LEGISLATION

APPROPRIATIONS

Special Provisions in Federal FY 2021 Continuing Resolution ("CR") (H.R. 8337)

September 30, 2020

Passed on the final day of the prior federal fiscal year, the FY2021 Continuing Resolution will keep federal government agencies open and operating through December 11, 2020 at current operating levels, except for a limited number of special provisions (called anomalies).

SEC. 4601: PANDEMIC ELECTRONIC BENEFITS TRANSFER (P-EBT) EXTENSION

P-EBT PROGRAM EXTENSION:

The P-EBT program created under section 1101 of the Families First Coronavirus Response Act is extend through September 30, 2021. P-EBT is intended to benefit eligible children who lost access to free or reduced-price meals due to the pandemic school closures.

SEC. 4602: EXTENDING SCHOOL MEAL PROGRAM WAIVER AUTHORITIES

National School Lunch Program requirement waivers addressing COVID-19

EXTENSION.-

The USDA waiver authorities created under section 2202(e) of the Families First Coronavirus Response Act are extended through September 30, 2021.

<u>Funding</u>.— Appropriates such sums as necessary to carry out this section, out of any funds in the Treasury not otherwise appropriated.

CORONAVIRUS



Council of the Great City Schools **MEMBER DISTRICTS** Albuquerque Anchorage Arlington, TX Atlanta Aurora, CO Austin **Baltimore** Birmingham Boston Bridgeport **Broward County** Buffalo Charleston Charlotte-Mecklenburg Chicago Cincinnati Clark County Cleveland Columbus Dallas Dayton Denver **Des Moines** Detroit **Duval County** El Paso Fort Worth Fresno **Guilford County** Hawaii Hillsborough County Houston Indianapolis Jackson Jefferson County, KY Kansas City Long Beach Los Angeles Manchester, NH **Miami-Dade County** Milwaukee Minneapolis Nashville New Orleans **New York City** Newark Norfolk Oakland **Oklahoma** City Omaha Orange County, FL Palm Beach County Philadelphia **Pinellas County** Pittsburgh Portland Providence Puerto Rico Richmond Rochester Sacramento San Antonio San Diego San Francisco Santa Ana Seattle Shelby County St. Louis St. Paul Stockton Toledo Tulsa

> Washington, D.C. Washoe County Wichita

Council of the Great City Schools®

1331 Pennsylvania Avenue, NW, Suite 1100N, Washington, DC 20004 (202) 393-2427 (202) 393-2400 (fax) www.cgcs.org

April 28, 2020

The Honorable Nancy Pelosi Speaker of the House U.S. House of Representatives Washington, D.C. 20515

The Honorable Kevin McCarthy Minority Leader U.S. House of Representatives Washington, D.C. 20515 The Honorable Mitch McConnell Majority Leader U.S. Senate Washington, D.C. 20510

The Honorable Charles Schumer Minority Leader U.S. Senate Washington, D.C. 20510

Dear Speaker Pelosi, Minority Leader McCarthy, Majority Leader McConnell, and Minority Leader Schumer:

The Council of the Great City Schools, the nation's primary coalition of large urban publicschool districts, writes to urge you in the strongest possible terms to approve new funding for local school systems in the next coronavirus supplemental appropriations bill. The Great City Schools support an additional federal allocation of \$175 billion in Educational Stabilization Funds distributed to the local level through the Title I formula. We also urge Congress to provide an additional \$13 billion for IDEA, \$12 billion in additional Title I program funding, \$2.0 billion for E-Rate, and emergency infrastructure funds that include public schools.

The down payment you made in our public education system by allocating some \$13.5 billion in the CARES Act for our schools was a critical lifeline for public education in this country. But we now urge you to provide a second, substantially larger installment for public school systems as you work on the fourth supplemental appropriations bill.

The initial allocation will help offset the unexpected costs we are incurring in providing meal services to our students and reestablishing instruction. Our public schools, in major cities and elsewhere, have stepped up to the challenge on very short order to revamp our operations and instructional systems to help meet the unexpected health threats that the nation now confronts. In the first chaotic days of the crisis, with no promise of any aid, our schools organized to provide meals to millions of students and families, set up drop-off points, arranged home deliveries, and distributed meals at homeless shelters and to students on the street. This work continues today, even as our staff and volunteers have contracted COVID-19. Your assistance will help sustain these vital efforts.

On the instructional side, our schools are providing instructional packets and making a rapid transformation from school-based to home-based learning. Lesson plans have been written and sent home with meals. Thousands of electronic devices are being purchased and distributed. Hot spots are being set up. Virtual instruction is being provided in many places alongside traditional although remote instruction, and teachers are being trained in how to teach from a distance. To be sure, school districts have a way to go before these instructional changes and online delivery systems are as effective for all students as they need to be. But the energy, dedication, and sense of urgency that have gone into these efforts have been nothing short of extraordinary.

At the same time, dark clouds are forming on the educational horizon that will spell disaster if Congress does not intervene. Significant revenue shortfalls are looming for local school districts that will exacerbate the disruption students have already faced. Some 40 to 50 percent of school district revenues, in fact, come from local sources that are expected to drop precipitously in the months ahead. This revenue decline will come on top of revenue losses in the months to come from state sources that have been more widely reported. Several big city school districts are now projecting 15 to 25 percent cuts in overall revenues going into next school year.

We are alarmed by these projections because we've seen them before. Similar losses occurred during the 2008-09 recession. At that time, Congress stepped up with nearly \$100 billion in education funding through the American Recovery and Reinvestment Act (ARRA). While not compensating for all losses at the time, ARRA provided an essential infusion of funds that allowed local school systems to rebuild their instructional and operational capacity. As local revenues declined further, Congress then approved an additional \$10 billion in 2010 for an Education Jobs Fund to help school districts retain existing employees, recall former employees, and hire new ones.

The situation now, however, is far more severe and promises to cause much more substantial damage. Unlike in 2008 and 2009, schools nationwide had to close in mid-March and will likely stay shuttered through the balance of the school year. As aggressive as schools have been in providing instruction at a distance, districts continue to need resources to provide electronic learning devices and internet connections to every child. The amount of time devoted each day to lessons is less now than what would occur in a regular classroom. Students' ability to interact with their teachers remains limited. Some teachers will have little more than a crash course on how to conduct online learning. And, the research on the efficacy of virtual learning is not particularly strong. The truth is that there is simply no substitute for students being with their teachers all day.

The result, coming out of this school year, will be substantial unfinished learning for many students. On top of the predictable summer learning loss, vast numbers of students will be entering the next school year substantially behind academically—at exactly the time when budget cuts due to local and state revenue shortfalls will be occurring.

These budget cuts will mean teaching staff will be laid off, class sizes will balloon, and remaining teaching staff will likely be redeployed into classes and subjects that they may not be used to teaching—all at a time when they will be asked to address unprecedented unfinished learning from the last school year. An estimated 20 percent loss in combined state and local revenues would likely result in some 275,000 teachers being laid off in big city public school systems alone. The ramifications are not only profound for the students involved, but for the nation. This educational catastrophe could weaken the country's economic foundation for years to come without significant financial support from Congress.

In fact, multiple economic studies have shown that there is a direct connection between a country's GDP growth and its investments in elementary and secondary education. Research published by the National Bureau of Economic Research (NBER), for example, has concluded that, "For 15 OECD countries, 38 percent of the variance in (economic) growth-rate changes can be explained by test score changes." Another NBER study found that, "Increasing (educational) spending by 10 percent for all school-age years increased wages by 7.25 percent each year." And another study published in the American Economic Journal concluded that roughly 20 to 30

percent of variation in state GDP per capita was attributable to variations in knowledge capital. Finally, public education is one of the largest employers in the nation, dwarfing many private sector companies. In other words, investing in education is one of the best investments the country can make, not only for the success of its citizens but for its overall long-term viability. Sustaining and increasing educational spending now not only saves jobs in the short-run; it ensures economic strength and stability in the long-run.

With additional federal funds, America's public schools will be able to add summer school, expand the school day after reopening in the fall, retain and stabilize our teaching force, address the needs of our most vulnerable students, narrow the digital divide, and have a fighting chance at salvaging the futures of millions of young people. Moreover, your investment in education will help save the country long term. We hope you recognize the importance of your investment in the nation's public schools and work to ensure that the country remains strong in the aftermath of this crisis. Thank you.

Sincerely,

Eric Gordon, Chair of the Board Council of the Great City Schools and CEO, Cleveland Metropolitan Public Schools

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Raquel Reedy Superintendent Albuquerque Public Schools

Meria Carstarphen Superintendent Atlanta Public Schools

1) Rin Mr.

Rico Munn Superintendent Aurora (CO) Public Schools

Brenda Canellin

Brenda Cassellius Superintendent Boston Public Schools

Bart M. Jenthis

Barbara Jenkins, Secretary/Treasurer Council of the Great City Schools and Superintendent, Orange County (FL) Public Schools

Deena Bishop Superintendent Anchorage School District

Paul Cruz Superintendent Austin Independent School District

Donja B. Santelies

Sonja Santelises Chief Executive Officer Baltimore City Public Schools

Michael J. Testani Superintendent Bridgeport Public Schools

obert Kuncie

Robert Runcie Superintendent Broward County Public Schools

Carnest Winston

Earnest Winston Superintendent Charlotte-Mecklenburg Public Schools

Laura Mitchell Superintendent Cincinnati Public Schools

talisa L. Diron

Talisa Dixon Superintendent/CEO Columbus City (OH) Public Schools

Elizabeth J. Lolei

Elizabeth Lolli Superintendent Dayton Public Schools

Tom Ahart Superintendent Des Moines Public Schools

Diana Greene Superintendent Duval County Public Schools

Kriner Cash Superintendent Buffalo Public Schools

Janice K. Jackson

Janice Jackson Chief Executive Officer Chicago Public Schools

Jesus Jara Superintendent Clark County School District

Michael Hinojosa Superintendent Dallas Independent School District

traana Carabaa

Susana Cordova Superintendent Denver Public Schools

euris D. Funde

Lewis Ferebee Chancellor District of Columbia Public Schools

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Nikolai Vitti Superintendent Detroit Public Schools Community District

Juan Cabrera Superintendent El Paso Independent School District

taht A. Jehn-

Robert Nelson Superintendent Fresno Unified School District

Therete Lither

Grenita Lathan Superintendent Houston Independent School District

Errick Greene Superintendent Jackson (MS) Public Schools

I Bode

Mark Beddell Superintendent Kansas City (MO) Public Schools

Austin Beutner Superintendent Los Angeles Unified School District

and G. (E)

Keith Posley Superintendent Milwaukee Public Schools

Kent Scribner Superintendent Fort Worth Independent School District

Sharon L. Contreras

Sharon Contreras Superintendent Guilford County Public Schools

Aleesia Johnson Superintendent Indianapolis Public Schools

nt Pee:

Martin Pollio Superintendent Jefferson County (KY) Public Schools

Christopher J. Steinhauser

Christopher J. Steinhauser Superintendent Long Beach Unified School District

Alberto Carvalho Superintendent Miami-Dade County Public Schools

Ed Graff Superintendent Minneapolis Public Schools

Rozen Leon

Roger Leon Superintendent Newark Public Schools

gh R fhron Frommall

Kyla Johnson-Trammell Superintendent Oakland Unified School District

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Cheryl Logan Superintendent Omaha Public Schools

* HRHX

William Hite Superintendent School District of Philadelphia

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Guadalupe Guerrero Superintendent Portland (OR) Public Schools

Harrison Peters Superintendent Providence Public Schools



Jorge Aguilar Superintendent Sacramento City Unified School District

Richard Carranza Chancellor New York City Department of Education

Acan Mc Haniel

Sean McDaniel Superintendent Oklahoma City Public Schools

Donald From P

Donald E. Fennoy II Superintendent Palm Beach County Public Schools

Michael a. Shego

Michael Grego Superintendent Pinellas County Public Schools

Anthony Hamlet Superintendent Pittsburgh Public Schools

Jason Kamras Superintendent Richmond (VA) Public Schools

ed Martin

Pedro Martinez Superintendent San Antonio Independent School District

Cindy Marten

Cindy Marten Superintendent San Diego Unified School District

Jon alm

Jerry Almendarez Superintendent Santa Ana Unified School District

Joris M. Ray Superintendent Shelby County Public Schools

graph Bothard

Joe Gothard Superintendent St. Paul Public Schools

Dr. Monules Durant

Romules Durant Superintendent Toledo Public Schools

Michan

Michael Casserly Executive Director Council of the Great City Schools

Vincent C. Matthews

Vincent Matthews Superintendent San Francisco Unified School District

Klenine Chin

Denise Juneau Superintendent Seattle Public Schools

Kelvin Adams Superintendent St. Louis Public Schools

for Z. Stary

John Deasy Superintendent Stockton Unified School District

Deborah Gist Superintendent Tulsa Public Schools



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Council of the Great City Schools[®]

1331 Pennsylvania Avenue, NW, Suite 1100N, Washington, DC 20004 (202) 393-2427 (202) 393-2400 (fax) www.cgcs.org

March 22, 2020

United States Senate Washington, DC 20510

Dear Senator:

The Council of the Great City Schools, the coalition of the nation's largest central city public school districts, is extremely concerned that the Administration and Congress are overlooking the pivotal role that public schools perform in responding to crises and helping our local communities recover after emergencies.

Our nation's public-school districts, particularly those school districts where populations are densest, have stepped up to the plate with no additional promise of assistance during the coronavirus outbreak to provide millions of emergency meals every day to children, families, and local community members. These school districts are also developing and distributing, electronically and in hard copy, instructional lessons to homes across the country. And they are developing innovative strategies to meet the academic needs of our poor students, English learners, students with disabilities, and homeless students. We have not ironed out every challenge, but our public schools are committed and determined to address the needs of all children.

At the same time, most school districts were prepared to be out of session for several weeks—not to be closed for the remainder of the school year. The strain that this will put on our schools is hard to quantify at this point, but it will be substantial, since many of the nation's schools are just now reaching the same funding levels that they had before the 2008 downturn. In April—next month—we will be contractually obligated in most places to notify staff of their positions for the next school year, but it is highly likely that a recession will drain local and state education coffers of the revenues that schools require to sustain current staffing levels. In addition, schools will need to catch students up on what they have missed being out for months. The prospect of compensating for unfinished learning at the very time that we may have to lay off thousands of teachers for the upcoming school year creates an untenable educational crisis for the country, one that may take years to recover from.

The federal government has put several remedies in place to address the needs of the private sector, but it has barely touched the unfolding financial crisis developing in our nation's public schools. In fact, the second supplemental appropriations bill specifically excluded school districts along with state and local government agencies from the financial support that private sector employers are receiving from the federal government.

The truth of the matter is that nation's school districts who are now stepping up in so many unsung ways to provide for their children and families risk a serious financial breakdown later in 2020 and beyond without immediate, substantial, and direct federal aid.

With state and local revenue sources drying up quickly, the nation's public schools will need a substantial infusion of direct federal financial assistance to maintain staff into the upcoming school year and deliver instruction and support services at current levels. The recent Family First Coronavirus Response Act established a new federally required expenditure for additional paid emergency sick leave and family and medical leave, but prohibited school districts and other governmental entities from receiving the same federal payroll tax credit subsidy that private sector employers will receive for identical emergency paid leave expenditures.

State and local governments, including school districts, are responding during this national crisis with emergency medical, police, fire, public health, and food services in their communities. For its part, the federal government has added new financial burdens to already overloaded and understaffed public agencies without commensurate federal support.

A variety of federal funding mechanisms could be used to directly help the nation's public schools provide essential education, food, and support services during the nationwide school closures and ultimate recovery. The federal government could utilize the Title IV-A program of pass-through grants to school districts under the Elementary and Secondary Education Act with minimal modifications to provide broad-based education and support services, academic enrichment, technology and digital learning, and security assistance; create a new federal formula grant with flexible funding to ensure the continuity of local instructional and support services; or establish something similar to the 2009 State Fiscal Stabilization Fund (SFSF) with minor modifications to ensure that public school services are not disproportionately reduced or supplanted as frequently occurred in many states during the 2008 economic recession.

The Council of the Great City Schools and its members are working feverishly to help the nation overcome the scourge of coronavirus, but it stresses that public education in this nation will immediately need tens of billions of dollars in direct and targeted financial assistance to school districts from the federal government The nation's public schools must retain their capacity to serve the nation's school children, families, and neighborhoods as the indispensable public institution in every American community.

Sincerely,

Michal Dlandy

Michael Casserly Executive Director

CGCS Summary of Key Provisions of the Phase 3 Coronavirus Response Legislation

Congress has passed the Coronavirus Aid, Relief, and Economic Security Act (CARES – H.R. 748). The massive \$2.2 trillion measure includes multiple forms of financial aid to nearly every sector of the economy and a variety of new federal government authorizations and waivers. The federal financial aid includes grants, loans, guarantees, loan forgiveness, tax credits, tax deferrals, market supports, and other financial mechanisms. Even with this historic level of federal aid, additional economic stimulus legislation is expected in the upcoming months, and hopefully additional assistance to the nation's public school systems.

Federal payments to individuals and families (rebates) and expanded Unemployment Insurance payments comprise a large segment of the massive aid package. The \$500 billion Treasury Exchange Stabilization Fund provides broad authority for the Treasury Department, in conjunction with the Federal Reserve Board, to provide grants, loans, guarantees, and support for business and key industries, as well as for state and local government obligations. A \$350 billion-plus small business support package represents another large portion of this stimulus effort.

Coronavirus Relief Fund

A \$150 billion state Coronavirus Relief Fund will be distributed to the states based on their relative population for coronavirus-related expenses not otherwise budgeted. Local governments with populations of over 500,000 can directly apply for their allocation out of their states share of the Relief Fund.

Education Stabilization Fund

\$30.75 billion is appropriated for an Education Stabilization Fund to states with \$13 billion for K-12 education, \$3 billion for governor discretionary use, and \$14 billion for higher education. The \$13 billion K-12 allotment will be distributed to states based on their Title I allocation with 90% of the state allocation pass-through to school districts again based on their share of Title I allotments. The K-12 funds can be used for any allowable purpose authorized under ESEA, IDEA, Perkins CTE, or McKinney-Vento homeless authorities, as well as for preparedness and response, needs of individual schools, sanitation supplies, planning for upcoming months, technology purchasing (hardware, software, connectivity), mental health services, summer and after school activities including online, and "other activities that are necessary to maintain the operation of and continuity of services and continuing to employ existing staff of the local educational agency".

The bill includes language that states and school districts receiving funds must continue to pay their employees and contractors "to the greatest extent practicable". Equitable services continue to be required for private school students and teachers. States are required to maintain state support for K-12 education for FY 2020 and FY2021 at the average of the preceding three fiscal years effort, although the Secretary of Education is authorized to waive that requirement. Also \$100 million has been appropriated for school security emergencies under Project SERV.

National Emergency Educational Waivers

The Secretary of Education is authorized to grant certain waivers of ESEA provisions for states and for school districts. State-level waivers are authorized for ESEA sec. 1111(b)(2) and (3) [academic assessments and for newly-arrived ELLs]; sec. 1111(c)(4) [state accountability system]; sec. 1111(d)(2)(C) and (D) [additional targeted support and improvement status]; sec. 1111(h)(1)(C) (i),(ii),(iii)(I),(iv),(v),(vi),(vii), (ix) and (2)(C)(i)(ii) [reports]; and section 421(b) of the General Education Provisions Act [prohibition on transportation of students for desegregation]. State and local waivers are authorized for ESEA sec. 1114(a)(1) [schoolwide program eligibility limits]; sec. 1118(a) and 8521 [maintenance of effort]; sec. 1127 [carryover limits]; sec. 4106(d) [needs assessments for Title IV Support and Enrichment Grants]; sec. 4106(e)(2)(C)(D)&(E) [Title IV set-aside requirements and caps]; and sec. 8101(42) [definition of professional development]. No waivers of IDEA provisions are authorized in federal law.

Delay of Payment of Employer Payroll Taxes

This provision (sec. 2302 of CARES) allows employers and self-employed individuals to defer payment of the employer share of the Social Security tax they otherwise are responsible for paying to the federal government with respect to their employees. The provision requires that the deferred employment tax be paid over the following two years, with half of the amount required to be paid by December 31, 2021 and the other half by December 31, 2022. This provision may allow employers, including school districts participating in the Social Security system, to delay payment of this portion of the payroll withholding tax and invest those funds during the period of delay/deferral in income-producing accounts. [Note: The new Employee Retention Payroll Tax Credit (sec. 2301 of CARES) specifically excludes state and local government agency participation in this tax credit in the same way the earlier payroll tax credit for paid Family, Medical and Sick Leave was prohibited in the Families First Coronavirus Response Act].

