional intent. CCSSO strongly supports the approach Congress intended through the CARES Act and the Department's longstanding interpretation of equitable services provisions in Title I, which counts low-income students for both Title I allocations and the calculation of non-public school shares, as both congressionally mandated and the most equitable outcome.

ED must allow States and LEAs to implement the law as Congress intended.

As stated earlier, state and local education agencies are extremely grateful for Congress' provision of the CARES Act funding. LEAs have major unmet needs arising from the pandemic that can be addressed with these critical resources. We believe ED must allow SEAs and LEAs to implement the law in the manner Congress intended, which would serve the original intent to provide much-needed funding and services to low-income students in public and private schools. We respectfully ask the Department:

- To immediately withdraw the IFR;
- To allow SEAs and LEAs to follow the law by providing equitable services as provided for in section 1117, including by complying with the section 1117 procedures for calculating the private-school share (States and LEAs have long experience in implementing section 1117 and are fully prepared to meet its requirements.);
- Not to further complicate implementation through the introduction of non-statutory requirements, such as a limitation to serving only Title I schools, a supplement-not-supplant requirement, or limitations on districtwide activities; and
- Not to penalize States or LEAs that have otherwise made a good faith effort to comply with the law prior to the publication of the IFR.

Thank you for the opportunity to comment on this notice. CCSSO and our members are hopeful that the Department will, as requested above, move forward to implement the CARES Act equitably and consistent with congressional intent. CCSSO and our members are working to meet the needs of all students across the country, no matter what type of education system they attend, and we look forward to a resolution on this issue.

Sincerely,



Carissa Moffat Miller
Executive Director
Council of Chief State School Officers