<u>Talking Points on Need for Federal Aid to School Districts to</u> Address the Impending Revenue Crisis in K-12 Public Education

- The nation's public schools have been on the front lines serving millions of meals to students, families, and community members every day, and making a rapid transformation from school-based to home-based learning during this deadly and economically destructive pandemic.
- Overall revenue reductions of 15 to 25 percent are projected by some urban school districts for next school year. The nation's school districts are financed overwhelmingly by state and local revenue sources in nearly equal amounts with variations from state to state. Plummeting state and local income tax receipts, sales taxes, corporate taxes, occupancy taxes, and property tax delinquencies challenge our financial capacity to provide traditional levels of education services and retain staff for the upcoming school year.
- Additional costs to acquire technology and curriculum for distance learning, retrain and redeploy staff, as well as absorb the reductions in federal child nutrition reimbursements have exacerbated the impending financial crisis for public schools.
- Underscore your local financial crisis with local examples of potential cuts to school services and staffing due to the revenue falloff, such as: staff furloughs or RIFs, closing neighborhood schools, class size increases, elimination of extracurricular activities and sports, elimination of elective courses, staggered school days or split shifts, etc.
- As aggressive as schools have been in providing instruction at a distance, the amount of time devoted to lessons is less than in a regular classroom and students' ability to interact with their teachers remains limited. When school resumes in the fall (in whatever manner that occurs), vast numbers of students will be entering the next school year substantially behind academically—at exactly the time when budget cuts due to local and state revenue shortfalls will be occurring.
- Four major federal coronavirus response bills totaling nearly \$3 trillion have been enacted since March yet only \$13 billion has been provided for the nation's public schools. In contrast, federal aid for school districts during the 2009-2010 Great Recession reached nearly \$100 billion for financial stabilization, job retention, Title I, IDEA, and school facilities within the \$800 billion federal recovery effort.
- The recent CARES Act bill [sec. 2302(f)] and Families First Coronavirus bill [sec. 7001(e)(4) and 7003(e)(4)] actually <u>barred</u> school districts as governmental employers from receiving the same payroll tax credit subsidies for "employee retention" and for "emergency sick leave and family leave" that the two bills provided to private sector employers. Ironically, private schools can receive these payroll tax credits while public school districts cannot.
- Public school districts need an immediate, substantial, and direct infusion of federal aid of some \$200 billion dollars as detailed by all the major national school organizations, including \$175 billion in education stabilization funds, \$25 billion split between Title I and IDEA, \$2 billion in additional FCC E-Rate support for distance learning, and allowing the same payroll withholding tax credits for school districts as provided for private sector employers.
- Stimulus funds allocated specifically for Title I and IDEA will ensure that districts have earmarked support to help the most at-risk learners to get back on track. And additional Education Stabilization Funds will help ensure that the overall education cuts do not do long-term harm to our students and schools.
- Waivers of federal requirements and flexibility are helpful, but major federal financial support is essential now
- Immediate federal assistance will help America's public schools retain their capacity to serve the nation's school children, families, and communities during the current school closures, the summer months, reopening, as well as for recovery in the upcoming school year.

Senator Mitch McConnell Majority Leader US Senate Washington, DC 20510

Senator Charles Schumer Minority Leader US Senate Washington, DC 20510 Representative Nancy Pelosi Speaker of the House US House of Representatives Washington, DC 20515

Representative Kevin McCarthy Minority Leader US House of Representatives Washington, DC 20515

April 6, 2020

United States Congress Washington, D.C. 20515

Dear Representatives and Senators:

We thank you for your leadership in the COVID emergency response packages to date, and for the clear signal of your support for education with the inclusion of K12 funds within the CARES Act. \$13.5 billion is a step in the right direction.

Our organizations represent the educators providing elementary and secondary education to the nation's public school students and are committed to ensuring any federal support and response include funding critical to states and districts as they navigate never-before-seen demands on their schools, districts, staff and students. As Congress negotiates a fourth emergency supplemental in response to the COVID-19 pandemic, it is imperative any package include significant, robust and flexible funding for our nation's public schools.

The scale and magnitude of COVID emerged quickly and the full impact has yet to be clear. Just weeks into this pandemic, we lack the type of data and economic indicators that can robustly inform the type of recommendations Congress is looking for as it relates to school district need. We know that the unemployment rate is expected to exceed 15 percent, the highest on record since 1940, and well above the high of 10 percent reported during the 2007-09 Great Recession. We know that the American Recovery and Reinvestment Act (ARRA) of 2009 totaled \$100 billion in education funding, with investments in both the state fiscal stabilization fund (\$48.6 billion) and categorical programs (\$10 billion for Title I and \$11.7 billion for IDEA). Given the likelihood that things continue to get worse before they turn around, it is realistic for Congress to acknowledge the need for an unprecedented level of investment, something that cannot—and should not—be done in one fell swoop but in a series of informed, detailed and targeted investments to bolster and support state and local economies as they navigate the wake of COVID-19. Our recommendations, outlined below, are for the next step in a remaining series of supplemental funding bills and are designed to help ensure Congressional investment can be efficiently and effectively leveraged by state and local education agencies.

In a recent survey, more than 1,600 superintendents described the impact of COVID-19 on their district to date. Immediate and initial responses—including increased cleaning costs, limiting large crowd activities, and cancelling of out-of-school activities—quickly pivoted to widespread closures, shifts to online learning, and efforts to ensure that teaching and learning can occur to the greatest extent possible. In their initial reporting about what these changes are, what they mean for district need and cost, and how they are looking to cover these costs in the short term, the pragmatic response is the overarching pressure of the homework gap and the push to use existing state and local funding to cover unplanned expenses:

- More than three-quarters (81%) of superintendents reported that a lack of internet access at home for students (the 'homework gap') is their biggest obstacle in transitioning to fully online learning in light of school closures.
- When asked how their districts will pay for/scale up existing education technology services to deliver curriculum and instruction, respondents replied 'repurposing existing state funding' (33%); 'repurposing existing local funding' (28%); 'realize efficiencies within existing school budget' (26%); 'federal e-rate program' (9%)' 'public/private partnerships' (3%); and 'other' (1%).
- When identifying the costs their districts will incur as part of this initial response to COVID-19 and transition to remote learning, respondents reported 'costs associated with cleaning' (86%); 'costs related to providing food services to students off site' (77%); 'printing/disseminating paper learning materials' (67%); 'increased costs related to expanded online learning' (59%); 'costs related to teacher pay' (53%); 'costs related to professional training for staff' (42%); 'marginal costs with COVID (regularly occurring costs that exceed the annual average)' (35%); 'costs related to higher use of substitute teachers' (15%); and 'other' (5%).

In light of this initial reporting, and paired with the fact that state revenues are projected to fall between 15 and 20 percent and that state funding represents nearly half of education funding, our recommendations for how the federal government can support district work in this realm fall in five buckets:

- Provision of Emergency Funding Directly to States to Support Local Education Agencies: Building off the education stabilization fund included in the CARES Act last month, the fourth emergency COVID response must include an investment of at least \$175 billion for K12 education at the state level to help bolster state budgets, to stimulate the economy in the short term and to invest in education and other essential public services to ensure the long-term economic health of our nation. Mechanisms exist to support quick and efficient allocation of the dollars through states to the local level. Any such funding must include strict protections related to 'supplement, not supplant' and ensure that a high percentage (all dollars except those related to administrative costs) end up at the local level. Particularly, we urge that a certain percentage [at least 90 percent] of funds provided through any education stabilization fund be designated for direct, supplemental subgrants to school districts for K-12 educational services and be distributed to LEAs within 15 days of receipt, again with a limitation on the percentage of subgrant funds withheld for administrative purposes.
- <u>Provision of Support for Federal Categorical Programs</u>: Recognizing the devastation facing state and local economies, it is clear that when schools open their doors, their student population will be significantly needier, with more students coming from families living at or near poverty, and students with disabilities in need of significant supports and services. We urge Congress to provide \$13 billion for IDEA and \$12 billion for Title I, funds to help school districts address the litany of needs for these students, playing catch up in the aftermath of COVID.
- <u>Emergency Funding for Technology for Remote Learning</u>: Outside of and in addition to the fiscal stabilization fund, Congress must include \$2 billion in funding to the E-rate program. As schools and families find themselves in the never-before-found situation of wide-spread home-based learning as schools are closed, it has highlighted a long-documented and persistent inequity as it relates to access to broadband. In the context of our students, this is called the 'homework gap'.
- <u>Infrastructure Funding Must Include Explicit Support for Schools</u>: In a time of economic uncertainty and downturn, federal financial support for state and local efforts to modernize our nation's school facility infrastructure would greatly assist local communities to build, repair and renovate our nation's schools, also creating much needed local jobs in communities across our country.
- <u>Recognize School Districts As Employers: Include Public Employers in Payroll Tax Credit</u>: When it comes to employer subsidies, Congress must treat state and local government—including public school districts, the nation's largest employer—in the same manner as businesses and non-profit agencies. Congress must ensure equitable treatment of state and local government agencies—including school districts—by including them in the benefits of payroll tax credit for "emergency paid leave" for our public employees

affected by the coronavirus. Just like businesses and nonprofit agencies, state and local government employers, including school districts, will be providing emergency family and medical paid leave and emergency paid sick leave. Under the Family First Coronavirus Response Act, unlike businesses and nonprofit agencies, state and local government employers, including school districts, are expressly prohibited from offsetting these additional personnel costs against our employer share of Social Security payroll withholding payments [see section 7001(e)(4) and 7003(e)(4) of H.R. 6201]. Ironically, private and parochial schools, as nonprofit agencies, would financially benefit from the proposed tax credits, along with private sector businesses, while public school districts, along with other state and local government employers, would be excluded from the payroll tax credits. As school districts are the largest employer in the United States collectively, we urge Congress to remove this prohibition and allow eligibility for school districts and other units of state and local governments to receive the payroll credits. Specifically, it is imperative that state and local government agencies are included in the payroll tax credit for paid sick and family leave in Family First Coronavirus Response Act, as well as the employee retention payroll tax credit in the CARES Act.

Thank you for your continued leadership, and we appreciate your attention to these critical education priorities within a broader COVID response.

Sincerely,

AASA, The School Superintendents Association American Federation of Teachers American School Counselor Association Council of Administrators of Special Education Council of Great City Schools National Association of Elementary School Principals National Association of Secondary School Principals National Association of School Psychologists National Association of State Directors of Special Education National Education Association National PTA National School Boards Association

CGCS Summary of Key Provisions of the House HEROES Bill (HR 6800)

The House is poised to pass a 5th coronavirus relief bill likely this week. The massive \$3 trillion bill provides financial assistance to many sectors of the economy, amends some previously enacted provisions of the Family First and CARES Act, and provides federal stimulus checks again to low and moderate-income individuals and their children. A key feature of the new Health and Economic Recovery Omnibus Emergency Solutions Act (HEROES Act) is financial relief for school districts, and state and local governments. The HEROES Act has minimal bipartisan support in the House and will be significantly revised when the further pandemic relief legislation is considered in the Senate.

The HEROES Act provides some \$100 billion for education with \$58 billion for K-12 education and \$42 billion for higher education. An additional \$3 billion would be appropriated to underwrite the shortfall in federal reimbursement for child nutrition programs, and \$1.5 billion would be provided for FCC E-rate expansion for schools and libraries. States would receive some \$500 billion under the House bill, as well as a higher Medicaid matching percentage, and cities and counties would receive some \$375 billion. Whether any of the state or local funding would trickle down to school districts would depend on local circumstance. The House also removed the earlier prohibition on receiving a payroll withholding tax credits for both sick/family paid leave and employee retention for state and local government employers, including school districts – allowing state and local agencies to keep more of their own money, instead of paying their full share of quarterly federal withholding payroll taxes.

The newly titled "State Fiscal Stabilization Fund" (comparable to the CARES Education Stabilization Fund) is slated for \$90 billion, which is less than requested by the Council and the major education groups. Comparatively, the \$58 billion for K-12 is equivalent to approximately 8% of nationwide K-12 public school expenditures. And, it is likely that this House bill (HR 6800) will be the "high water mark" for federal funding since the Senate leadership has not committed to moving forward with any new stimulus package to date.

State and Local Fiscal Relief Funds

A \$540 billion State Fiscal Relief Fund and a \$375 billion Local Fiscal Relief Fund (including \$31 billion for metropolitan cities and \$187 billion for counties). Whether these state and local government subsidies will trickle down to school district is speculative.

State Fiscal Stabilization Fund (Education)

\$90 billion to be appropriated for a State Fiscal Stabilization Fund to states with \$58 billion for K-12 education and \$32 billion for higher education – with another \$10 billion for other specified aid for higher education. The funds are intended to help maintain or restore state and local fiscal support for elementary and secondary education and postsecondary education. State allocations are based on their age 5-24 population for 61 percent of the Fund and their Title I low-income student count for 39 percent of the Fund. States will distribute 65 percent of their allotment to school districts based on their share of the state's regular Title I allocation in the most recent fiscal year. 30 percent of the state's allocation is reserved for higher education. The K-12 funds can be used for any allowable purpose authorized under ESEA, IDEA, Perkins CTE, Adult Education, or McKinney-Vento homeless authorities, as well as for preparedness and response, supporting online learning including technology and internet access, professional development in providing online instruction, assisting students and parents to equitably participate in online instruction, planning and implementing summer learning (including classroom instruction or online learning), needs of individual schools, sanitation supplies, planning for upcoming months, planning and coordination during closures, providing technology for online learning for all students, support the needs of various groups of at-risk students, addressing learning gaps related to school closures, supporting continuing student engagement through social and emotional learning, and other activities that are necessary to maintain the operation of and continuity of services including maintaining employment of existing personnel and reimbursement for eligible costs incurred during the national emergency.

The House bill also includes new legislative language designed to better direct the implementation of congressional intent. The bill includes additional provisions relating to State-level maintenance of effort, including that States shall maintain the percent of total spending on elementary, secondary, and postsecondary education in fiscal year 2019 for fiscal years 2020, 2021, and 2022, and that a State's application shall include assurances that the State will maintain support for elementary and secondary education in fiscal year 2020, fiscal year 2021, and fiscal year 2022 at least at the level of such support that is the average of such State's support for elementary and secondary education in the 3 fiscal years preceding the date of enactment of this Act (without a waiver authorization). Additionally, each state's application for funding must include baseline data on state spending in these areas.

The bill also amends the CARES Act equitable services provision for private school students and teachers to be provided in the same manner as under section 1117 of Title I by adding specific references to how proportionate share calculations are made under Title and adds as prohibitions against the Education Department establishing any priorities or preferences or limiting the uses of funds not otherwise specified in the Act.

The bill maintains the CARES Act language that states and school districts receiving funds must continue to pay their employees and contractors "to the greatest extent practicable" during the disruptions and closures. A new proviso also requires a state assurance that that all students with disabilities are afforded their full rights under IDEA, including all rights and services outlined in individualized education programs.

<u>\$3 Billion for School Meals Reimbursement Shortfalls</u>

The House bill recognizes that the number of school meals and accompanying federal reimbursements provided for pickup or delivery during school closures is significantly less than during normal school cafeteria operations. Yet, the personnel and other fixed costs of school food service programs continue. The \$3 billion provided in the HEROES Act would assist with the shortfall in typical meal reimbursements by covering 55% of the 2019 reimbursements for March, April, May and June (a basic fixed cost national estimate) adjusted by the reimbursement currently received for meals provided through pickup and delivery operations.

<u>\$1.5 Billion Additional FCC E-Rate Funding</u>

The bill provides \$1.5 billion in supplemental funding for the FCC's E-Rate program for equipment and Wi-Fi connections for school and library programs. The transition to remote learning by the nation's public schools during the pandemic has highlighted the FCC's prohibition on supporting home-based devices and connectivity despite the obvious need for internet access for all students to complete homework assignments and meet current academic standards. The \$1.5 billion in supplemental funding will allow for device and equipment acquisition as well as the support costs associated of connecting students to the internet at home.

Payroll Withholding Tax Credit Allowed for School Districts, States and Localities

The prohibition barring state and local government agencies, including school districts from participating in the same Payroll Withholding Tax Credits that private sector employers were afforded is been repealed in the HEROES Act. The Council had objected to this inequitable treatment of school districts as major employers in both the Family First coronavirus relief bill for sick and family leave payroll tax credits and the CARE Act provision for employee retention payroll tax credits. The revised provisions correct the current circumstances where private schools as employers can claim these tax credits while public schools cannot. This HEROES Act provision would allow school districts to retain a portion of their own funds that would have otherwise been paid to the federal government in quarterly payroll tax withholding payments. This is an important improvement that warrants direct advocacy with your Senate delegation.

Troubled Pension System Financial Assistance

The HEROES Act authorizes the federal Pension Benefit Guarantee Commission (PBGC) to provide financial assistance to troubled pension programs. The economic downturn has affected the investments and solvency of many statewide pension system that were already underfunded. The PBGC is directed to help shore up these troubled pension programs.

Perkins CTE Carryover Waiver and No Special Education Waivers

The bill allows for unspent Perkins CTE funds to be carried over into the upcoming program year. No waivers were provided for IDEA.

New Essential Worker \$13/hour Supplemental Pay Program

The bill authorizes the Treasury Department to operate a new grant program to pay essential workers (on-site, providing in-person services, cleaning, transportation, warehousing, etc., including education, but not teleworkers) a \$13/hour supplement. This is a \$180 billion program that would cover a wide range of worker.

Great City Schools Legislative Liaisons Conference Call – June 1, 2020

Coronavirus Relief Legislation Status Summary

- A fifth coronavirus recovery and relief bill passed in the House in mid-May (H.R. 6800) and is awaiting action in the Senate hopefully in June.
- The \$3 trillion House-passed HEROES Act includes some \$1 trillion in financial relief for states, local governments, and school districts.
- The House HEROES Act contains \$58 billion in K-12 fiscal stabilization funds with broad allowable uses, as well as \$1.5 billion for expanded FCC E-rate support for equipment and Wi-Fi connectivity, and \$3 billion to cover the shortfall in school meal reimbursements for the current fixed costs of school meal programs
- The House HEROES Act also contains \$540 billion for State fiscal relief and \$375 billion in city and county fiscal relief.
- In combination, the \$150 billion in State fiscal relief under the CARES Act in March and the \$540 billion in State fiscal relief under the House-passed HEROES Act in May would underwrite the vast majority of the currently projected State revenue losses (estimated at \$650 billion by the Center for Budget and Policy Priorities). At this level of federal aid to States, some significant allotment of these State relief funds <u>should</u> reasonably be shared with the state's public schools.
- Since \$740 billion was spent on the nation's school in the previous school year, the \$13 billion in the March CARES Act and the \$62 billion in the pending HEROES Act equates to approximately 10% of national K-12 expenditures annually.
- If public schools project an aggregate 20% revenue loss from both state revenue source and local revenue source reductions for the upcoming school year, then the pending direct federal K-12 financial assistance of \$75 billion would underwrite about half of the public school's revenue shortfall.
- By directly covering only half the financial shortfall under the pending federal legislation, the nation's schools would be left in desperate financial condition while trying to absorb additional costs associated with reopening, distance learning activities, social distancing on school buses and in classroom, and recouping student academic performance.
- While the House-passed HEROS Act included language designed to negate the Education Department's private school equitable services funding guidance/interpretation, how to allot funds for private school services for both the CARES Act \$13 billion and any additional HEROES Act funds will be up for negotiation in any final version of the next supplemental funding measure.

Summary of Key Provisions Senate Majority HEALS Act Legislative Package

July 28, 2020

The Senate majority leadership unveiled a series of bills to provide some \$1 trillion in additional coronavirus relief nearly two and a half months after the House passed its \$3 trillion HEROES Act. The package of bills (titled HEALS Act) includes: an <u>emergency supplemental</u> appropriations bill containing \$105 billion in education funds (\$70 billion for K-12 schools along with physical reopening conditions and a statewide private school funding reservation); <u>a new</u> federally-funded Education Freedom Scholarship Program authorization; a Back to School and Work bill with health and higher education provisions as well as K-12 and other waiver extensions; a Child Care bill; a Workers, Family, and Employee Assistance bill including unemployment insurance, new individual rebates checks, TANF emergency funds, a series of tax credits (without State and local government and school eligibility); and national liability protection for businesses, health providers, schools, and colleges.

The HEALS Act education appropriations are barely half of the requested \$200 billion in funding relief by the major K-12 education groups back in April. There is no equivalent State Government relief fund or Local Government Relief fund as in the House HEROES Act, although various categorical aid provisions for state and local governments in public health, social services, unemployment insurance, etc. are included.

The \$105 billion in Education Stabilization Fund appropriations breaks down as follows:

- 5% for the Governors Emergency Education Relief (GEER)
- 67% (\$70 billion) for the Elementary and Secondary School Emergency Relief (ESSER)
- 28% (\$29 billion) for Higher Education Emergency Relief

ESSER funds include the following provisions and restrictions:

1) Allocated to States based on the Title I formula and to school districts based on most recent fiscal year share of Title I allocations within the state

- One-third of funds allocated to all Title I eligible school districts expeditiously
- Two-thirds of funds allocated based on physical "in-person" reopening conditions:
 - a full allocation from the two-thirds provided if at least 50% of student present in schools for at least 50% of the school week
 - a prorated portion of the two-thirds determined by the Governors for schools with some physical reopening
 - \circ no eligibility for schools without any physical reopening

2) State set-aside funds for private schools based on the statewide proportion of pre-Covid private school enrollment

• a private school receives an allocation based on its proportion of low-income private school enrollment within the state

• same basic physical "in-person" conditions for full, pro rata, and no allocation applicable for two-thirds of the set-aside

3) Maintenance of Effort for State education funding based on the proportionate level of state support relative to overall FY19 state spending

\$10 billion is provided for the Child Care block grant

The Council will provide updates as further information and analysis of the provisions of the HEALS Act package are available. There appears to be no school district or other government employer access to the Employee Retention Tax Credit (ERTC) specifically prohibited in the CARES Act, and an analogous prohibition is included for the new Healthy Workplace Tax Credit.

<u>This package of bills is unsupportable</u> based on insufficient education funding, excessive and unworkable federal funding conditions, and the unprecedented federal financial aid to private schools.

Senator Mitch McConnell Majority Leader U.S. Senate Washington, D.C. 20510

Senator Charles Schumer Minority Leader U.S. Senate Washington, D.C. 20510

Representative Nancy Pelosi Speaker of the House U.S. House of Representatives Washington, D.C. 20515

Representative Kevin McCarthy Minority Leader U.S. House of Representatives Washington, D.C. 20515 Senator Richard Shelby Chairman, Appropriations Committee U.S. Senate Washington, D.C. 20510

Senator Patrick Leahy Vice Chairman, Appropriations Committee U.S. Senate Washington, D.C. 20510

Representative Nita Lowey Chairwoman, Appropriations Committee U.S. House of Representatives Washington, D.C. 20515

Representative Kay Granger Ranking Member, Appropriations Committee U.S. House of Representatives Washington, D.C. 20515

July 30, 2020

Dear Congressional Leadership,

On behalf of the undersigned organizations, representing the nation's educators and education leaders—those doing the critical, challenging work of keeping our nation's students learning and supported in these unprecedented circumstances—we write to share our response to the Health, Economic Assistance, Liability Protection and Schools (HEALS) Act.

We commend the Senate majority for taking action to introduce an additional emergency supplemental bill in response to the continued impact of the COVID-19 pandemic on state and local economies, and for including funding dedicated to K-12 education. However, the bill misses the mark and falls far short of the needs facing our nation's schools, which our groups have been clear to repeatedly communicate and highlight. We welcome the chance to work with the Senate to advance a bipartisan bill that can be signed into law and provide quick, efficient and effective relief for schools and communities across the country.

The proposed funding level of \$105 billion for education allocates just \$70 billion in funding dedicated to K-12 education, less than half of what many education groups have called for as the necessary baseline amount¹. We urge the Senate to significantly increase the funding level for K-12 education to ensure the long-term economic health of our nation and to help schools safely start the academic year and remain running for staff and students so our economy can reopen safely and successfully.

We also call on the Senate to include \$4 billion in one-time emergency funding to the Federal Communications Commission's E-Rate program to quickly and efficiently help support public and private schools and public libraries in their efforts to ensure students have internet access at home this coming school year. The reality of remote learning is that between 15 and 16 million students—many from rural towns or low-income families—lack the access to the technology and connectivity they need to learn from home during the COVID-19 pandemic.

In addition, the funding mechanisms under HEALS are much less flexible and more prescriptive than previous emergency COVID-19 relief packages. This will unnecessarily complicate and limit the ability of school districts to safely open schools consistent with local conditions and needs. We are strongly opposed to the conditions placed on the Elementary and Secondary School Emergency Relief Fund (ESSER Fund) and the idea that local school

¹ Edu Group Funding Letter, April 6, 2020

districts would have to physically open—regardless of community COVID threat and spread, and the potential effects upon public health—in order to receive full ESSER funding.

We also oppose the idea that the federal role is to determine a one-size-fits-all formula under which all schools must physically open. How and when to reopen schools safely is the most local of considerations, and communities and families across the country are and have been deeply engaged in thoughtful planning in this regard.

The federal government has never been a "national school board," and the HEALS Act should empower and support state and local education leaders and educators in their work to determine when and how to safely reopen schools in person based on state and local health data, science and information. For these reasons, and to better ensure continuity between these supplemental funds and those of the Coronavirus Aid, Relief, and Economic Security (CARES) Act and other federal emergency supports, the next ESSER Fund should be revised to mirror ESSER as approved by the Senate under the CARES Act.

We also oppose the inclusion of language to create a national voucher program by authorizing the Education Freedom Scholarships, especially as this would provide certain states with an advantage over others. Public dollars should remain in public schools, and the use of an emergency supplemental appropriation to accomplish a partisan privatization agenda is opportunistic. The authorization should be removed from the bill and efforts to support education and schools must prioritize the nation's public schools and the more than 50 million students they serve each day.

In addition, we are disappointed the HEALS Act failed to ensure that allocation of federal emergency resources to support needy students in private schools is premised on equity. Many of the groups supporting this letter delivered a clear response² to Secretary DeVos' flawed interpretation of equitable services under the CARES Act, a misinformed reframing of policy aimed at securing a disproportionately large share of federal funding for private schools. It is imperative that any final emergency supplemental require 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. SEAs and LEAs have decades of experience in implementing section 1117 and are fully prepared to meet its requirements.

Finally, the proposed Senate bills fail to adopt the HEROES Act provisions providing access for school districts (and other state and local governmental employers) to the same employer payroll withholding tax credits that private sector employers and even private schools can currently claim. Moreover, the new bills similarly bar school districts from participating in the Senate's Healthy Workplace Tax Credits. School districts again are seeking equitable treatment by Congress in pandemic relief measures.

We stand ready to work with you on this important investment.

Sincerely,

AASA, The School Superintendents Association American Federation of Teachers American School Counselor Association Association of Educational Service Agencies Association of School Business Officials International Council of Administrators of Special Education Council of Great City Schools National Association of Elementary School Principals National Association of Secondary School Principals National Association of State Directors of Special Education

² Edu Group Equitable Services letter, May 5, 2020

National Education Association National PTA National Rural Education Advocacy Consortium National Rural Education Association National School Boards Association

CC: Senator Lamar Alexander Senator Patty Murray Representative Bobby Scott Representative Virginia Foxx

<u>Talking Points for Senate Consideration on Fifth COVID-19 Stimulus Bill:</u> Significant Federal Aid Needed to Address the Impending Financial Crisis in K-12 Public Education

- Without further federal assistance, a combination of costly factors are driving school districts into a grave financial crisis that will affect a generation of K-12 students and eclipse what schools experienced during The Great Recession.
 - Overall revenue reductions of 15 to 25 percent are projected for some urban school districts in the upcoming school year. Plummeting state and local income tax receipts, sales taxes, corporate taxes, occupancy taxes, and property tax delinquencies will challenge our financial capacity to provide traditional levels of education services and retain staff for the upcoming school year and beyond. Some districts may be held harmless initially, but midyear cuts to state and local budgets are expected in 2021 and in the future.
 - After the school closures in March, district budgets were quickly strained by the additional costs that were required to acquire technology and curriculum for distance learning, retrain and redeploy staff, and absorb reductions in federal child nutrition reimbursements for off-site meal services.
 - Schools districts have also been working tirelessly since the spring to plan for the re-opening of schools, despite uncertainly about the pandemic's course. The exact nature of each district's re-opening will depend on input from state and local public health officials, and what is safest for our students, teachers, and school communities. Both virtual education and in-person instruction involve substantial costs, as does the possibility of moving seamlessly between the two approaches. Preparing to respond to changing conditions and readying schools, students, and staff for multiple options is extremely costly and will exacerbate the financial crisis for public schools without further federal assistance.
- Four major federal coronavirus response bills totaling nearly \$3 trillion have been enacted since March, yet only \$13 billion was provided for the nation's public schools in the CARES Act. This amount is wholly insufficient based on the needs of schools, and ongoing delays in releasing funds and the debate over equitable services for private school students means even less funds may eventually reach our district. (Also see this Ed Week article explaining why CARES Act spending has been slow, nothing to do with school needs: https://tinyurl.com/ybvfzcur)
- When school resumes in the fall (in whatever manner that occurs), vast numbers of students will be entering the next school year substantially behind academically—at exactly the time when budget cuts due to local and state revenue shortfalls will be occurring. The education funding provided in the House HEROES Act was a good start, but was still insufficient to meet the needs of schools nationwide.
- Public school districts need an immediate, substantial, and direct infusion of federal aid along the lines of the \$200 billion dollars requested by major national school organizations in April and Senator Murray in the Coronavirus Child Care and Education Relief Act (CCCERA). This includes \$175 billion in education stabilization funds, additional E-Rate funding to support student connectivity, and \$25 billion to be split between Title I and IDEA to ensure that districts have earmarked support to help the most at-risk learners to get back on track.
- We also request that Congress allow school districts access to the same payroll withholding tax credits that have been provided for private sector employers. Both the CARES Act [sec. 2302(f)] and the Families First Coronavirus bill [sec. 7001(e)(4) and 7003(e)(4)] barred school districts as governmental employers from receiving the same payroll tax credit subsidies for "employee retention" and for "emergency sick leave and family leave" that the two bills provided to private sector employers. Ironically, private schools can receive these payroll tax credits while public school districts cannot.
- Our district agrees with congressional intent to provide equitable services to Title I-eligible private school students and schools with CARES Act funding, but Congress must oppose the siphoning of any COVID-19 relief funds to wealthy private schools, or the creation of vouchers or any similar private school subsidies.
- Substantial and immediate federal assistance is needed to help America's public schools not only survive the financial crisis caused by this pandemic but rise to the challenge of serving our students successfully in this adverse environment.

Key Education Provisions of Problem Solvers Caucus (Bipartisan Moderates) Relief Proposal

September 2020

The bipartisan congressional Problem Solvers Caucus released an outline of a compromise COVID-relief proposal that is smaller in scope than the House-passed Heroes Act but larger than the Senate Republican proposals. Nonetheless, neither Republican nor Democratic leadership seem inclined to support this \$1.5 billion proposal. A few White House statements were generally supportive of this effort to propose a compromise package. The education provisions of the new proposal include:

- \$100 billion for elementary and secondary education
- \$30 billion for institutions of higher education
- \$15 billion for child care providers (\$10 billion for providers and \$5 billion for the Child Care and Development Block Grant)
- \$12 billion for broadband access
- \$500 billion for state and local aid, and
- Postsecondary student loan forbearance extended through the end of the year

Summary of Senate Majority "Skinny" Immediate Relief Bill

September 2020

Senate Majority Leader Mitch McConnell unveiled a \$500 billion "skinny" coronavirus recovery bill (Immediate Relief for Families, Schools, and Small Businesses) with no bipartisan support and little chance of passage. The skinny bill pales in comparison to the \$3 trillion House-passed HEROES Act back in May or the \$1 trillion Senate Republican proposal from July.

The proposed measure includes:

- covid-19 liability protections for businesses and schools;
- some additional funds for pandemic testing, tracing, and treatment;
- some additional funds for farms and fisheries;
- an extra \$300 per week of unemployment insurance through December;
- additional funding for the Payroll Protection Program for small businesses (including private and charter schools);
- some additional child care grant funding;
- Education Stabilization Grants of \$70 billion with the same in-person reopening conditions and private school state-level reservation of funds as proposed back in July;
- an expansion of charitable tax deductions and tax credits for contributions for State private school scholarship (voucher) programs; and
- a one-time "authorization" of federal grants to state voucher programs.

The proposed legislation does <u>not</u> include any recovery rebate payments to individuals or any state or local government relief funds.

The "skinny" bill may be considered by the Senate. The Majority Leader has been trying to secure Republican votes for the measure, although without some Senate Democratic support an attempted floor vote may be futile. Obviously, <u>the bill is not supportable</u>. Meanwhile, negotiations between the Administration and Congressional leadership on a compromise fifth coronavirus bill continue without any reported breakthroughs.

Summary of Key Provisions of the House Updated HEROES Act 2.0

September 28, 2020

The House announced an updated 5th coronavirus relief bill with a reduced \$2.2 trillion price tag. The updated HEROES Act provides financial assistance to many sectors of the economy, amends some previously enacted provisions of the Family First and CARES Act, and provides a new round of federal stimulus checks to low and moderate-income individuals and their families. Additional funding is also provided for dozens of federal programs across multiple federal agencies, including various pandemic health initiatives and the Postal Service. The bill extends the supplemental \$600 weekly Unemployment Insurance payments, as well as the Payroll Protection Program for small businesses and creates a new Restaurant Revitalization Program. Beyond funding measures, there are also hundreds of pages of other requirements and revisions to other federal laws, and eviction and foreclosure protections as well.

Financial relief for school districts is substantially increased, while aid to state and local governments is reduced to nearly half the original proposal from May. Additional support is provided for selected industries and for emergency operations by FEMA, including personnel protective equipment for schools and others. Additional funding is provided for election security and operations to protect the integrity of the upcoming November elections. Census non-response activities are extended by a month and the Census congressional redistricting data reporting is extended by 120 days. The bill is expected to garner little bipartisan support in the House but is designed to encourage further negotiations on a compromise 5th relief package with the Senate and the White House.

The new legislation substantially expands aid for education totaling \$225 billion. \$208 billion is directed to the State Fiscal Stabilization Fund for education of which \$175 billion is allotted for K-12 education and \$27 billion for higher education, as well as \$4 billion for governors and \$2 billion for BIA. Additional funding is provided to USDA to underwrite the shortfall in federal reimbursements for school meal and related programs. A new \$5 billion would be provided for Emergency School Facility grants to support improvements in school health infrastructure including ventilation systems. And an additional \$11.7 billion would be provided to selected types of higher education institutions, including Historically Black and Minority Serving institutions and private non-profit institutions. A \$50 billion Child Care Stabilization Fund is created and \$7 billion is provided for the Child Care Block Grant, as well as \$1.7 billion for Head Start. \$12 billion would be provided for broadband and device support for schools and libraries, and \$3 billion for emergency home connectivity.

States would receive some \$238 billion in relief under the House bill, as well as a higher Medicaid matching percentage for federal FY21, and cities and counties would receive \$179 billion. The House also removed the earlier prohibition on receiving a payroll withholding tax credits for both sick/family paid leave and employee retention for state and local government employers, <u>including school districts</u> – allowing state and local agencies to keep more of their own money, instead of paying their full share of quarterly federal withholding payroll taxes.

State and Local Fiscal Relief Funds

\$436 billion in state and local recovery aid is provided with a \$238 billion State Coronavirus Relief Fund and a \$179 billion Local Coronavirus Relief Fund (\$89.5 billion for municipalities and \$89.5 billion for counties). Funds can be used for COVID-related expenses, to replace foregone revenues not projected by January 31, 2020, or to respond to negative economic impacts of COVID. Funds also can be used for education although only a few states made substantial education expenditure with their CARES Act state relief funds. Funds remain available until expended providing flexibility over the next several years, and the CARES Act relief funds now may be expended through December 31. 2021. Washington DC would be treated like a state, rather than a territory under this bill as well as under the CARES Act. Funds would be awarded directly from Treasury within 30 days of enactment.

State Fiscal Stabilization Fund (Education)

\$208 billion would be appropriated for a State Fiscal Stabilization Fund with \$175 billion for K-12 education and \$27 billion for higher education. Another \$11.7 billion is appropriated for other specified aid for higher education and \$5 billion for K-12 Emergency School Facility Grants for health-related infrastructure improvements. The bill includes no conditions on the mode of school reopening in order to qualify for funds. The Stabilization funds are intended to help maintain or restore state and local fiscal support for elementary and secondary education and postsecondary education. State allocations are based on their age 5-24 population count for 61 percent of the Fund and their Title I low-income student count for 39 percent of the Fund. States will distribute 85 percent of their allotment to school districts based on their share of the state's regular Title I allocation in the most recent fiscal year. 13 percent of the state's allocation is reserved for higher education.

The K-12 funds can be used for any allowable purpose authorized under ESEA, IDEA, Perkins CTE, Adult Education, or McKinney-Vento homeless authorities, as well as for preparedness, response and mitigation activities related the spread of infectious disease in coordination with health authorities; supporting online learning including technology, assistive technology, and internet access; professional development in providing online instruction; assisting students and parents to equitably participate in online instruction; planning and implementing summer learning (including classroom instruction or online learning); planning and coordination for long-term closures; providing technology for online learning for all students; supporting the needs of various groups of at-risk students including through Title III authorized activities: addressing learning gaps related to school closures: supporting continuing student engagement through social and emotional learning; and other activities that are necessary to maintain the operation of and continuity of services including maintaining employment of existing personnel and reimbursement for eligible costs incurred during the national emergency.

The bill includes additional provisions relating to State-level maintenance of effort, including that States shall maintain the percent of total spending on elementary, secondary, and postsecondary education in FY2019 for FY 2020, 2021, and 2022; state assurances that the State will maintain support for elementary and secondary education in FY2020, 2021, 2022 at least at the level of support that is the average of such State's support for elementary and secondary education in the 3 fiscal years preceding the date of enactment of this Act; states must maintain or exceed the per pupil funding for K-12 education in FY2019 or the proportion of state funding

for K-12 education in FY2019 for FY20, 2021 and 2022; and the state must not reduce funding for high-need school districts (defined as those above the state median percentage of economically disadvantaged students) such that the per pupil reduction in state funds is below the overall per pupil reduction for all school districts. Additionally, each state's application for funding must include baseline data on state spending for the above requirements.

The bill includes no equitable services provision for private school students and teachers. The bill also adds as prohibitions against the Education Department establishing any priorities or preferences or limiting the uses of funds not otherwise specified in the Act.

The bill maintains the CARES Act language that states and school districts receiving funds must continue to pay their employees and contractors "to the greatest extent practicable" during the disruptions and closures. And the bill includes the earlier HEROES Act proviso requiring a state assurance that that all students with disabilities are afforded their full rights under IDEA, including all rights and services outlined in individualized education programs. An additional provision requires a state assurance not to displace CBAs and maintain wages, benefits, terms, and conditions of CBAs.

<u>\$5 billion Emergency School Facility Grants</u>

\$5 billion in Emergency School Facility grants would be provided by the Secretary of Education to SEAs based on a state application within 30 days of enactment and a funding decision within another 30 days. State allocations are based on the most recent year's Title I Part A allotments, and subgrants to school districts are to be provided within 60 days of the state application approval by the Secretary. States may reserve ½% for administration. Subgrants to school districts will be allocated to LEAs with the highest percentage of students eligible for the free and reduced-price lunch program that have public school facilities with the highest needs relating to the coronavirus as determined by the state. A qualified LEA must apply to the state describing the coronavirus facility needs of the LEA and an estimated cost of addressing those needs. Funds may be used for: school facility repairs and improvement to reduce the risk of virus transmission and exposure and support student health needs; improving indoor air quality systems including windows and door replacements; water systems; electrical systems; providing for outdoor instruction and physical distancing; training; and planning, management, design, repair, renovation and construction for above uses. School districts receiving funds must prioritize facilities with the most significant needs related to coronavirus conditions.

School Meals Reimbursement Shortfalls

The House bill recognizes that the number of school meals and accompanying federal reimbursements provided for pickup or delivery during school closures or hybrid operations is significantly less than during normal school cafeteria operations. Yet, personnel and other fixed costs of school food service programs continue. The bill provides reimbursements to States to cover the shortfall in school meal and supplement reimbursements and for CCAFP reimbursements based on 55% of the 2019 reimbursements for the month of the preceding year (a basic fixed cost national estimate) adjusted by any reimbursement currently provided by USDA under its meal programs and waivers. The reimbursements for school food authorities would be distributed by the State.

\$15 Billion in Broadband, Connectivity, Wifi Hotspots, and Device Support

The bill provides \$12 billion in supplemental funding for the E-Rate program for equipment, connected devices, Wi-Fi connections, and advanced telecommunications services for school and library programs. The transition to remote learning by the nation's public schools during the pandemic has highlighted the obvious need for internet access and equipment for all students to complete homework assignments and meet current academic standards, particular for low-income students. The new bill would also support \$3 billion for emergency home lifeline connectivity through internet access in high need communities.

Payroll Withholding Tax Credit Allowed for School Districts, States and Localities

The prohibitions barring state and local government agencies, including school districts, from participating in the same Payroll Withholding Tax Credits that private sector employers were afforded is repealed in this version of the HEROES Act as well. The Council had objected to this inequitable treatment of school districts as major employers in both the Family First coronavirus relief bill for sick and family leave payroll tax credits and the CARES Act provision for employee retention payroll tax credits. The revised provisions would correct the current circumstances where private schools as employers can claim these tax credits while public schools cannot. These provisions would allow school districts to retain a portion of their own funds that would have otherwise been paid to the federal government in quarterly payroll tax withholding payments. This is an important improvement that warrants direct advocacy with your House and Senate delegation.

Representative Nancy Pelosi Speaker of the House U.S. House of Representatives Washington, D.C. 20515

Representative Kevin McCarthy Minority Leader U.S. House of Representatives Washington, D.C. 20515 Representative Nita Lowey Chairwoman, Appropriations Committee U.S. House of Representatives Washington, D.C. 20515

Representative Kay Granger Ranking Member, Appropriations Committee U.S. House of Representatives Washington, D.C. 20515

October 1, 2020

Dear House Leadership,

On behalf of the undersigned organizations representing the nation's educators and education policy leaders those doing the critical, challenging work of keeping our nation's students learning and supported in these unprecedented circumstances—we write to affirm our continued commitment to ensure that any federal support and response include funding critical to states and districts as they continue to navigate never-before-seen demands. As Congress negotiates a fifth emergency supplemental in response to the COVID-19 pandemic, it is imperative any package includes significant, robust and flexible funding for our nation's public schools, staff and students.

Thank you for your leadership in the COVID emergency response packages to date, and for the clear signal of your support for education with the inclusion of \$175 billion in K12 funds within the revised HEROES Act. The revised proposal represents a significant investment commensurate with the ongoing work and efforts of schools to open their doors and safely support staff and student teaching and learning in the midst of the pandemic.

Collectively, our groups have consistently advocated for the needs of our nation's public schools. Our recommendations for how the federal government can support district work in this realm fall in five areas, many of which are reflected in the latest House proposal:

- <u>Provision of Emergency Funding Directly to States to Support Local Education Agencies</u>: Building off the education stabilization fund included in the CARES Act earlier this year, the fifth emergency COVID response must include an investment of at least \$175 billion for K12 education at the state level to help bolster state budgets, stimulate the economy in the short term and invest in education and other essential public services to ensure the long-term economic health of our nation.
- <u>Provision of Support for Federal Categorical Programs</u>: Recognizing the devastation facing state and local economies, it is clear that when schools open their doors, their student population will be significantly needier, with more students coming from families living at or near poverty and students with disabilities in need of significant supports and services. We urge Congress to provide \$13 billion for IDEA and \$12 billion for Title I, funds to help school districts address the litany of needs for these students, playing catch up in the aftermath of COVID.
- <u>Emergency Funding for Technology for Remote Learning</u>: Outside of and in addition to the fiscal stabilization fund, Congress must make a significant investment in funds for connectivity, similar to the \$12 billion investment in the revised HEROES Act for the E-rate program. As schools and families find themselves in the never-before-found situation of wide-spread home-based learning as schools are closed or hybrid, it has highlighted a long-documented and persistent inequity as it relates to access to broadband. In the context of our students, this is called the "homework gap".
- <u>Infrastructure Funding Must Include Explicit Support for Schools</u>: In a time of economic uncertainty and downturn, federal financial support for state and local efforts to modernize our nation's school facility infrastructure would greatly assist local communities to build, repair and renovate our nation's schools, including upgrades to ventilation systems consistent with health and safety protocols to mitigate COVID.

<u>Recognize School Districts As Employers: Include Public Employers in Payroll Tax Credit</u>: When it comes to
employer subsidies, Congress must treat state and local government—including public school districts, the
nation's largest employer—in the same manner as businesses and non-profit agencies by including them
in the benefits of payroll tax credit for "emergency paid leave" for our public employees affected by the
coronavirus. Just like businesses and nonprofit agencies, state and local government employers, including
school districts, will be providing emergency family and medical paid leave and emergency paid sick leave.

Thank you for your leadership and this revised proposal, which can be used as a first step in a renewed push for bipartisan support for a fifth COVID emergency supplemental. We appreciate your attention to these critical education priorities within a broader COVID response.

Sincerely,

AASA, The School Superintendents Association American Federation of School Administrators American Federation of Teachers Association of Educational Service Agencies Association of School Business Officials International Council of Administrators of Special Education **Council of Chief State School Officers** Council of Great City Schools International Society for Technology in Education National Association of Elementary School Principals National Association of School Psychologists National Association of Secondary School Principals National Association of State Boards of Education National Association of State Directors of Special Education National Education Association National PTA National Rural Education Advocacy Consortium National Rural Education Association National School Boards Association

CC: Senator Mitch McConnell Senator Chuck Schumer Senator Richard Shelby Senator Patrick Leahy Senator Lamar Alexander Senator Patty Murray Senator Roy Blunt Representative Bobby Scott Representative Virginia Foxx

SCHOOL BOARD RESOLUTIONS

ANCHORAGE SCHOOL DISTRICT ASDR 2019-2020-07

RESOLUTION IN SUPPORT OF ADDITIONAL FEDERAL EDUCATION FUNDING FOR OUR NATION'S PUBLIC SCHOOLS.

WHEREAS, the COVID-19 pandemic is a monumental and unprecedented challenge, emerging quickly and demanding an immediate overhaul of the instructional plans and strategies of school systems across the country; and

WHEREAS, the nation's public schools remain committed to delivering high-quality instruction while ensuring the health and safety of our students and staff; and

WHEREAS, this challenge will persist and likely grow as COVID-19 affects our economy and destabilizes funding for public schools; and

WHEREAS, reputable economists have predicted the end of the nation's economic expansion and forecast a recession that may be deep and long-lasting; and

WHEREAS, any nationwide recession is likely to affect urban areas and their poorest citizens most severely; and

WHEREAS, the numbers of unemployment claims in the nation's big cities are already the highest we have seen since the Great Depression and may only grow; and

WHEREAS, urban public-school systems across the country are already incurring substantial unexpected costs to provide meal services and purchase and deploy digital instructional devices; and

WHEREAS, urban public-school systems are facing difficult decisions about how to allocate dwindling financial resources to sustain high-quality instruction and other essential services for students and families over the next several years; and

WHEREAS, revenue shortfalls will unequivocally result in budget cuts and personnel reductions in urban school systems;

WHEREAS, these budget cuts will be happening at the same time that urban public school systems will be working to address the immense instructional challenge of unfinished learning that many students will face coming out of this school year; and

WHEREAS, the American Recovery and Reinvestment ACT (ARRA) of 2009 provided \$100 billion in education funding with investments in both the education stabilization fund and various federal categorical programs for public schools, such as Title I and the Individuals with Disabilities Act; and

WHEREAS, Congress followed ARRA in 2010 with \$10 billion in additional funding for the Education Jobs Fund to help school districts retain existing employees, recall former employees, and hire new ones; and

WHEREAS, by comparison the recent Coronavirus Aid, Relief, and Economic Security (CARES) Act provides only \$13 billion for education stabilization funding, which is less than half of one percent of the total \$2.2 trillion relief provided in the CARES Act and is far below the investment that the federal government provided in 2009 and 2010 in ARRA and the Education Jobs fund; and

WHEREAS, public education is one of the largest employers of any organization, public or private, in the nation; and

WHEREAS, published economic research has demonstrated a strong connection between a country's GDP growth and its investments in elementary and secondary education; and

WHEREAS, research has repeatedly found a strong causal relationship between levels of schooling and wages that individuals earn over a lifetime; and

WHEREAS, for public schools to thrive and for our students to realize a bright and productive future, the federal government needs to make a substantial new investment in our wellbeing; and

WHEREAS, the Council of the Great City Schools, the National Education Association, the American Federation of Teachers, the National School Boards Association, the American Association of School Administrators, and the National Parent Teachers Association, and others have called for some \$200 billion in relief for the nation's public schools; and

WHEREAS, this level of funding is the minimum needed by the nation's urban public schools to sustain and accelerate their academic achievement trends over the past decade, including gains in reading and math achievement that outpace the national average;

NOW, THEREFORE, BE IT RESOLVED that the Anchorage School District calls on its Congressional delegation, including our United States Senators and House of Representative members, to advocate for and approve additional federal education funding for our nation's public schools.

PASSED AND APPROVED by the Anchorage School District Board on this 12th day of May, 2020.

ANCHORAGE SCHOOL BOARD

Elisa Vakalis, School Board President Eller Vakalis

Margo Bellamy Dave Donley Alisha Hilde Andy Holleman Starr Marsett Deena Mitchell

Dr. Deena Bishop, Superintendent

RESOLUTION BY THE BOARD OF EDUCATION OF THE CITY OF CHICAGO URGING THE UNITED STATES CONGRESS TO PROVIDE ADDITIONAL FEDERAL EDUCATIONAL FUNDING FOR PUBLIC SCHOOLS TO MITIGATE THE ADVERSE FINANCIAL EFFECTS OF THE COVID-19 PANDEMIC ON PUBLIC SCHOOLS

WHEREAS, the COVID-19 pandemic is a monumental and unprecedented challenge, emerging quickly and demanding an immediate overhaul of the instructional plans and strategies of school systems across the country; and

WHEREAS, the nation's public schools remain committed to delivering high-quality instruction while ensuring the health and safety of our students and staff; and

WHEREAS, this challenge will persist and likely grow as COVID-19 affects our economy and destabilizes funding for public schools; and

WHEREAS, reputable economists have predicted the end of the nation's economic expansion and forecast a recession that may be deep and long-lasting; and

WHEREAS, any nationwide recession is likely to most severely affect urban areas, their most economically disadvantaged residents, and Black and Latinx communities that are disproportionately impacted by the pandemic and its economic repercussions; and

WHEREAS, the numbers of unemployment claims in the nation's big cities are already the highest we have seen since the Great Depression and may only grow; and

WHEREAS, 12,000 students in Chicago are currently homeless, among approximately 1.5 million nationally--a number that will likely increase with the ongoing public health and economic crisis--and federal funds are necessary to address the scope of housing insecurity and provide the rent relief, mortgage relief, and access to affordable housing necessary to provide students a safe and stable place to live and learn.

WHEREAS, urban public-school systems across the country are already incurring substantial unexpected costs to provide meal services and purchase and deploy digital instructional devices; and

WHEREAS, urban public-school systems are facing difficult decisions about how to allocate dwindling financial resources to sustain high-quality instruction and other essential services for students and families over the next several years; and

WHEREAS, these decisions will be happening at the same time that urban public school systems will be working to address the immense instructional challenge of unfinished learning that many students will face coming out of this school year; and

WHEREAS, the American Recovery and Reinvestment Act (ARRA) of 2009 provided \$100 billion in education funding with investments in both the education stabilization fund and various federal categorical programs for public schools, such as Title I and the Individuals with Disabilities Act; and

WHEREAS, Congress followed ARRA in 2010 with \$10 billion in additional funding for the Education Jobs Fund to help school districts retain existing employees, recall former employees, and hire new ones; and

WHEREAS, by comparison, the recent Coronavirus Aid, Relief, and Economic Security (CARES) Act provides only \$13 billion for education stabilization funding, which is less than half of one percent of

the total \$2.2 trillion relief provided in the CARES Act and is far below the investment that the federal government provided in 2009 and 2010 in ARRA and the Education Jobs fund; and

WHEREAS, on May 15, 2020 the House voted to significantly increase this figure, passing the Health and Economic Recovery Omnibus Emergency Solutions (HEROES) Act calling for \$3 trillion in additional funding including \$58 billion that would go to K-12 education that would flow through the states to be distributed local districts and \$3 billion for school meal providers and the U.S. Department of Agriculture's (USDA) Child and Adult Care Food Program but the Senate has refused to vote on the bill; and

WHEREAS, public education is one of the largest employers of any organization, public or private, in the nation; and

WHEREAS, published economic research has demonstrated a strong connection between a country's GDP growth and its investments in elementary and secondary education; and

WHEREAS, research has repeatedly found a strong causal relationship between levels of schooling and wages that individuals earn over a lifetime; and

WHEREAS, many students and their families experienced trauma prior to the pandemic, and are experiencing further trauma as a result of the pandemic and associated economic crises, which will require additional trauma-informed and healing-centered supports in the coming months and years for the development of the whole child; and

WHEREAS, for public schools to thrive and for our students to realize a bright and productive future, the federal government needs to make a substantial new investment in our wellbeing; and

WHEREAS, the Council of the Great City Schools, the National Education Association, the American Federation of Teachers, the National School Boards Association, the American Association of School Administrators, and the National Parent Teachers Association, and others have called for some \$200 billion in relief for the nation's PK-12 public schools; and

WHEREAS, this level of funding is the minimum needed by the nation's urban public schools to care for our school communities and keep students healthy, safe, and engaged in order to sustain and accelerate their academic achievement trends over the past decade, including gains in reading and math achievement that outpace the national average, and close opportunity gaps for historically underserved students.

NOW, THEREFORE, BE IT RESOLVED, that the Board of Education of the City of Chicago on behalf of Chicago Public School District 299 ("Chicago Public Schools") thanks our House of Representative Members for passing the HEROES Act and join our Senators in asking the Senate for a vote on the HEROES Act, and urge the President to sign it, and further, encourage them to continue to advocate for and approve additional federal education funding distributed to our nation's public schools at the local level through the Title I formula.

ALBUQUERQUE PUBLIC SCHOOLS BOARD OF EDUCATION GREAT CITY SCHOOL DISTRICT

COVID-19 CONGRESSIONAL FUNDING RESOLUTION

WHEREAS, the COVID-19 pandemic is a monumental challenge, emerging quickly and demanding an immediate overhaul of the instructional plans and strategies of school systems across the country; and

WHEREAS, the nation's public schools remain committed to delivering high-quality instruction while ensuring the health and safety of our students and staff; and

WHEREAS, this challenge will persist and likely grow as COVID-19 affects our economy and destabilizes funding for public schools; and

WHEREAS, reputable economists have forecast a recession that may be deep and long-lasting; and

WHEREAS, any nationwide recession is likely to affect urban areas and their poorest communities most severely; and

WHEREAS, the numbers of unemployment claims in the nation's big cities are already the highest we have seen since the Great Depression and may only grow; and

WHEREAS, urban public-school systems across the country are already incurring substantial unexpected costs to provide meal services and purchase and deploy digital instructional devices; and

WHEREAS, urban public-school systems are facing difficult decisions about how to allocate dwindling financial resources to sustain high-quality instruction and other essential services for students and families over the next several years; and

WHEREAS, revenue shortfalls will unequivocally result in budget cuts and personnel reductions in urban school systems;

WHEREAS, these budget cuts will be happening at the same time that urban public school systems will be working to address the immense instructional challenge of unfinished learning that many students will face coming out of this school year; and

WHEREAS, the American Recovery and Reinvestment ACT (ARRA) of 2009 provided \$100 billion in education funding with investments in both the education stabilization fund and various federal categorical programs for public schools, such as Title I and the Individuals with Disabilities Act; and

WHEREAS, Congress followed ARRA in 2010 with \$10 billion in additional funding for the Education Jobs Fund to help school districts retain existing employees, recall former employees, and hire new ones; and

WHEREAS, by comparison the recent Coronavirus Aid, Relief, and Economic Security (CARES) Act provides only \$13 billion for education stabilization funding, which is less than half of one percent of the total \$2.2 trillion relief provided in the CARES Act and is far below the investment that the federal government provided in 2009 and 2010 in ARRA and the Education Jobs fund; and

WHEREAS, public education is one of the largest employers of any organization, public or private, in the nation; and

WHEREAS, published economic research has demonstrated a strong connection between a country's GDP growth and its investments in elementary and secondary education; and

WHEREAS, research has repeatedly found a strong causal relationship between levels of schooling and wages that individuals earn over a lifetime; and

WHEREAS, for public schools to thrive and for our students to realize a bright and productive future, the federal government needs to make a substantial new investment in our wellbeing; and

WHEREAS, the Council of the Great City Schools, the National Education Association, the American Federation of Teachers, the National School Boards Association, the American Association of School Administrators, and the National Parent Teachers Association, and others have called for some \$200 billion in relief for the nation's public schools; and

WHEREAS, this level of funding is the minimum needed by the nation's urban public schools to sustain and accelerate their academic achievement trends over the past decade, including gains in reading and math achievement that outpace the national average;

WHEREAS, federal assistance allows the district to provide assistance to students and families during school closure, through the summer months, and provisions for reopening schools with expected additional requirements and costs;

NOW, THEREFORE, BE IT RESOLVED that the Albuquerque Public School Board of Education calls on its Congressional delegation, including our United States Senators and House of Representative members, to advocate for and approve additional federal education funding for our nation's public schools and to urge the dismissal of guidance from the US Department of Education from April 30, 2020, which encourages states to ignore federal Title I funding distribution guidelines based on student poverty and thereby, allows private schools access to a disproportionate share of Title I funding based on student population, not student poverty.

APPOVED AND ADOPTED by the Board of Education of the Albuquerque Public School district at its regular meeting held this 6th day of May 2020.

2020

CINCINNATI PUBLIC SCHOOLS

A RESOLUTION IN SUPPORT OF ADDITIONAL FEDERAL EDUCATION FUNDING FOR OUR NATION'S PUBLIC SCHOOLS

WHEREAS, the COVID-19 pandemic is a monumental and unprecedented challenge, emerging quickly and demanding an immediate overhaul of the instructional plans and strategies of school systems across the country; and

WHEREAS, the nation's public schools remain committed to delivering high-quality instruction while ensuring the health and safety of our students and staff; and

WHEREAS, this challenge will persist and likely grow as COVID-19 affects our economy and destabilizes funding for public schools; and

WHEREAS, reputable economists have predicted the end of the nation's economic expansion and forecast a recession that may be deep and long-lasting; and

WHEREAS, any nationwide recession is likely to affect urban areas and their poorest citizens most severely; and

WHEREAS, the numbers of unemployment claims in the nation's big cities are already the highest we have seen since the Great Depression and may only grow; and

WHEREAS, urban public-school systems across the country are already incurring substantial unexpected costs to provide meal services and purchase and deploy digital instructional devices; and

WHEREAS, urban public-school systems are facing difficult decisions about how to allocate dwindling financial resources to sustain high-quality instruction and other essential services for students and families over the next several years; and

WHEREAS, revenue shortfalls will unequivocally result in budget cuts and personnel reductions in urban school systems;

WHEREAS, these budget cuts will be happening at the same time that urban public school systems will be working to address the immense instructional challenge of unfinished learning that many students will face coming out of this school year; and

WHEREAS, the American Recovery and Reinvestment ACT (ARRA) of 2009 provided \$100 billion in education funding with investments in both the education stabilization fund and various federal categorical programs for public schools, such as Title I and the Individuals with Disabilities Act; and

WHEREAS, Congress followed ARRA in 2010 with \$10 billion in additional funding for the Education Jobs Fund to help school districts retain existing employees, recall former employees, and hire new ones; and

WHEREAS, by comparison the recent Coronavirus Aid, Relief, and Economic Security (CARES) Act provides only \$13 billion for education stabilization funding, which is less than half of one percent of the total \$2.2 trillion relief provided in the CARES Act and is far below the investment that the federal government provided in 2009 and 2010 in ARRA and the Education Jobs fund; and

WHEREAS, public education is one of the largest employers of any organization, public or private, in the nation; and

WHEREAS, published economic research has demonstrated a strong connection between a country's GDP growth and its investments in elementary and secondary education; and

WHEREAS, research has repeatedly found a strong causal relationship between levels of schooling and wages that individuals earn over a lifetime; and

WHEREAS, for public schools to thrive and for our students to realize a bright and productive future, the federal government needs to make a substantial new investment in our wellbeing; and

WHEREAS, the Council of the Great City Schools, the National Education Association, the American Federation of Teachers, the National School Boards Association, the American Association of School Administrators, and the National Parent Teachers Association, and others have called for some \$200 billion in relief for the nation's public schools; and

WHEREAS, this level of funding is the minimum needed by the nation's urban public schools to sustain and accelerate their academic achievement trends over the past decade, including gains in reading and math achievement that outpace the national average;

NOW, THEREFORE, BE IT RESOLVED that the Board of Education of the Cincinnati City School District calls on its Congressional delegation, including our United States Senators and House of Representative members, to advocate for and approve additional federal education funding for our nation's public schools.

> Carolyn Jones, President Ryan Messer, Vice President Melanie Bates Eve Bolton Pamela Bowers Ben Lindy Mike Moroski

Resolution No. 2020-9.01(B)

Board of Education

Great City School District

RESOLUTION

WHEREAS, the COVID-19 pandemic is a monumental and unprecedented challenge, emerging quickly and demanding an immediate overhaul of the instructional plans and strategies of school systems across the country; and

WHEREAS, the nation's public schools remain committed to delivering high-quality instruction while ensuring the health and safety of our students and staff; and

WHEREAS, this challenge will persist and likely grow as COVID-19 affects our economy and destabilizes funding for public schools; and

WHEREAS, reputable economists have predicted the end of the nation's economic expansion and forecast a recession that may be deep and long-lasting; and

WHEREAS, any nationwide recession is likely to affect urban areas and their poorest citizens most severely; and

WHEREAS, the numbers of unemployment claims in the nation's big cities are already the highest we have seen since the Great Depression and may only grow; and

WHEREAS, urban public-school systems across the country are already incurring substantial unexpected costs to provide meal services and purchase and deploy digital instructional devices; and

WHEREAS, urban public-school systems are facing difficult decisions about how to allocate dwindling financial resources to sustain high-quality instruction and other essential services for students and families over the next several years; and

WHEREAS, revenue shortfalls will unequivocally result in budget cuts and personnel reductions in urban school systems;

WHEREAS, these budget cuts will be happening at the same time that urban public school systems will be working to address the immense instructional challenge of unfinished learning that many students will face coming out of this school year; and

WHEREAS, the American Recovery and Reinvestment ACT (ARRA) of 2009 provided \$100 billion in education funding with investments in both the education stabilization fund and various federal categorical programs for public schools, such as Title I and the Individuals with Disabilities Act; and

WHEREAS, Congress followed ARRA in 2010 with \$10 billion in additional funding for the Education Jobs Fund to help school districts retain existing employees, recall former employees, and hire new ones; and

WHEREAS, by comparison the recent Coronavirus Aid, Relief, and Economic Security (CARES) Act provides only \$13 billion for education stabilization funding, which is less than half of one percent of the total \$2.2 trillion relief provided in the CARES Act and is far below the investment that the federal government provided in 2009 and 2010 in ARRA and the Education Jobs fund; and

WHEREAS, public education is one of the largest employers of any organization, public or private, in the nation; and

WHEREAS, published economic research has demonstrated a strong connection between a country's GDP growth and its investments in elementary and secondary education; and

WHEREAS, research has repeatedly found a strong causal relationship between levels of schooling and wages that individuals earn over a lifetime; and

WHEREAS, for public schools to thrive and for our students to realize a bright and productive future, the federal government needs to make a substantial new investment in our wellbeing; and

WHEREAS, the Council of the Great City Schools, the National Education Association, the American Federation of Teachers, the National School Boards Association, the American Association of School Administrators, and the National Parent Teachers Association, and others have called for some \$200 billion in relief for the nation's public schools; and

WHEREAS, this level of funding is the minimum needed by the nation's urban public schools to sustain and accelerate their academic achievement trends over the past decade, including gains in reading and math achievement that outpace the national average;

NOW, THEREFORE, BE IT RESOLVED that the Cleveland Municipal School District calls on its Congressional delegation, including our United States Senators and House of Representative members, to advocate for and approve additional federal education funding for our nation's public schools.

APPOVED AND ADOPTED by the Board of Education of the Cleveland Municipal School District at its regular meeting held this 28th day in April 2020.

CLEVELAND MUNICIPAL SCHOOL DISTRICT BOARD OF EDUCATION

Bv:

Eric S. Gordon Chief Executive Officer

Derek M. Richey

Chief Financial Officer

Cinne E. Bingham

Anne E. Bingham Board of Education Chair

4/28/2020 Date



RESOLUTION URGING CONGRESSIONAL ACTION TO APPROVE ADDITIONAL FEDERAL EDUCATION FUNDING FOR THE NATION'S PUBLIC SCHOOLS

WHEREAS, the COVID-19 pandemic is a monumental and unprecedented challenge, emerging quickly and demanding an immediate overhaul of the instructional plans and strategies of school systems across the country; and

WHEREAS, the nation's public schools remain committed to delivering high-quality instruction while ensuring the health and safety of our students and staff; and

WHEREAS, this challenge will persist and likely grow as COVID-19 affects our economy and destabilizes funding for public schools; and

WHEREAS, reputable economists have predicted the end of the nation's economic expansion and forecast a recession that may be deep and long-lasting; and

WHEREAS, any nationwide recession is likely to affect urban areas and their poorest citizens most severely; and

WHEREAS, the numbers of unemployment claims in the nation's big cities are already the highest we have seen since the Great Depression and may only grow; and

WHEREAS, urban public-school systems across the country are already incurring substantial unexpected costs to provide meal services and purchase and deploy digital instructional devices; and

WHEREAS, urban public-school systems are facing difficult decisions about how to allocate dwindling financial resources to sustain high-quality instruction and other essential services for students and families over the next several years; and

WHEREAS, revenue shortfalls will unequivocally result in budget cuts and personnel reductions in urban school systems; and

WHEREAS, these budget cuts will be happening at the same time that urban public school systems will be working to address the immense instructional challenge of unfinished learning that many students will face coming out of this school year; and

WHEREAS, the American Recovery and Reinvestment ACT (ARRA) of 2009 provided \$100 billion in education funding with investments in both the education stabilization fund and various federal categorical programs for public schools, such as Title I and the Individuals with Disabilities Act; and

WHEREAS, Congress followed ARRA in 2010 with \$10 billion in additional funding for the Education Jobs Fund to help school districts retain existing employees, recall former employees, and hire new ones; and

WHEREAS, by comparison the recent Coronavirus Aid, Relief, and Economic Security (CARES) Act provides only \$13 billion for education stabilization funding, which is less than half of one percent of the total \$2.2 trillion relief provided in the CARES Act and is far below the investment that the federal government provided in 2009 and 2010 in ARRA and the Education Jobs fund; and

WHEREAS, public education is one of the largest employers of any organization, public or private, in the nation; and

WHEREAS, published economic research has demonstrated a strong connection between a country's GDP growth and its investments in elementary and secondary education; and

WHEREAS, research has repeatedly found a strong causal relationship between levels of schooling and wages that individuals earn over a lifetime; and

WHEREAS, for public schools to thrive and for our students to realize a bright and productive future, the federal government needs to make a substantial new investment in our wellbeing; and

WHEREAS, the Council of the Great City Schools, the National Education Association, the American Federation of Teachers, the National School Boards Association, the American Association of School Administrators, and the National Parent Teachers Association, and others have called for some \$200 billion in relief for the nation's public schools; and

WHEREAS, this level of funding is the minimum needed by the nation's urban public schools to sustain and accelerate their academic achievement trends over the past decade, including gains in reading and math achievement that outpace the national average.

NOW. THEREFORE, BE IT RESOLVED that the Guilford County Board of Education calls on its Congressional delegation, including our United States Senate and House of Representatives members, to advocate for and approve additional federal education funding for our nation's public schools.

Signed this, 30th Day of April 2020

tai n Deena A. Hayes, Chairperson

Guilford County Board of Education

aron L. Contreras Sharon L. Contreras, PhD Superintendent of Schools/Secretary

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SPECIAL SCHOOL DISTRICT NO. 1 Board of Education

May 12, 2020

Resolution Supporting Increased Federal Education Funding

WHEREAS, the COVID-19 pandemic is a monumental and unprecedented challenge, emerging quickly and demanding an immediate overhaul of the instructional plans and strategies of school systems across the country; and

WHEREAS, the nation's public schools remain committed to delivering high-quality instruction while ensuring the health and safety of our students and staff; and

WHEREAS, this challenge will persist and likely grow as COVID-19 affects our economy and destabilizes funding for public schools; and

WHEREAS, reputable economists have predicted the end of the nation's economic expansion and forecast a recession that may be deep and long-lasting; and

WHEREAS, any nationwide recession is likely to affect urban areas and their poorest citizens most severely; and

WHEREAS, the numbers of unemployment claims in the nation's big cities are already the highest we have seen since the Great Depression and may only grow; and

WHEREAS, urban public-school systems across the country are already incurring substantial unexpected costs to provide meal services and purchase and deploy digital instructional devices; and

WHEREAS, urban public-school systems are facing difficult decisions about how to allocate dwindling financial resources to sustain high-quality instruction and other essential services for students and families over the next several years; and

WHEREAS, revenue shortfalls will unequivocally result in budget cuts and personnel reductions in urban school systems;

WHEREAS, these budget cuts will be happening at the same time that urban public school systems will be working to address the immense instructional challenge of unfinished learning that many students will face coming out of this school year; and

WHEREAS, the American Recovery and Reinvestment ACT (ARRA) of 2009 provided \$100 billion in education funding with investments in both the education stabilization fund and various federal categorical programs for public schools, such as Title I and the Individuals with Disabilities Act; and

WHEREAS, Congress followed ARRA in 2010 with \$10 billion in additional funding for the Education Jobs Fund to help school districts retain existing employees, recall former employees, and hire new ones; and

WHEREAS, by comparison the recent Coronavirus Aid, Relief, and Economic Security (CARES) Act provides only \$13 billion for education stabilization funding, which is less than half of one percent of the total \$2.2 trillion relief provided in the CARES Act and is far below the investment that the federal government provided in 2009 and 2010 in ARRA and the Education Jobs fund; and

WHEREAS, public education is one of the largest employers of any organization, public or private, in the nation; and

WHEREAS, published economic research has demonstrated a strong connection between a country's GDP growth and its investments in elementary and secondary education; and

WHEREAS, research has repeatedly found a strong causal relationship between levels of schooling and wages that individuals earn over a lifetime; and

WHEREAS, for public schools to thrive and for our students to realize a bright and productive future, the federal government needs to make a substantial new investment in our wellbeing; and

WHEREAS, the Council of the Great City Schools, the National Education Association, the American Federation of Teachers, the National School Boards Association, the American Association of School Administrators, and the National Parent Teachers Association, and others have called for some \$200 billion in relief for the nation's public schools; and

WHEREAS, this level of funding is the minimum needed by the nation's urban public schools to sustain and accelerate their academic achievement trends over the past decade, including gains in reading and math achievement that outpace the national average;

NOW, THEREFORE, BE IT RESOLVED that the Board of Directors of Special School District No. 1 hereby calls on its Congressional delegation, including our United States Senators and House of Representative members, to advocate for and approve additional federal education funding for our nation's public schools.

Signed by:

Kim Ellison Board of Education Chairperson

Josh Pauly Board of Education Clerk

5/15/2020

Date

5/18/2020

Date



Board of Education Tulsa Public Schools

WHEREAS, the COVID-19 pandemic is a monumental and unprecedented challenge, emerging quickly and demanding an immediate overhaul of the instructional plans and strategies of school systems across the country; and

WHEREAS, Tulsa Public Schools and all of the nation's public schools remain committed to delivering high-quality instruction while ensuring the health and safety of our students and staff; and

WHEREAS, this challenge will persist and likely grow as COVID-19 affects our economy and destabilizes funding for public schools; and

WHEREAS, reputable economists have predicted the end of the nation's economic expansion and forecast a recession that may be deep and long-lasting; and

WHEREAS, any nationwide recession is likely to affect urban areas and their poorest citizens most severely; and

WHEREAS, the numbers of unemployment claims in the nation's big cities are already the highest we have seen since the Great Depression and may only grow; and

WHEREAS, our district and urban public-school systems across the country are already incurring substantial unexpected costs to provide meal services and purchase and deploy digital instructional devices; and

WHEREAS, our district and other public-school systems are facing difficult decisions about how to allocate dwindling financial resources to sustain high-quality instruction and other essential services for students and families over the next several years; and

WHEREAS, revenue shortfalls have already resulted in budget cuts and threaten a reduction of services to students when they need their education more than ever before;

WHEREAS, these budget cuts will be happening at the same time that our district and others will be working to address the immense instructional challenge of unfinished learning that many students will face coming out of this school year; and

WHEREAS, the American Recovery and Reinvestment ACT (ARRA) of 2009 provided \$100 billion in education funding with investments in both the education stabilization fund and various federal categorical programs for public schools, such as Title I and the Individuals with Disabilities Act; and

WHEREAS, Congress followed ARRA in 2010 with \$10 billion in additional funding for the Education Jobs Fund to help school districts retain existing employees, recall former employees, and hire new ones; and

WHEREAS, by comparison the recent Coronavirus Aid, Relief, and Economic Security (CARES) Act provides only \$13 billion for education stabilization funding, which is less than half of one percent of the total \$2.2 trillion relief provided in the CARES Act and is far below the investment that the federal government provided in 2009 and 2010 in ARRA and the Education Jobs fund; and

WHEREAS, our district is one of the largest employers in our county and public education nationwide is one of the largest employers of any organization, public or private; and

WHEREAS, published economic research has demonstrated a strong connection between a country's GDP growth and its investments in elementary and secondary education; and

WHEREAS, research has repeatedly found a strong causal relationship between levels of schooling and wages that individuals earn over a lifetime; and

WHEREAS, for public schools to thrive and for our students to realize a bright and productive future, the federal government needs to make a substantial new investment in our wellbeing; and

WHEREAS, the Council of the Great City Schools, the National Education Association, the American Federation of Teachers, the National School Boards Association, the American Association of School Administrators, and the National Parent Teachers Association, and others have called for some \$200 billion in relief for the nation's public schools; and

WHEREAS, this level of funding is the minimum needed by the nation's public schools to sustain and accelerate their academic achievement trends over the past decade, including gains in reading and math achievement that outpace the national average;

NOW, THEREFORE, BE IT RESOLVED that the Tulsa Public Schools Board of Education calls on our Congressional delegation, including our United States Senators and House of Representative members, to advocate for and approve additional federal education funding for our nation's public schools.

APPROVED AND ADOPTED by the Tulsa Public Schools Board of Education at its regular meeting held this day, May 18, 2020.

RESOLUTION OF THE SCHOOL BOARD OF PALM BEACH COUNTY, FLORIDA, A GREAT CITY SCHOOL DISTRICT, SUPPORTING ADDITIONAL FEDERAL EDUCATION FUNDING FOR OUR NATION'S PUBLIC SCHOOLS

Resolution No. 20-01 May 20, 2020

WHEREAS, the COVID-19 pandemic is a monumental and unprecedented challenge, emerging quickly and demanding an immediate overhaul of the instructional plans and strategies of school systems across the country; and

WHEREAS, the nation's public schools remain committed to delivering high-quality instruction while ensuring the health and safety of our students and staff; and

WHEREAS, this challenge will persist and likely grow as COVID-19 affects our economy and destabilizes funding for public schools; and

WHEREAS, reputable economists have predicted the end of the nation's economic expansion and forecast a recession that may be deep and long-lasting; and

WHEREAS, any nationwide recession is likely to affect urban areas and their poorest citizens most severely; and

WHEREAS, the numbers of unemployment claims in the nation's big cities are already the highest we have seen since the Great Depression and may only grow; and

WHEREAS, urban public-school systems across the country are already incurring substantial unexpected costs to provide meal services and purchase and deploy digital instructional devices; and

WHEREAS, urban public-school systems are facing difficult decisions about how to allocate dwindling financial resources to sustain high-quality instruction and other essential services for students and families over the next several years; and

WHEREAS, revenue shortfalls will unequivocally result in budget cuts and personnel reductions in urban school systems;

WHEREAS, these budget cuts will be happening at the same time that urban public school systems will be working to address the immense instructional challenge of unfinished learning that many students will face coming out of this school year; and

WHEREAS, the American Recovery and Reinvestment ACT (ARRA) of 2009 provided \$100 billion in education funding with investments in both the education stabilization fund and various federal categorical programs for public schools, such as Title I and the Individuals with Disabilities Act; and

WHEREAS, Congress followed ARRA in 2010 with \$10 billion in additional funding for the Education Jobs Fund to help school districts retain existing employees, recall former employees, and hire new ones; and

WHEREAS, by comparison the recent Coronavirus Aid, Relief, and Economic Security (CARES) Act provides only \$13 billion for education stabilization funding, which is less than half of one percent of the total \$2.2 trillion relief provided in the CARES Act and is far below the investment that the federal government provided in 2009 and 2010 in ARRA and the Education Jobs fund; and

WHEREAS, public education is one of the largest employers of any organization, public or private, in the nation; and

WHEREAS, published economic research has demonstrated a strong connection between a country's GDP growth and its investments in elementary and secondary education; and

WHEREAS, research has repeatedly found a strong causal relationship between levels of schooling and wages that individuals earn over a lifetime; and

WHEREAS, for public schools to thrive and for our students to realize a bright and productive future, the federal government needs to make a substantial new investment in our wellbeing; and

WHEREAS, the Council of the Great City Schools, the National Education Association, the American Federation of Teachers, the National School Boards Association, the American Association of School Administrators, and the National Parent Teachers Association, and others have called for some \$200 billion in relief for the nation's public schools; and

WHEREAS, this level of funding is the minimum needed by the nation's urban public schools to sustain and accelerate their academic achievement trends over the past decade, including gains in reading and math achievement that outpace the national average;

NOW, THEREFORE, BE IT RESOLVED that THE SCHOOL BOARD OF PALM BEACH COUNTY, FLORIDA calls on its Congressional delegation, including our United States Senators and House of Representative members, to advocate for and approve additional federal education funding for our nation's public schools.

APPROVED AND ADOPTED by THE SCHOOL BOARD OF PALM BEACH COUNTY, FLORIDA at its regular meeting held this 20th day in May 2020.

THE SCHOOL BOARD OF PALM BEACH COUNTY, FLORIDA, a corporate body politic

By: Barbieri, Jr., Esq., Chairman

ATTEST:

By: Donald E. Fennoy II, Ed.D Superintendent

APPROVED AS TO FORM AND LEGAL SUFFICIENCY

Bruce a. Harris

School Board Attorney

RESOLUTION No. 6111

Resolution to advocate for and approve additional federal education funding for public schools due to the COVID-19 pandemic

WHEREAS, the COVID-19 pandemic is a monumental and unprecedented challenge, emerging quickly and demanding an immediate overhaul of the instructional plans and strategies of school systems across the country; and

WHEREAS, the nation's public schools remain committed to delivering high-quality instruction while ensuring the health and safety of our students and staff; and

WHEREAS, this challenge will persist and likely grow as COVID-19 affects our economy and destabilizes funding for public schools; and

WHEREAS, economists have predicted the end of the nation's economic expansion and forecast a recession that may be deep and long-lasting; and

WHEREAS, any nationwide recession is likely to affect urban areas and their poorest citizens most severely; and

WHEREAS, the numbers of unemployment claims in Oregon are already the highest we have seen since the Great Depression and may only grow; and

WHEREAS, urban public-school systems across the country are already incurring substantial unexpected costs to provide meal services and purchase and deploy digital instructional devices; and

WHEREAS, urban public-school systems are facing difficult decisions about how to allocate dwindling financial resources to sustain high-quality instruction and other essential services for students and families over the next several years; and

WHEREAS, revenue shortfalls will unequivocally result in budget cuts and personnel reductions in school systems across Oregon;

WHEREAS, these budget cuts will be happening at the same time that public school systems will be working to address the immense instructional challenge of unfinished learning that many students will face coming out of this school year; and

WHEREAS, the American Recovery and Reinvestment ACT (ARRA) of 2009 provided \$100 billion in education funding with investments in both the education stabilization fund and various federal categorical programs for public schools, such as Title I and the Individuals with Disabilities Act; and

WHEREAS, Congress followed ARRA in 2010 with \$10 billion in additional funding for the Education Jobs Fund to help school districts retain existing employees, recall former employees, and hire new ones; and

WHEREAS, by comparison the recent Coronavirus Aid, Relief, and Economic Security (CARES) Act provides only \$13 billion for education stabilization funding, which is less than half of one percent of the total \$2.2 trillion relief provided in the CARES Act and is far below the investment that the federal government provided in 2009 and 2010 in ARRA and the Education Jobs fund; and

WHEREAS, public education is one of the largest employers of any organization, public or private, in the nation; and

WHEREAS, published economic research has demonstrated a strong connection between a country's GDP growth and its investments in elementary and secondary education; and

WHEREAS, research has repeatedly found a strong causal relationship between levels of schooling and wages that individuals earn over a lifetime; and

WHEREAS, for public schools to recover and thrive and for our students to realize a bright and productive future, the federal government needs to make a substantial new investment in our wellbeing; and

WHEREAS, the Council of the Great City Schools, the National Education Association, the American Federation of Teachers, the National School Boards Association, the American Association of School Administrators, and the National Parent Teachers Association, and others have called for some \$200 billion in support for the nation's public schools; and

WHEREAS, this level of funding is the minimum needed by the nation's public schools to sustain and accelerate their academic achievement trends over the past decade,; and

WHEREAS, Portland Public Schools is grateful to our congressional delegation for supporting the CARES Act, which includes approximately \$120 million for Oregon K-12 through the Elementary and Secondary School Emergency Education Relief Fund (ESSEER); and

WHEREAS, the Portland Public Schools allocation of the ESSEER is \$8.7 million; and

WHEREAS, Portland Public Schools is expected to face a significant budget deficit heading into the 2020-2021 school year;

NOW, THEREFORE, BE IT RESOLVED that the Portland Public School District calls on its Congressional delegation, including our United States Senators and House of Representative members, to advocate for and approve additional federal education funding for our nation's public schools during this time of unprecedented challenges to our students and their families..

APPROVED AND ADOPTED by the Board of Education of the Portland Public Schools district at its regular meeting held this day in April 2020.



RESOLUTION

The School Board of Broward County, Horida

No. 20-108

RESOLUTION IN SUPPORT OF COUNCIL OF THE GREAT CITY SCHOOLS MEMBER DISTRICTS' REQUEST FOR ADDITIONAL FEDERAL FUNDING DUE TO COVID-19

As one of the school district members of the Council of the Great City Schools, Broward County Public schools supports the call for Congress to provide more funding for public school systems in the next coronavirus supplemental appropriations bill. Because of declines in state and local revenues, significant revenue shortfalls are looming for school districts projecting 15 to 25 percent cuts in overall revenues going into next school year.

WHEREAS, the COVID-19 pandemic is a monumental and unprecedented challenge, emerging quickly and demanding an immediate overhaul of the instructional plans and strategies of school systems across the country; and

WHEREAS, the nation's public schools remain committed to delivering high-quality instruction while ensuring the health and safety of our students and staff; and

WHEREAS, this challenge will persist and likely grow as COVID-19 affects our economy and destabilizes funding for public schools; and

WHEREAS, reputable economists have predicted the end of the nation's economic expansion and forecast a recession that may be deep and long-lasting; and

WHEREAS, any nationwide recession is likely to affect urban areas and their poorest citizens most severely; and

WHEREAS, the numbers of unemployment claims in the nation's big cities are already the highest we have seen since the Great Depression and may only grow; and

WHEREAS, urban public-school systems across the country are already incurring substantial unexpected costs to provide meal services and purchase and deploy digital instructional devices; and

WHEREAS, urban public-school systems are facing difficult decisions about how to allocate dwindling financial resources to sustain high-quality instruction and other essential services for students and families over the next several years; and

WHEREAS, revenue shortfalls will unequivocally result in budget cuts and personnel reductions in urban school systems;

WHEREAS, these budget cuts will be happening at the same time that urban public school systems will be working to address the immense instructional challenge of unfinished learning that many students will face coming out of this school year; and

WHEREAS, the American Recovery and Reinvestment ACT (ARRA) of2009 provided \$100 billion in education funding with investments in both the education stabilization fund and various federal categorical programs for public schools, such as Title I and the Individuals with Disabilities Act; and

WHEREAS, Congress followed ARRA in 2010 with \$10 billion in additional funding for the Education Jobs Fund to help school districts retain existing employees, recall former employees, and hire new ones; and

WHEREAS, by comparison the recent Coronavirus Aid, Relief, and Economic Security (CARES) Act provides only \$13 billion for education stabilization funding, which is less than half of one percent of the total \$2.2 trillion relief provided in the CARES Act and is far below the investment that the federal government provided in 2009 and 2010 in ARRA and the Education Jobs fund; and

WHEREAS, public education is one of the largest employers of any organization, public or private, in the nation; and

WHEREAS, published economic research has demonstrated a strong connection between a country's GDP growth and its investments in elementary and secondary education; and

WHEREAS, research has repeatedly found a strong causal relationship between levels of schooling and wages that individuals earn over a lifetime; and

WHEREAS, for public schools to thrive and for our students to realize a bright and productive future, the federal government needs to make a substantial new investment in our wellbeing; and

WHEREAS, the Council of the Great City Schools, the National Education Association, the American Federation of Teachers, the National School Boards Association, the American Association of School Administrators, and the National Parent Teachers Association, and others have called for some \$200 billion in relief for the nation's public schools; and

WHEREAS, this level of funding is the minimum needed by the nation's urban public schools to sustain and accelerate their academic achievement trends over the past decade, including gains in reading and math achievement that outpace the national average;

NOW, THEREFORE, BE IT RESOLVED that the School Board of Broward County, Florida calls on its Congressional delegation, including our United States Senators and House of Representative members, to advocate for and approve additional federal education funding for our nation's public schools.

Given at Fort Lauderdale, Florida this 5th day of May 2020

THE SCHOOL BOARD OF BROWARD COUNTY, FLORIDA

By:_

Donna P. Korn, Chair

ATTEST:

Robert W. Runcie, Superintendent of Schools

City of Boston In School Committee

April 29, 2020

BOSTON SCHOOL COMMITTEE RESOLUTION IN SUPPORT OF INCREASED FEDERAL SUPPORT AND STIMULUS FUNDING FOR PUBLIC K-12 EDUCATION

WHEREAS, the COVID-19 pandemic is a monumental and unprecedented challenge, emerging quickly and demanding an immediate overhaul of the instructional plans and strategies of school systems across the country; and

WHEREAS, the nation's public schools remain committed to delivering high-quality instruction while ensuring the health and safety of our students and staff; and

WHEREAS, to date the 10,000 employees of the Boston Public Schools have worked around the clock to continue to provide our 55,000 BPS students and families with access to food, shelter, Wi-Fi, and other educational needs, distributing more than 300,000 meals and over 30,000 Chromebooks; and

WHEREAS, during the COVID-19 pandemic the Boston Public Schools, in coordination with the Office of the Mayor of the City of Boston, Martin J. Walsh, has spent more than \$5.1 million to acquire 20,000 Chromebooks to prevent learning loss; and

WHEREAS, the Boston Public Schools and the City of Boston have maintained payroll for over 10,000 full and part-time district employees, providing stability to our community during economic uncertainty; and

WHEREAS, the Boston Public Schools has continued to provide 13,000 - 15,000 meals per day to students in Boston, despite a projected shortfall of revenue from the Federal Meals Program, which is estimated to cost the district a projected \$5M through the end of the current school year; and

WHEREAS, these challenges will persist and likely grow as COVID-19 affects our economy and destabilizes funding for public schools; and

WHEREAS, reputable economists have predicted the end of the nation's economic expansion and forecast a recession that may be deep and long-lasting; and

WHEREAS, any nationwide recession is likely to affect urban areas and their poorest citizens most severely; and

City of Boston In School Committee

WHEREAS, the numbers of unemployment claims in the nation's big cities are already the highest we have seen since the Great Depression and may only grow; and

WHEREAS, urban public-school systems across the country are already incurring substantial unexpected costs to provide meal services and purchase and deploy digital instructional devices; and

WHEREAS, urban public-school systems are facing difficult decisions about how to allocate dwindling financial resources to sustain high-quality instruction and other essential services for students and families over the next several years; and

WHEREAS, revenue shortfalls will unequivocally result in budget cuts and personnel reductions in urban school systems;

WHEREAS, these budget cuts will be happening at the same time that urban public school systems will be working to address the immense instructional challenge of unfinished learning that many students will face coming out of this school year; and

WHEREAS, the American Recovery and Reinvestment ACT (ARRA) of 2009 provided \$100 billion in education funding with investments in both the education stabilization fund and various federal categorical programs for public schools, such as Title I and the Individuals with Disabilities Act; and

WHEREAS, Congress followed ARRA in 2010 with \$10 billion in additional funding for the Education Jobs Fund to help school districts retain existing employees, recall former employees, and hire new ones; and

WHEREAS, by comparison the recent Coronavirus Aid, Relief, and Economic Security (CARES) Act provides only \$13 billion for education stabilization funding, which is less than half of one percent of the total \$2.2 trillion relief provided in the CARES Act and is far below the investment that the federal government provided in 2009 and 2010 in ARRA and the Education Jobs fund; and

WHEREAS, public education is one of the largest employers of any organization, public or private, in the nation; and

WHEREAS, published economic research has demonstrated a strong connection between a country's GDP growth and its investments in elementary and secondary education; and

WHEREAS, research has repeatedly found a strong causal relationship between levels of schooling and wages that individuals earn over a lifetime; and

City of Boston In School Committee

WHEREAS, for public schools to thrive and for our students to realize a bright and productive future, the federal government needs to make a substantial new investment in our wellbeing; and

WHEREAS, the Council of the Great City Schools, the National Education Association, the American Federation of Teachers, the National School Boards Association, the American Association of School Administrators, and the National Parent Teachers Association, and others have called for some \$200 billion in relief for the nation's public schools; and

WHEREAS, this level of funding is the minimum needed by the nation's urban public schools to sustain and accelerate their academic achievement trends over the past decade, including gains in reading and math achievement that outpace the national average; therefore, let it be

RESOLVED: That the Chairperson and members of the Boston School Committee join with the Superintendent of Schools in urging the Massachusetts Congressional Delegation, including our United States Senators and House of Representative members, to advocate for and approve additional federal education funding for our nation's public schools.

On roll call, the order was approved by the following vote:

- YEAS Hardin Coleman; Michael D. O'Neill, Lorna Rivera, Jeri Robinson, Quoc Tran, Vice Chairperson Alexandra Oliver-Dávila, and Chairperson Michael Loconto - 7
- NAYS 0
- ABSENT 0

Attest:

- Elizabech Sullivan

Elizabeth A. Sullivan Executive Secretary

Board of Education

Dayton Public School District

WHEREAS, the COVID-19 pandemic is a monumental and unprecedented challenge, emerging quickly and demanding an immediate overhaul of the instructional plans and strategies of school systems across the country; and

WHEREAS, the nation's public schools remain committed to delivering high-quality instruction while ensuring the health and safety of our students and staff; and

WHEREAS, this challenge will persist and likely grow as COVID-19 affects our economy and destabilizes funding for public schools; and

WHEREAS, reputable economists have predicted the end of the nation's economic expansion and forecast a recession that may be deep and long-lasting; and

WHEREAS, any nationwide recession is likely to affect urban areas and their poorest citizens most severely; and

WHEREAS, the numbers of unemployment claims in the nation's big cities are already the highest we have seen since the Great Depression and may only grow; and

WHEREAS, urban public-school systems across the country are already incurring substantial unexpected costs to provide meal services and purchase and deploy digital instructional devices; and

WHEREAS, urban public-school systems are facing difficult decisions about how to allocate dwindling financial resources to sustain high-quality instruction and other essential services for students and families over the next several years; and

WHEREAS, revenue shortfalls will unequivocally result in budget cuts and personnel reductions in urban school systems;

WHEREAS, these budget cuts will be happening at the same time that urban public school systems will be working to address the immense instructional challenge of unfinished learning that many students will face coming out of this school year; and

WHEREAS, the American Recovery and Reinvestment ACT (ARRA) of 2009 provided \$100 billion in education funding with investments in both the education stabilization fund and various federal categorical programs for public schools, such as Title I and the Individuals with Disabilities Act; and

WHEREAS, Congress followed ARRA in 2010 with \$10 billion in additional funding for the Education Jobs Fund to help school districts retain existing employees, recall former employees, and hire new ones; and

WHEREAS, by comparison the recent Coronavirus Aid, Relief, and Economic Security (CARES) Act provides only \$13 billion for education stabilization funding, which is less than half of one percent of the total \$2.2 trillion relief provided in the CARES Act and is far below the investment that the federal government provided in 2009 and 2010 in ARRA and the Education Jobs fund; and

WHEREAS, public education is one of the largest employers of any organization, public or private, in the nation; and

WHEREAS, published economic research has demonstrated a strong connection between a country's GDP growth and its investments in elementary and secondary education; and

WHEREAS, research has repeatedly found a strong causal relationship between levels of schooling and wages that individuals earn over a lifetime; and

WHEREAS, for public schools to thrive and for our students to realize a bright and productive future, the federal government needs to make a substantial new investment in our wellbeing; and

WHEREAS, the Council of the Great City Schools, the National Education Association, the American Federation of Teachers, the National School Boards Association, the American Association of School Administrators, and the National Parent Teachers Association, and others have called for some \$200 billion in relief for the nation's public schools; and

WHEREAS, this level of funding is the minimum needed by the nation's urban public schools to sustain and accelerate their academic achievement trends over the past decade, including gains in reading and math achievement that outpace the national average;

NOW, THEREFORE, BE IT RESOLVED that the Dayton City school district calls on its Congressional delegation, including our United States Senators and House of Representative members, to advocate for and approve additional federal education funding for our nation's public schools.

APPROVED AND ADOPTED by the Board of Education of the Dayton City school district at its special meeting held April 29, 2020.

Mohamed Al-Hamdani President Dayton Board of Education

Office of School Board Members Board Meeting of April 29, 2020 April 28, 2020

Dr. Lawrence S. Feldman, Board Member

SUBJECT: REQUEST APPROVAL OF RESOLUTION NO. 20-019 OF THE SCHOOL BOARD OF MIAMI-DADE COUNTY, FLORIDA, CALLING ON ITS CONGRESSIONAL DELEGATION TO ADVOCATE FOR AND APPROVE ADDITIONAL FEDERAL EDUCATION FUNDING FOR OUR NATION'S PUBLIC SCHOOLS

COMMITTEE: PERSONNEL, STUDENT, SCHOOL & COMMUNITY SUPPORT

LINK TO STRATEGIC BLUEPRINT: INFORMED, ENGAGED AND EMPOWERED STAKEHOLDERS

On April 24, 2020, the Council of Great City Schools (CGCS) convened its weekly scheduled phone conference to address relevant topics facing urban school districts throughout the nation during the COVID-19 pandemic. During this last meeting, it was agreed that the CGCS's leadership and leverage in federal advocacy would be useful in addressing the shared concerns regarding school districts' funding in the wake of the crisis. As an initiative in this effort, a board resolution supporting the allocation of additional federal funds to school districts, as they face the possibility of substantial local and state revenue shortfalls, was discussed. Consequently, the CGCS drafted a resolution, which has now been provided to all its district members for their consideration. This item seeks to request the approval of this resolution, calling on its Congressional delegation, including our United States Senators and House of Representative Members, to advocate for and approve additional federal education funding for our nation's public schools.

In addition to the Board Resolution, CGCS drafted and submitted a letter signed by many of its member superintendents to Congress. This letter, signed by 62 superintendents, including our own Superintendent Alberto M. Carvalho, signaled a concerted effort and action, which boards can support through their adoption of its companion resolution proposed by this item. Notwithstanding this initiative, Miami-Dade County Public Schools has maintained its own efforts in state and federal advocacy for funding, as evidenced by communications to Governor DeSantis and Secretary of Education Betsy DeVos and thorough efforts outlined in advocacy updates provided to the Board.

This item does not appear on the published Agenda. There exists good cause to vary from the published agenda as the CGCS resolution was released on April 28, 2020, after the agenda was published. It is necessary to inform the Congressional delegation of the Board's support of the district's advocacy efforts before the next regularly scheduled school board meeting.

This item has been reviewed and approved by the School Board Attorney's office as to form and legal sufficiency.

ACTION PROPOSED BY DR. LAWRENCE S. FELDMAN:

The School Board of Miami-Dade County, Florida, approve Resolution No. 20-019 of The School Board of Miami-Dade County, Florida, calling on its Congressional delegation to advocate for and approve additional federal education funding for our nation's public schools.

H-11 Good Cause

RESOLUTION NO. 20-019 OF THE SCHOOL BOARD OF MIAMI-DADE COUNTY, FLORIDA, CALLING ON ITS CONGRESSIONAL DELEGATION TO ADVOCATE FOR AND APPROVE ADDITIONAL FEDERAL EDUCATION FUNDING FOR OUR NATION'S PUBLIC SCHOOLS

WHEREAS, the COVID-19 pandemic is a monumental and unprecedented challenge, emerging quickly and demanding an immediate overhaul of the instructional plans and strategies of school systems across the country; and

WHEREAS, the nation's public schools remain committed to delivering high-quality instruction while ensuring the health and safety of our students and staff; and

WHEREAS, this challenge will persist and likely grow as COVID-19 affects our economy and destabilizes funding for public schools; and

WHEREAS, reputable economists have predicted the end of the nation's economic expansion and forecast a recession that may be deep and long-lasting; and

WHEREAS, any nationwide recession is likely to affect urban areas and their poorest citizens most severely; and

WHEREAS, the numbers of unemployment claims in the nation's big cities are already the highest we have seen since the Great Depression and may only grow; and

WHEREAS, urban public-school systems across the country are already incurring substantial unexpected costs to provide meal services and purchase and deploy digital instructional devices; and

WHEREAS, urban public-school systems are facing difficult decisions about how to allocate dwindling financial resources to sustain high-quality instruction and other essential services for students and families over the next several years; and

WHEREAS, revenue shortfalls will unequivocally result in budget cuts and personnel reductions in urban school systems; and

WHEREAS, these budget cuts will be happening at the same time that urban public school systems will be working to address the immense instructional challenge of unfinished learning that many students will face coming out of this school year; and

WHEREAS, the American Recovery and Reinvestment ACT (ARRA) of 2009 provided \$100 billion in education funding with investments in both the education stabilization fund and various federal categorical programs for public schools, such as Title I and the Individuals with Disabilities Act; and

WHEREAS, Congress followed ARRA in 2010 with \$10 billion in additional funding for the Education Jobs Fund to help school districts retain existing employees, recall former employees, and hire new ones; and

WHEREAS, by comparison the recent Coronavirus Aid, Relief, and Economic Security (CARES) Act provides only \$13 billion for education stabilization funding, which is less than half of one percent of the total \$2.2 trillion relief provided in the CARES Act and is far below the investment that the federal government provided in 2009 and 2010 in ARRA and the Education Jobs fund; and

WHEREAS, public education is one of the largest employers of any organization, public or private, in the nation; and

WHEREAS, published economic research has demonstrated a strong connection between a country's GDP growth and its investments in elementary and secondary education; and

WHEREAS, research has repeatedly found a strong causal relationship between levels of schooling and wages that individuals earn over a lifetime; and

WHEREAS, for public schools to thrive and for our students to realize a bright and productive future, the federal government needs to make a substantial new investment in our wellbeing; and

WHEREAS, the Council of the Great City Schools, the National Education Association, the American Federation of Teachers, the National School Boards Association, the American Association of School Administrators, and the National Parent Teachers Association, and others have called for some \$200 billion in relief for the nation's public schools; and

WHEREAS, this level of funding is the minimum needed by the nation's urban public schools to sustain and accelerate their academic achievement trends over the past decade, including gains in reading and math achievement that outpace the national average.

NOW, THEREFORE, BE IT RESOLVED THAT:

The School Board of Miami-Dade County, Florida, approve Resolution No. 20-019 of The School Board of Miami-Dade County, Florida, calling on its Congressional delegation to advocate for and approve additional federal education funding for our nation's public schools.

A copy of this resolution is placed in the permanent records of this Board.

Presented this twenty-ninth day of April, A.D. 2020

THE SCHOOL BOARD OF MIAMI-DADE COUNTY, FLORIDA

CHAIR

ATTEST:

Secretary

BOARD OF EDUCATION SAN DIEGO UNIFIED SCHOOL DISTRICT

In Support of Federal Advocacy to) <u>Prioritize Stable Public School Funding</u>)

RESOLUTION

WHEREAS, the COVID-19 pandemic is a monumental and unprecedented challenge which emerged quickly and is resulting in the largest adaptive challenge in the history of our public school system to deliver a high-quality education while ensuring the health and safety of our students; and

WHEREAS, we know this challenge will persist as COVID-19 impacts our economy and destabilizes funding for public schools; and

WHEREAS, the UCLA Anderson Forecast recently announced the arrival of the 2020 recession, after adjusting for the impacts of the COVID-19 pandemic, which ends the economic expansion in the United States and the State of California; and

WHEREAS, UCLA Anderson Forecast predicts the recession will be more severe in California than the overall nation due to a larger proportion of economic activity in tourism and trans-Pacific transportation; and

WHEREAS, the emerging impact to California's economy is currently visible in the number of weekly unemployment claims that were filed, which totaled a historic high of 878,727 during the week of March 28 as compared to the record high prior to COVID-19 of 115,462, according to the Legislative Analyst's Office; and

WHEREAS, while the complete picture of economic indicators are still delayed, local, state, and federal governments, along with school districts like San Diego Unified, are facing difficult decisions to ensure the delivery of critical services in the short-term, such as extended learning and/or summer school, while grappling with the reality of an economic recession that includes both a decline in revenues; and

WHEREAS, at the same time school districts like San Diego Unified are incurring new costs to effectively respond to COVID-19 which adds to the severity of the economic recession; and

WHEREAS, the American Recovery and Reinvestment Act (ARRA) of 2009 provided a total of \$100 billion in education funding with investments in both the state fiscal stabilization fund and categorical programs for public schools such as Title I and the Individuals with Disabilities Education Act; and

WHEREAS, by comparison the recent Coronavirus Aid, Relief, and Economic Security (CARES) Act provides only a total of \$13 billion to directly stabilize public school funding nationwide, which is about half of one percent of the total \$2.2 trillion relief provided in the

CARES Act and is far below the investment that the federal government provided in 2009 in the ARRA Act that totaled \$100 billion; and

WHEREAS, in order for public schools to persevere in this pandemic to protect against the loss of educational attainment and to overcome the educational inequities amplified by COVID-19, a significant federal investment is necessary to stabilize education funding and to ensure funding is available for extended learning options and/or summer school; and

WHEREAS, while persevering in the midst of the greatest economic downturn in recent history, public schools will be the glue that holds our communities together and give us hope for the future; and

WHEREAS, a coalition of national education organizations, such as the National Education Association, the American Federation of Teachers, The School Superintendents Association, the Council of Great City Schools, the National Parent Teachers Association, the National School Boards Association, to name a few, have called for \$200 billion to begin providing meaningful relief to our nation's public schools, but additional relief totaling \$350 billion will likely be needed to ensure public school funding is stabilized over the next two years; and

WHEREAS, this level of funding is necessary for San Diego Unified to continue making progress in closing academic achievement gaps as documented in the Learning Policy Institute's Positive Outliers series and in UCLA's Center for the Transformation of Schools case study series on San Diego Unified; and

NOW, THEREFORE, BE IT RESOLVED that the San Diego Unified School District calls on our Congressional delegation, inclusive of our United States Senators and House of Representatives, and the Governor of California to advocate for additional federal funding to prioritize stable public school funding.

APPROVED AND ADOPTED by the Board of Education of the San Diego Unified School District at a regular meeting held this 14th day of April, 2020.

President

Member

Vice President

Member

Member

Superintendent

Student Board Member

APPROVED AS TO FORM AND LEGALITY

70

the San Diego Unified School District on

Approved in public meeting of the Board of Education of

Action Item - 62.

Title: *Call for State and Federal Funding of Public Education (Added 4.30.20) Walk on

Board of Education Meeting Date: 4/30/2020

Action under consideration

WHEREAS, the COVID-19 pandemic is a monumental and unprecedented challenge, emerging quickly and demanding an immediate overhaul of the instructional plans and strategies of school systems across Pennsylvania; and

WHEREAS, the School District of Philadelphia remains committed to delivering high-quality instruction while ensuring the health and safety of our students and staff; and

WHEREAS, this challenge will persist and likely grow as COVID-19 affects our economy and destabilizes funding for public schools; and

WHEREAS, the School District of Philadelphia is already incurring unexpected costs for supplies, staffing, and remote learning; and

WHEREAS, because of the COVID-19 pandemic, the School District of Philadelphia's proposed Fiscal Year 2021 budget has a \$38 million budget gap that will grow to \$1 billion by Fiscal Year 2025; and

WHEREAS, the School District of Philadelphia is facing difficult decisions about how to allocate dwindling financial resources to sustain high-quality instruction and other essential services for students and families over the next several years; and

WHEREAS, these budget cuts will be happening at the same time that the School District of Philadelphia will be working to address the immense instructional challenge of unfinished learning that many students will face coming out of this school year; and

WHEREAS, the School District of Philadelphia is not alone in the challenges it faces; and

WHEREAS, the Pennsylvania School Boards Association, the Pennsylvania Association of School Business Officials, and the Pennsylvania State Education Association have stated that Pennsylvania school districts could lose more than \$325 million in local revenue for this year and an estimated \$1 billion in local revenue for Fiscal Year 2021; and

WHEREAS, the Coronavirus Aid, Relief, and Economic Security (CARES) Act provides only \$13 billion for education stabilization funding, which is less than half

of one percent of the total \$2.2 trillion relief provided in the CARES Act and is far below the investment that the federal government provided in 2009 and 2010 in American Recovery and Reinvestment Act (ARRA) and the Education Jobs fund; and

WHEREAS, the CARES Act requires states to maintain education funding at the average of the last three fiscal years but allows states to seek a waiver of this requirement; and

WHEREAS, Pennsylvania cut education funding by \$1 billion and used federal funding to offset its obligations during the Great Recession; and

WHEREAS, as a result, Pennsylvania school districts were forced to close school buildings, eliminate programs and reduce personnel; and

WHEREAS, Pennsylvania school districts have not fully recovered from state cuts to education during the Great Recession; and

WHEREAS, state and federal officials need to prioritize funding for education to avoid a similar school district funding crisis; and

WHEREAS, the School District of Philadelphia supports an additional \$200 billion in federal relief for public schools nationwide; and

WHEREAS, this level of funding is the minimum needed by public schools to address revenue loss, cover mandate costs, and sustain and accelerate academic achievement trends over the past decade; and

WHEREAS, Pennsylvania school districts need this funding to be in addition to state education funding at 2019-2020 budget levels; and

WHEREAS, additional federal funding and level state funding will allow the School District of Philadelphia to minimize the financial impact of COVID-19.

NOW, THEREFORE, BE IT RESOLVED that the School District of Philadelphia calls on our state officials, including Governor Wolf, and our Pennsylvania State Senators and Pennsylvania State Representatives, to preserve state funding for education; and

We call on our Congressional delegation, including our United States Senators and House of Representative members, to advocate for and approve additional federal education funding for our nation's public schools.

Office Originating Request: Board of Education

CHILD NUTRITION

Memo to Congressional Staff on School Meal Flexibility Issues

Mandy, Ali, Rob and Jacqlyn:

We appreciate the bipartisan interest in providing school meal program flexibility.

Here is an inital CGCS response to the request for some specific examples of the impact of the USDA decision to limit food service program flexibility waivers previously provided during the pandemic school closures. As we collect further information during SY20-21 reopening (virtual, in-person, or hybrid), we will try to provide additional examples. Nearly all of the implementation issues related to the loss of program flexibility waivers have some cost implications, regardless of whether they have more direct administrative, financial, or individual nutritional impact. The withdraw of the prior summer program flexibility by USDA has already significantly reduced program reimbursements in the few school districts that have reopened virtually in August. Nonetheless, it is the infection concerns that continue to drive CGCS reopening considerations regardless of the financial implications.

CGCS is sensitive to the challenges that USDA faces in not having a FY21 annual appropriation in place for October 1 on which to plan and execute policy. Many of the Great City Schools similarly enter our 2020-21 school year without a firm budget and uncertain projected revenues from state sources and from local sources -- as well as questionable budget placeholders at the state level or even the local level that are unlikely to materialize.

The NSLP and SBP were designed to operate at individual school sites, which is not the case since the March school closures and still not the case for school districts operating 100% virtual instructional programs or in some hybrid configurations. With the withdraw of the prior USDA flexibility waivers, the combination of the lower meal participation rate, the lower meal reimbursement rate, individual versus area eligibility, and NSSP/SBP meal accounting requirements has exacerbate the financial crunch facing school meal programs. School districts do not have the financial capacity to maintain staff and service levels at current program participation rates that have been further depressed by USDA flexibility restrictions. Additional flexibility is essential to maintain the viability of school meal programs.

Operational Problems Arising from Withdraw of USDA Flexibility Waivers:

-Checking student eligibility and home school enrollment under NSLP/SBP will be administratively cumbersome and will delay meal pick-up and delivery processes while individual schools remain closed to students

-Documenting meal pick-up and delivery under NSLP/SBP for families with multiple children attending different schools further complicates and delays meal distribution, particularly with the loss of the SFSP/SSO and area eligibility waivers -- families with children attending different CEP and non-CEP schools will face similar challenges, as well as families whose children attend schools with universal breakfast program but individual NSLP eligibility (now requiring unbundling of the meal program packages for pick-up and delivery or separate reduced or paid lunch payments)

-The loss of the summer area eligibility waivers requires school food service staff to deny meals for the younger siblings of eligible students who had been receiving meal packages under the SFSP/SSO waivers to date during the pandemic

-The technology to check individual student eligibility and document meal counts under NSLP/SBP is not readily available at some meal pick-up and delivery sites, and meal accounting software adjustments must be made to maintain the more detailed documentation – connectivity in some areas remains a major problem and hot spots can be spotty at these pick-up and delivery locations

-Mailing "bar codes" to families for student eligibility purposes is not universally effective, particularly given the high mobility of urban low-income families and generally requiring some volume of specific eligibility checks on site

-Some districts must have staff return to their offices following the day's meal pick-up and delivery, in order to enter the newly reinstituted NSLP/SBP meal accounting figures, thereby adding to the administrative burden

-Reopening school kitchens at every school site -- despite having no students attending school in-person for districts in 100% remote mode -- is generally impractical and costly, necessitating the ongoing use of multi-site pick-up and delivery options but now without prior USDA flexibilities

-Meal participation rates for a few large urban school districts that have reopened in 100% virtual mode in the past two weeks (now are operating under the

NSLP/SBP requirements) are at less than 80 percent of normal on-site meal participation levels – this also represents a decline in meal participation compared to the earlier summer program levels

-The reimbursement rates under the newly required NSLP/SBP operations are less than the reimbursement rates for the SFSP/SSO, despite basically maintaining the same pick-up and delivery systems initiated at the outset of the pandemic while still in 100% virtual instructional mode

-Handling reduced and paid meal payments under NSLP/SBP eligibility, including cash payments, present additional challenges in the absence of the flexibility waivers

-The additional decline in meal participation due to the withdraw of the flexibility waivers will likely reduce future commodity benefits for school meal programs

-The decline in meal participation is affecting vendor prices and vendor deliveries, as well as farm to school program initiatives

-Continued meal pattern flexibility is essential based on the grab-and-go nature of the pick-up systems, particularly in the ongoing high temperatures in most urban districts and the challenges for maintain proper food temperatures as well as milk options and water availability at each site

-With 100% remote instruction, the CACFP requirement for on-site enrichment activities appears impossible to provide

-With 100% remote instruction, the Fresh Food and Vegetable requirements for congregate daily service appears impossible to provide

-Imposing the NSLP/SBP eligibility and meal accounting requirements on a 100% remote pick-up and delivery systems will likely result in administrative errors, compliance issues, and financial repayments

Hope the information is helpful.

Jeff



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NPRM COMMENT: Simplifying School Meal Service and Monitoring Requirements

Docket ID: FNS—2019—0007

RIN: 0584-AE67

March 20, 2010

School Programs Branch Policy and Program Development Division Food and Nutrition Service U.S Department of Agriculture 1320 Braddock Place, 4th floor Alexandria, Va. 22314

The Council of the Great City Schools, the coalition of the nation's largest central city school districts, submits comments on the proposed regulation changes and flexibilities for school meal programs published in the January 23, 2020 Federal Register. The Council has requested regulatory simplification and flexibility in eleven sets of regulatory comments submitted since 2011. The Council appreciates the regulatory relief provided in recent years and the Department's outreach to the Great City Schools. The Council continues to support additional regulation revisions and flexibilities – many reflected in the Notice of Proposed Rulemaking (NPRM). Increased school meal costs, insufficient federal reimbursements, micromanaging school menus, and restricting local cafeteria revenue during the implementation of the Healthy Hunger Free Kids Act (HHFKA) has resulted in a multi-year regulatory burden that begs for reform.

The Council underscores our support for the basic nutrient and dietary requirements for school meals (except for the widely criticized and congressionally suspended sodium targets), as well as our opposition to the sale of junk food in our schools. Nonetheless, the Council has contended consistently that the Department's meal pattern regulations represent unwarranted federal micromanagement of school meal programs. We find little justification for continuing to impose federal requirements on the type, volume, frequency, form, and even the color of food items in our school cafeterias. We remain puzzled by regulations prescribing exhaustive details on food items being served each week to school children, when other food items are higher in nutrient value (e.g. dark green vegetables versus orange and red vegetables). Moreover, the USDA regulations for the HHFKA resulted in nearly one-third of the nation's schools abandoning their nutrient-based meal plans in favor of federally mandated food-specific meal patterns.

The shortcut procedure used to pass the Healthy and Hunger Free Kids Act of 2010 (HHFKA) did not provide for full legislative scrutiny by the House and Senate of the 227-page bill nor provide the usual opportunity to revise the measure through the regular legislative process. The nation's schools were then left with a regulatory framework that added over \$1 billion in <u>annual</u> unreimbursed costs to school breakfast and lunch programs according to USDA complicating the ability of school nutritionists and food service staff to provide attractive food options to students.

The Great City Schools food service programs are run by professionals – many being dietitians and nutritionists – who do not require prescriptive federal menu specifications to provide healthy meals in school cafeterias. The Council rejects questionable narratives promoted by some advocates suggesting that schools will misuse any additional regulatory flexibility to repeatedly serve "pizza and fries". In contrast to overregulating our cafeteria food items, the Council would recommend further flexibility in our food service programs to support nutrition education and promotional materials in our cafeterias and across the school district with federal funds.

The Council's comments on the proposed school meal regulation revisions are organized in the order addressed in the NPRM narrative.

Administrative Review

Opposition to Any Criteria, Characteristic, or Factor in Administrative Reviews, Follow-Ups, Monitoring, or Audits that Treat SFAs with Large Enrollments, Multiple Sites, Large Numbers of Meals Served, High Staffing Levels, or High Poverty Differently from SFAs Without Characteristics Attributable to Large Size. The Council too often finds that large urban SFAs are targeted for additional or more frequent review based on having large school meal programs, rather than on issues of program performance and program quality. The preamble material to the NPRM, for example, suggests that enrollment size could be considered as a "risk factor" (FR at page 4097) Large urban food service programs are often reviewed and monitored more frequently due to easy accessibility, proximity, or cost-effectiveness for State agency personnel. The Council strongly suggests that reviews and other monitoring activities should be conducted with consistent frequency across all SFAs with additional follow-up activities based solely on program performance concerns and objective risk factors – instead of size or proximity. Further, the Council recommends that any new definitions, such as significant noncompliance in 7 CFR 210.18(e)(5), similarly avoid size-based program biases.

The Council also sees no rationale, for example, in allowing unique grade configurations for only small school districts (serving less than 2,500 students) to use one or two meal patterns for their age/grade span groups, while larger school districts would not have that flexibility. Student nutrient and dietary needs clearly do not vary based on the overall size of the school district. Again, USDA regulations should not reflect size-based program biases.

Support for Proposed 5-Year Administrative Review with Follow-up for High Risk SFAs Within <u>Two Years.</u> The Council supports the proposed changes to the Administrative Review Cycle in 7 CFR 210.18(c). The Council also recommends federal-level enumeration of <u>all</u> applicable risk factors to be considered for additional review purposes, in order to avoid inconsistencies across states or within states.

<u>Support for Expanded Use of Third-Party Audits</u>. Since school districts operating federal programs are already required to comply with single audit requirements, the Council concurs with the proposed rule in 7 CFR 210.18(f)(3) to allow reliance on single independent audit reviews and findings in order to avoid duplication of efforts and minimize burdens on state agency staff. Local food service staff also would be relieved from some of the redundant records requests and site reviews.

<u>Opposition to SFAs Being Subject to Never-Ending Continuations of Administrative Reviews</u>. A large part of the Great City Schools' support for the 5-Year Administrative Review Cycle in the proposed rule is the completion of the review process – once and for all -- in a five-year period. The local staff burdens during an Administrative Review cannot be overstated during the multi-week if not multi-month review process or large food service programs. The preamble to the proposed regulations (FR at pages 4098-9) indicates that the proposed rules in 7 CFR 210.18(f), (g), and (h) would allow states to conduct administrative review activities outside the established administrative review process. The Council strongly opposes subjecting SFAs to a segmented administrative review process outside/beyond the currently established period. Effectively, SFAs could be reviewed on a piecemeal basis over any unspecified amount of time. This proposed segmented administrative review period could negate the intended benefit of the change to a 5-Year review cycle.

Support for Limiting to Types of Violations for which Mandatory Fiscal Action Must Be Taken. The Council supports establishing a consistent set of repeated violations that require fiscal actions in 7 CFR 210.18(l)(2). Imposing fiscal penalties against public agencies that deliver public services to disadvantaged populations should be done judiciously. Allowing discretion for handling less serious violations with training and technical assistance and specifying the types of violations requiring fiscal sanctions is an appropriate regulatory revision.

Meal Service Simplification and Flexibility

Support for the Proposed Flexibility for the Vegetable Subgroups, But Recommend Further Flexibility. The Council appreciates USDA's recognition of the difficulties in meeting the varied five vegetable subgroup requirements of the current regulations. Using the same minimum amounts for vegetable subgroups across all age/grade span groups will be very helpful. Additionally, allowing legumes offered as a meat alternative to also count for the weekly legume requirement is also supported. Nonetheless, the Council sees no strong rationale for maintaining the requirements for five vegetable subgroups, in contrast to a simpler weekly vegetable total. Colorful plate presentations and vegetable variety are best addressed at the local level in conjunction with seasonal fresh vegetable availability. In fact, certain vegetables have higher nutritional value than others, and objectively should be served more often. Federal directives, therefore, are more appropriately focused on critical nutrient and dietary matters than on micromanaging school menu items. And, if there is a superseding concern about the potential of overreliance on starchy vegetables, USDA could establish a weekly "maximum" for starchy vegetables, while eliminating all other subgroup requirements in 7 CFR 210.10 in favor of simply maintaining the weekly vegetable total and current nutrient/dietary requirements.

Support for One-Grade Flexibility for Age/Grade Span Groups, and Opposition to Allowing Only Small School Districts to Use the One-or-Two Meal Pattern Flexibility But Not Larger Districts. The Council appreciates USDA consideration of the operational difficulties in providing multiple meal patterns in unique age/grade span configurations in the nation's public schools. Adding or subtracting a grade on either or both ends of a unique grade span in a school is very helpful. However, urban districts often have so many unique grade configurations due to available building space across our urban communities that the additional flexibilities proposed for only small school districts serving less than 2,500 students are needed for larger districts as well. Large districts frequently utilize many different grade configurations (e.g., PreK-5, K-5, K-6, 3-8, 5-8, 6-8, 6-12, 7-12, and 9-12). The Council is puzzled why the one-or-two meal pattern flexibility proposed for small school districts in the proposed rule in not similarly provided to large districts. Students in small and large districts do not have different dietary and nutritional needs that would warrant such disparate treatment of large districts. In 7 CFR 210.10(m)(4)(i)(B), the Council recommends striking the "serving fewer than 2,500 students" and allowing the "one or two meal patterns" as an additional flexibility option for <u>all</u> school districts with unique grade configurations where the subclause (A) option would not be effective.

Support for Allowing Interchangeable Meat/Alternative or a Grain (or combinations) at Breakfast. The Council supports the commonsense regulatory change in 7 CFR 220.8(c) to no longer require a daily grain minimum when a meat/meat alternative, a grain, or combination of the two is provided at breakfast. The proposal would simplify program requirements and allow for more appealing breakfast options.

Support for Fruit Component Flexibility in Outside-the-Cafeteria Breakfast Service Settings, But Opposition to Unnecessary State-Level Approval of this Flexibility. The proposed regulations in 7 CFR 220.8(c)(2) and (m)(1) would facilitate the increasing use of Grab and Go Breakfast or Breakfast in the Classroom options using prepackaged meals. The proposal responds to a longstanding flexibility request from program operators who reported that a full cup of fruit was often too much for younger students and resulted in wasted food. Moreover, students were already allowed to take only a ½ cup of fruit in a cafeteria setting using offer-versus-served options, but not outside of cafeteria settings. Under the proposed rule, schools would still retain the option of providing additional fruit. The Council, however, opposes and strongly recommends eliminating the unnecessary procedure of securing State-level approval for this outside-the-cafeteria flexibility.

Support for Allowing Calorie-Free, Non-Carbonated, Naturally Flavored Potable Water Option During Meal Service, and the Sale of Calorie-Free, Naturally Flavored Water for All Age Groups <u>Under Competitive Foods Requirements</u>. The Council supports the commonsense flexibility of providing the option of naturally flavored water in the cafeteria, as well as the sale of naturally flavored water as a competitive food item during the school day for all age groups.

Competitive Foods Simplification

<u>Support for Extending the Timeframe for the Cafeteria Entrée Exception</u>. The Council strongly supports and appreciates the flexibility that this proposed regulation would provide to school food service programs. The HHFKA regulations not only added over \$1 billion in annual unreimbursed costs to school meal programs nationwide, but also limited cafeteria revenue through the restriction on allowable a la carte entrée sales – in effect a double financial hit on school meal programs. The Council cannot overstate the importance of this flexibility for urban school meal programs. The Council, however, takes no position on the "Inquiry" regarding extending the entrée exemption to all food items. It is the "extended entrée exemption" that has been a critical flexibility request from urban school meal programs since the initiation of the current federal restriction.

Public Inquiry Items

Support for Permanently Allowing the Current Flexibility to Substitute Vegetables for Fruits at Breakfast.

Support for Removing the Whole Grain/Grain-Rich First Ingredient Requirement.

No Position Taken on Extending the Proposed Entrée Exemption to Food Items.

Opposition to Changing the 30-day Summary Posting Requirement for State Administrative Reviews, In Order to Prevent Further Delays in State Review Process.

Support for Allowing Grain-based Desserts in CACFP Consistent with Current SBP and NSLP Requirements.

Allow SFA Compliance for School Year 2020-21 With Either the Old Regulation Provisions or New Final Regulation Provisions. The Council specifically requests the flexibility for SFAs to be deemed in compliance for school year 2020-21 if the SFA is implementing either provisions of the old regulations or the new regulations once finalized.

The Council has consistently supported additional simplification and flexibility in the HHFKA regulations since their inception and supports the vast majority of the proposed school meal program rules with the few caveats noted in the above comments. The Council has consistently suggested that federal micromanagement of food items through overly prescriptive meal pattern regulations are unnecessary, counterproductive, and costly. Rather than overprescribing the variety of food items in school meal programs, the Council suggests that USDA look for opportunities in law, waivers, or guidance to allow school meal program administrators to provide and pay for nutrition education activities for students under the SBP and NSLP.

Please let us know if there are questions regarding the Council's comments.

Sincerely,

Jeff Simering Director of Legislative Services



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NPRM COMMENT: Streamlining Summer Food Services Program Requirements

Docket ID: FNS—2019—0034

RIN: 0584-AE72

March 20, 2010

Community Meals Branch Policy and Program Development Division Food and Nutrition Service U.S Department of Agriculture 1320 Braddock Place Alexandria, Va. 22314

The Council of the Great City Schools, the coalition of the nation's largest central city school districts, submits comments on the proposed regulation changes and flexibilities for streamlining Summer Food Service Program (SFSP) published in the January 23, 2020 Federal Register. The Council supports codifying current flexibilities previously allowable under USDA waivers and policy guidance.

The Great City Schools operate the largest school meal programs in the nation. Typically, large urban school districts operate breakfast programs, lunch programs, snack programs, supper programs, and summer food service programs. As large public institutions, the Great City Schools operate under strict financial and management protocols and do not require that type of oversight or assistance that small non-profit agencies might need. The Council, therefore, supports and appreciates the flexibilities and revisions proposed by USDA in the NPRM that recognize the operational capacity of our local educational agencies. Additionally, the Council has particular interest in the coordination of both federal and state program and oversight requirements, since our schools operate multiple food service programs and want to minimize the burdens of overlapping federal and state reviews, monitoring activities, and audits. The proposed rules facilitate such coordinated activities across applicable federal and state agencies and the varied USDA programs operated by urban school districts.

The Council's comments on the proposed SFSP regulatory revisions are organized in the order addressed in the NPRM narrative.

Support for Establishing Streamlined Requirements and Procedures for Experienced Sponsors and SFAs. The Council supports providing SFAs that operate the SBP and NSLP with streamlined requirements and procedures as "experienced sponsors" in the SFSP application process in 7 CFR 225.6(c)(3) and (4) and 225.14(c)(1). The Council also supports provisions facilitating the sharing of program information among state agencies in order to reduce duplication and burden.

Support for Expanding the Initial Site Visit Time Period Using a Tiered Framework, As Well As Allowing For Concurrent Review. The Council supports the codification in 7 CFR 225.15(d)(2) of a tiered framework expanding the initial "first week" site visit requirement to allow site visits over a two-week period for sponsors operating more than 10 sites. The NPRM at 7 CFR 225.15(d)(3) also allows the initial full review to be conducted concurrently with the first site visit rather than at a different time in the first four weeks. Since large urban SFAs typically operate dozens, if not hundreds of SFSP sites, these proposed rule revisions will allow for more effective and efficient start-up operations.

<u>Support for Codifying Current "Site Cap" Flexibility for Serving More Meals</u>. The Council supports the NPRM at 7 CFR 225.6(h)(2)(iii) allowing meals to be served and reimbursed in excess of the "site cap" if a site cap adjustment is requested prior to submitting a claim.

<u>Support for Proposed Multi-Step Site-Based Meal Claim Validation Sampling Procedure</u>. Rather than conducting validations for 100 percent of meal claims at all sites as part of sponsor reviews, the Council supports the proposed multi-step sampling-plus procedure in 7 CFR 225.7(e)(5) and (6). The Council continues to try to determine whether the proposed Error Percentage Formula Methodology (at FR page 4070) is optimal, but nonetheless considers sampling to be an appropriate approach.

Support for Removing Current Meal Time Restrictions and Codifying a One-Hour Elapsed Time Rule. The Council supports this commonsense proposed rule at 7 CFR 225.16(c) allowing sponsors the flexibility to serve meals in timeframes responsive to their customer preferences, as well as provide for unforeseen circumstances.

<u>Support for Flexibility Allowing Off-Site Consumption of Food Items Taken From Congregate</u> <u>Meal Settings</u>. Students often prefer to take some SFSP food items off site to consume later. The Council supports codifying the flexibility to do so. In order to provide additional flexibility and accommodate student preferences, however, the Council recommends deleting the "one" item restriction in the proposed rules, and instead allowing "fruit, vegetable, and grain items" to be taken off site in 7 CFR 225.6(i)(15) and 225.26(h). This congregate meal regulatory flexibility is important for efficient operations and student preferences across the multiple sites operated by urban SFAs.

<u>Support for Continuing the OVS Option for SFA Program Sponsors</u>. SFAs are experienced in following NSLP OVS requirements and can continue to apply those methods efficiently in the SFSP under proposed 7 CFR 225.16(f)(1)(ii).

Support for Codifying the Field Trip (Meals Away from Site) Exception and State Notification. The Council supports the codification of the field trip meals exception and state notification requirement in proposed 7 CFR 225.6(i) and 225.16(g).

Support for Proposed Extension of Eligibility Submissions to Every Five Years. The Council supports using the five-year eligibility duration in 7 CFR 225.6(g)(1)(ix) and 225.6(g)(2)(iii) consistent with other area eligibility determinations.

<u>Support for Web-Based Training Options in the SFSP</u>. The Council supports online SFSP training options in proposed 7 CFR 225.7(a) consistent with other meal programs operated by SFAs.

Opposition to Codifying Multiple Pages of Regulatory Waiver Procedures and Requirements. The Council opposes adding multiple pages of regulatory procedures and requirements for the implementing USDA's statutory waiver authority. Waivers are generally intended to allow more efficient program operations and relief from unproductive regulations. It seems counterintuitive and counterproductive to add pages of new federal regulations in order to provide for waivers of other federal regulations. Moreover, the Council objects to including a requirement (not found in statute authority) allowing State agencies to deny a local program waiver request. The Council recognizes the State interest in ensuring appropriate program operations and can support consideration of any comments a State agency may forward along with a local waiver request to USDA. But the Council cannot support adding a new State-level "waiver denial" authority not found in the authorizing statute. The Council recommends deleting all five new waiver-related regulatory provisions proposed in the NPRM.

The Council has consistently supported additional simplification and flexibility in USDA food service program regulations and supports the vast majority of the proposed SFSP rules with the few caveats noted in the above comments.

Please let us know if there are questions regarding the Council's comments.

Sincerely,

Jeff Simering Director of Legislative Services

April 27, 2020

The Honorable Sanford Bishop Chairman U.S. House of Representatives Appropriations Subcommittee on Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Washington, DC 20515

The Honorable John Hoeven Chairman U.S. Senate Appropriations Subcommittee on Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Washington, D.C. 20510 The Honorable Jeff Fortenberry Ranking Member U.S. House of Representatives Appropriations Subcommittee on Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Washington, DC 20515

The Honorable Jeff Merkley Ranking Member U.S. Senate Appropriations Subcommittee on Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Washington, D.C. 20510

Dear Chairmen Bishop and Hoeven and Ranking Members Fortenberry and Merkley:

Thank you for your diligent work on the COVID-19 relief packages. We appreciate the opportunity to provide a recommendation for the fourth package and thank you in advance for your consideration of the unique situation of school nutrition programs.

As the nation grapples with the impact of COVID-19 disruptions, school nutrition professionals are working on the frontlines to combat rising levels of food insecurity in their communities. School meal programs chose to keep workers employed, deliver meals to students with no additional reimbursement, and expose staff to the coronavirus with little to no funding for proper personal protective equipment. Many maintained fixed expenses such as salaries while taking on unanticipated expenses such as hazard pay and transportation.

School nutrition programs rely on reimbursement from meal service to pay for expenses. Last year between the months of March and June, school nutrition programs served more than 2.5 billion meals and snacks, receiving over \$5 billion in reimbursement. Now according to early reports, programs are serving only a fraction of those meals; this unanticipated loss of revenue has forced programs to tap into fund balances and draw upon lines of credit to sustain their operations. Looking to recovery, it is imperative to support these programs while protecting jobs and limited education resources. Funding must be provided to make programs financially solvent and to maintain the integrity of essential food security programs as the recovery process begins, with many more children relying on school meal programs.

We urge Congress to provide \$2.6 billion to mitigate a portion of the estimated, significant financial loss that school nutrition programs have and will continue to experience. We appreciate your consideration of this request.

AASA, The School Superintendents Association Academy of Nutrition and Dietetics Action for Healthy Kids (AFHK) Advocates for Better Children's Diets American Heart Association American Public Health Association American Society for Nutrition Artisan Grain Collaborative Association of School Business Officials International (ASBO) Balanced Center for Science in the Public Interest Center for Wellness and Nutrition Council of the Great City Schools First Focus Campaign for Children FoodCorps **FoodPlay Productions** Good Food Collective Healthy Food America International Foodservice Manufacturers Association Jacques Pepin Foundation Laurie M. Tisch Center for Food, Education & Policy, Teachers College, Columbia University LunchAssist MAZON: A Jewish Response to Hunger MomsRising National Association of Pediatric Nurse Practitioners National Association of School Nurses National Athletic Trainers' Association National Education Association National Farm to School Network School Nutrition Association Share Our Strength Slow Food USA Society for Nutrition Education and Behavior Society of State Leaders of Health and Physical Education Union of Concerned Scientists United Fresh Produce Association Urban School Food Alliance Wellness in the Schools

CC: Chairman Pat Roberts, Senate Agriculture Committee Ranking Member Debbie Stabenow, Senate Agriculture Committee Chairman Bobby Scott, House Education & Labor Committee Ranking Member Virginia Foxx, House Education & Labor Committee

EQUITABLE SERVICE REGULATIONS

September 25, 2020

Dear Chief State School Officer:

On March 27, 2020, President Trump signed the Coronavirus Aid, Relief, and Economic Security (CARES) Act, an emergency response to the COVID-19 pandemic and its devastation of our American families, schools, and communities.

The Department of Education responded immediately, strongly, and effectively. Moving with unprecedented speed, we pushed billions of CARES Act dollars to States and local school districts. We made available every Federal government resource at our disposal to help all children receive the educational and other special services they need, deserve, and are entitled to under law.

We started from a premise that I believe with every fiber of my being: all children are created equal, and all children matter. In the CARES Act, there is nothing suggesting Congress intended to deny some American students the help they need. In the real world, the pandemic harmed everyone. Sadly, that fact did not stop some from suing us, attempting to deny private-school children and teachers help they needed. Unfortunately for students, a U.S. District Court has vacated the Department's Interim Final Rule (IFR).

The Department strongly, but respectfully, disagrees with the ruling. However, we respect the rule of law and will enforce the law as the courts have opined. The Department will not appeal these rulings. As you likely know, the IFR has not been in effect since the court's decision on September 4, 2020, and we subsequently provided notice of the decision on our website.

The Department will not take any action against States or local districts that followed the guidance and/or the IFR prior to notice of the court's decision. Going forward, districts must calculate the minimal proportional share for CARES Act equitable services according to the formula provided in Section 1117(a)(4)(A) of the ESEA of 1965. Section 1117 requires robust consultation with private schools, among other things, and we will use our enforcement authority aggressively to ensure districts comply with this and other relevant equitable services requirements.

More broadly, the truth remains that *all* schools and *all* students have borne the pandemic's burden and need support. We hope, through meaningful consultation and honest assessment, education leaders will do right by all students they serve. You know as well as I do that many private schools serve disadvantaged, lower income families, and it is bad for these communities when those private schools close. Not only does it place a burden on families that chose a different school for their child, but it also places a burden on public schools as well.

To that end, I strongly encourage you to use the CARES Act dollars we provided to assist public schools and to provide equitable services to private schools as soon as possible.

Thank you for your continued efforts to serve every member of America's rising generation.

Sincerely,

Betsy Devos

Summary of Education Secretary DeVos' Statement on Decision to Not Appeal the Three Court Ruling Enjoining and Vacating the Department's CARES Act Private School Policies

September 28, 2020

Secretary DeVos acknowledged in a statement on Friday afternoon September 25th that the court decisions enjoining and striking down the ED Department's equitable services rules for overallocating funds to private schools will not be appealed by the federal government. Previously the Department had withdrawn its Interim Final Rules from its official website.

Most of the Great City Schools have been in the process of recalculating the private school equitable services proportionate share based on following Title I sec. 1117 procedures and reengaging in private school consultation based on the revised allotment.

While the DeVos letter indicates that the ED Department will not take compliance action against SEAs and LEAs for following the Department's guidance and interim final rule prior to the Sept. 4th court ruling, there is nothing in the DeVos letter that should prevent a school district from recalculating and adjusting the private school proportionate share of the CARES Act funds. To do otherwise would shortchange the innumerable public schools, public school students, and probably some high poverty private schools as well of their rightful benefits under the CARES Act.

Thanks to all the Council's districts for the ongoing support for these litigation initiatives in multiple courts.



Council of the **Great City Schools MEMBER DISTRICTS** Albuquerque Anchorage Arlington, TX Atlanta Aurora, CO Austin Baltimore Birmingham Boston Bridgeport **Broward County** Buffalo Charleston Charlotte-Mecklenburg Chicago Cincinnati **Clark County** Cleveland Columbus Dallas Dayton Denver **Des Moines** Detroit **Duval County** El Paso Fort Worth Fresno **Guilford County** Hawaii Hillsborough County Houston Indianapolis Jackson Jefferson County, KY Kansas City Long Beach Los Angeles Manchester, NH **Miami-Dade County** Milwaukee Minneapolis Nashville New Orleans **New York City** Newark Norfolk Oakland **Oklahoma** City Omaha Orange County, FL Palm Beach County Philadelphia Pinellas County Pittsburgh Portland Providence **Puerto Rico** Richmond Rochester Sacramento San Antonio San Diego San Francisco Santa Ana Seattle Shelby County St. Louis St. Paul Stockton Toledo Toronto Tulsa Washington, D.C. Washoe County

Council of the Great City Schools®

1331 Pennsylvania Avenue, NW, Suite 1100N, Washington, DC 20004 (202) 393-2427 (202) 393-2400 (fax) www.cgcs.org

July 31, 2020

CARES Act: Equitable Services to Students and Teachers in Non-Public Schools

Docket ID: ED-2020-OESE-0091 **RIN:** 1810-AB59

The Council of the Great City Schools, the coalition of the nation's largest central city public school districts, submits comments in strong opposition to the Education's Departments July 1, 2020 Interim Final Rule (Federal Register Vol. 85, No. 127) on interpreting the equitable services provisions of the Coronavirus Aid, Relief and Economic Security Act (CARES Act) to redirect a disproportionate amount of federal funds for services in private schools. The Council requests that the Department immediate withdraw the regulations and the April 30, 2020 non-regulatory guidance that preceded it.

The Council objects to the policies underlying the Department's actions in promoting private school interests at the expense of public-school children, and we challenge the Department's administrative authority to impose these new requirements. For decades, the Council has opposed federal overregulation, including during the Bush, Obama, and Trump administrations. The July 1 Interim Final Rule exemplifies the type of Education Department administrative overreach, both substantively and procedurally, that the Council consistently opposes.

The K-12 funding in the CARES Act includes a straightforward section (section 18005) directing the provision of "equitable services in the same manner as provided under section 1117 of the ESEA of 1965" to private school students and teachers. Virtually every school administrator in America knows what this language means as they have been providing equitable services for decades to private school students in the cornerstone ESEA Title I program for disadvantaged students. Yet, the Education Department opted to depart from the plain language of the CARES Act and proffer a differing interpretation that created unwarranted confusion and delay in the implementation of this \$13 billion emergency appropriation. The Department has abandoned its own October 2019 guidance and common sense reading of the CARES Act to the detriment of the nation's public schools and the children they serve.

The Council finds the Department's most recent decision reflected in the Interim Rule allowing three different options for proportionate share calculations to be inexplicable. The Department created its own interpretation of the statute in its April 30 guidance, and now has created three differing interpretations of the statute as the basis for its "emergency" Interim Final Rule. According to the Interim Final Rule, the CARES Act reference to the decades-old equitable services provisions of Title I apparently allows for the allotment of funds based on either: 1) counting all students [34 CFR 76.665(c)(1)(ii)] attending private schools located in the school district jurisdiction, including those

students who do not live in the school district; 2) counting only the low-income students who reside in Title I attendance areas and were included in the calculation for school year 2019-20 but with expenditure conditions [34 CFR 76.665(c)(1)(i)(A)]; or 3) counting only low-income students who attend private school located in the school district jurisdiction, including those who do not live in the school district, again with additional expenditure conditions [34 CFR 76.665(c)(1)(i)(B)].

The Great City Schools are also concerned that the Department's interpretations in these interim final regulations may change yet again (see 85 FR at 39484) and further complicate school-level implementation, despite the immediate effective date of July 1. As it is under the Department's rule, the equitable services provisions apparently can mean one thing in one school district and something different in its neighboring school districts. Different states similarly have had varying interpretations of the Department's rules and guidance. The internal inconsistency of the Department's interpretation is baffling.

The Council's comments below underscore the correspondence sent to Secretary DeVos questioning the Department's interpretations, including the joint letter from the major national elementary and secondary education organizations on May 5, 2020, the letter from the Council of Chief State School Officers on May 5, 2020, and the letter sent from senior leaders of the House and Senate education-related committees on May 20, 2020.

The Council's comments also summarize the concerns of the nation's largest urban school districts in relation to the Department's Interim Final Rule, guidance, and its underlying interpretation of equitable services under the CARES Act.

Comments of the Council of the Great City Schools

In General: The Council Recommends Withdraw of the Entire Interim Final Rule.

<u>The Interim Final Rule Offers Convoluted Interpretations Designed to Provide</u> <u>Unwarranted Levels of Funding to Private Schools Contrary to the Language of the</u> <u>CARES Act.</u>

The Department's July 1 Interim Final Rule attempts to rationalize its policy preference for redirecting additional financial support to private schools by offering alternative meanings to any words or phrases that might purport a scintilla of ambiguity in the CARES Act or ESEA. Using this tortured approach, the Department claims that any hint of ambiguity or repetitive reference justifies an unfettered reinterpretation of ESEA section 1117 under which the Department is allowed to "pick and choose" the provisions of section 1117 that it deems to be applicable or non-applicable. To the contrary, the provisions of ESEA section 1117 readily adapt to the implementation of equitable services in section 18005 of the CARES Act under any normal interpretation. Using either a dictionary definition of the "same" manner being virtually identical to the traditional Title I equitable services requirements in section 1117 or a case law interpretation of "in the same manner as provided under" – as referenced in the landmark Obamacare ruling of the Supreme Court [NFIB v. Sebelius 567 U.S. 519 (2012)] – to incorporate the methodology or procedures of ESEA Title I, section 1117 "fits" the implementation framework for delivering equitable services to private school students and teachers under the

ESSER provisions of the CARES Act [see Council's amicus brief in State of Michigan, et al v. DeVos at <u>https://tinyurl.com/y5d4xf74</u>].

The Department's Regulatory Analysis Ignores a Separate Private Schools Provision of ESEA (Section 8501) that Aligns with their Equitable Services Interpretation Rather than ESEA Section 1117, and It Overlooks a Similar "All Students" Provision in Earlier CARES Act Legislative Drafts that Was Later Discarded by Congress.

There are two separate private school equitable services provisions in ESEA – section 1117, which is applicable to Title I and section 8501 of Title VIII, which is applicable to the other programs of ESEA. Section 1117 allots funds for private school equitable services to participating private schools based on the number of low-income private school students who "reside" in public school-participating Title I school attendance areas. Private schools with such low-income students choose whether to participate or not participate in Title I equitable services for their eligible students. Section 8501 allots funds for private school equitable services to those private schools choosing to participate in other ESEA programs based on the number of <u>all</u> private school students – regardless of income status or academic status – "enrolled" in private schools in areas served by the school district.

The Department's April 30 guidance and its default Interim Rule option [34 CFR 76.665(c)(1)(ii)] directly align with ESEA section 8501, not ESEA section 1117 as expressly referenced in the CARES Act. And, the Senate in its "initial" drafting of education stabilization funding in the CARES Act started to allot funds for equitable services to "*reflect the proportion of students residing within the boundaries of the local educational agency who attend non-public schools*" (Senate Legislative Counsel -- HEN20279), analogous to the "all students" allotment promoted in the Interim Rule and the guidance (although counting only students "residing" in the school district in contrast to the Department's further erroneous interpretation of students "attending" private schools "located" in the school district jurisdiction). However, Congress discarded the earlier "all students" legislative provision in favor of the ESEA section 1117 reference. The Council further notes that there is also no statutory basis for determining the equitable services proportionate share based on students that do **not** live/reside in the school district's jurisdiction in either the final version of the CARES Act or in ESEA section 1117.

Again, the Department ignores the plain language of section 18005(a) of the CARES Act, the legislative evolution of the CARES Act, and the decades-old "equitable services" practices and procedures of Title I of ESEA to fabricate an erroneous interpretation that would drive additional funding for services for private school students in a manner entirely inconsistent with these applicable statutes.

Equitable Services is a "Term of Art" with Roots Back to the Original ESEA of 1965 and Can Not Be Reinterpreted by Department Fiat to Justify A Policy Preference for Providing Increased Government Support to Private Schools at the Expense of Public-School Children.

With decades of operational practice providing equitable services to eligible private school students under the ESEA Title I program for disadvantaged students, school administrators, federal and state education regulators, and Congress understand the procedures and parameters of providing such services. The ever-changing efforts by the Education Department to reinvent

equitable services procedures and parameters in relation to the CARES Act funding (GEER and ESSER) impermissibly abandons and ignores the historical understanding of equitable services according to ESEA Title I as a well-understood "term of art" in statute, in Department regulations and guidance, and in educational practice at the state and local level.

<u>The Department's Equitable Services Guidance and Interim Rule Increases Inequity</u> <u>Contrary to the Claim of Improving Equity</u>

Rather than allocating CARES Act education funding based on low-income students residing in a school district jurisdiction in accordance with section 18005(a) of the CARES Act ("in the same manner as provided under section 1117 of the ESEA"), the Department's guidance and Interim Rule create a "default" procedure to calculate the proportionate share based on "all" students regardless of income and even residence within the school district's jurisdictional boundaries. As a result, more of the district's CARES Act funds, which were generated by the low-income student population based in the Title I formula, would be diverted to private schools that generally serve a more affluent and less disadvantaged student population. In fact, the nation's free public schools traditionally serve a greater concentration of low-income, special education, homeless, migrant, foster, language-minority, medically fragile, court-involved, and other at-risk students than tuition-based private schools. Moreover, the greatest concentrations of COVID-19 infections are generally found in low-income and minority communities, thereby warranting the CARES Act funding allocation system favoring economically disadvantaged schools and their students. Ironically, the private schools that serve concentrations of lowincome students would also receive less equitable services per student under the default "all students" procedure of the guidance and Interim Rule.

Moreover, section 18006 of the CARES Act – that immediately follows the equitable services provision of section 18005 – requires school districts to continue to pay public school employees and contractors to the greatest extent practicable as a condition for public schools receiving CARES Act education stabilization funds. Private schools have no such CARES Act payment responsibilities for employees or contractors further supporting the plain language interpretation of the CARES Act directing funds through the more narrowly tailored ESEA Title I section 1117 low-income procedures rather than the broader ESEA section 8501 "all" student allotment procedures as referenced above.

Additionally, private schools – *but not public schools* – have access to other federal CARES Act financial support, including millions of dollars under the Payroll Protection Program and additional millions in payroll withholding tax credits under the Employee Retention tax credits and Paid Sick/Family Leave tax credits in the last two coronavirus relief measures enacted in March. In fact, private schools with annual tuitions ranging into the tens of thousands of dollars also qualify for CARES Act-funded equitable services, despite the Education Department's request in the preamble to the Interim Rules (85 FR at 39483) that affluent private schools voluntarily forego CARES-funded private school services.

The Council finds the Department's claim of greater equity under their Interim Final Rule to be baseless.

In the Alternative to Withdrawing the Entire Interim Final Rule, the Council Offers Section-by-Section Comments and Recommended Revisions.

<u>The Department's Interim "Consultation" Rule Claims an Inconsistency Relating to</u> <u>Proportionate Share Determinations that Does Not Exist in the CARES Act or ESEA</u> <u>Section 1117</u>.

The Department invents a nonexistent inconsistency in the CARES Act under 34 CFR 76.665(b)(2) in its phrase "except to the extent inconsistent with the CARES Act *and this section*" (emphasis added) when no inconsistency actually exists. The inconsistency is solely the Department's own creation in its reference to "*this section*" of the regulations, which in turn cross-references its own erroneously proportionate share regulation in 34 CFR 76.665(c). Without the Department's tortured proportionate share regulation, there is no inconsistency in following the existing Title I section 1117(c) "consultation" provisions. Additionally, the Council sees no inconsistency with the congressional directive to follow the ESEA Title I section 1117 procedures and methodologies even in the unique circumstances of a "by-pass" of a local educational agency and subsequent arrangements operated through a permissible third party contractor to carry out equitable services to eligible private school students.

Contrary to the Department's implication that some subset of consultation provisions of sec. 1117 are inconsistent with the CARES Act, the Interim Rule misleadingly references section 1117(b)(1)(E) and (J)(ii) for calculating proportionate shares (which include the cross-reference to section 1117(a)(4)(A) regarding low-income students from participating Title I school attendance areas). The inconsistency, however, is within the Department's own Rule and not with "in the same manner as provided under section 1117" under section 18005(a) of the CARES Act. Moreover, the Department's effort to reinterpret section 18005(a) by claiming surplus or repetitive language regarding consultation is similarly unavailing. The July 1 Congressional Research Service analysis of the Department's ongoing equitable services interpretations debunks the rationales raised in the preamble material and directly counters the Department's purported distinctions (see link below). Additionally, the Council notes that Congress frequently repeats key statutory principles in subsequent legislation to underscore matters of operational importance and to signal to regulatory agencies and critical constituencies that such key interests continue to be ensured. Such statutory restatements are common in essential areas like civil rights. And in the instance of section 1117 equitable services, similar cornerstone principles are underscored in the CARES Act regarding procedures for getting critical advice (consultation) from private school officials on the needs of their eligible students, as well as the pivotal administrative responsibilities of public officials in the proper and constitutional use (public control) of these public funds.

The Council, therefore, recommends eliminating all erroneous, confusing, and superfluous regulatory language from the Interim "consultation" Rule.

Recommendation: In 34 CFR 76.665(b)(2), strike everything after "ESEA" and insert a period.

<u>The Department's Interim "Proportionate Share" Rule is an Erroneous Interpretation of</u> Both the CARES Act and Equitable Services Under ESEA Title I Section 1117.

As described above and in the Council's amicus brief in the State of Michigan, et al v. DeVos, the Department erroneously interpreted the equitable services provision of the CARES Act to divert additional federal financial assistance to private schools. Based on a survey of the Council's member urban school districts and information included in the aforementioned challenge to the Department's Interim Rules and guidelines, the Council estimates our 76 Great City School districts could lose approximately \$292 million that would be diverted under the Interim Rule and guidance to services to private school students <u>not</u> "in the same manner as provided under section 1117 of ESEA". The Pennsylvania Department of Education in their May 7, 2020 letter to Secretary DeVos estimates a 200 percent increase in private school funding for equitable services under the Department's "all" students proportionate share interpretation and in some instances more than a 4000 percent shift of funding in favor of more affluent students. The nation's Great City Schools again object to the Department's preferential treatment of private schools at the expense of public-school students and its fabricated interpretation designed to produce increased funding for private school students.

The Department's proportionate share rule not only disproportionately allots additional CARES Act funding to private school students and diverts funds away from public schools with higher concentrations of poverty, but also financially encourages private schools that typically do not participate in equitable services under other ESEA programs to apply for CARES Act services. Ironically, the new-found interest in participation in CARES Act equitable services among often more affluent private schools not only diverts CARES funds away from public schools with higher concentrations of low-income students, but it also diverts funds from away from other private schools (often parochial schools) serving low-income communities. Typically, though not in every case, federal education programs with allotments based on all students, in contrast to low-income students or other disadvantaged students, as well as programs allowing broader uses of funds will attract increased private school participation. Moreover, the Department's interpretation in 34 CFR 76.665(c)(1)(i)(B) and (c)(1)(ii) counts private school students who reside outside the school district but commute into private schools located within the school district's jurisdictional boundaries. The Great City Schools object to paying for private school services for children living in the suburbs and whose families pay taxes in jurisdictions other than our school districts. Even worse, a number of urban school districts such as New York City, Philadelphia, and Kansas City are located on interstate boundaries and would be responsible for paying for services for private school students commuting into private schools in the city from outside their respective states.

Finally, the Department has inserted two poison pills into the proportionate share Interim Final Rule that prevent most school districts from availing themselves of the two low-income calculation options. Despite the Department's claims of providing additional public-school flexibility in the July 1 Rule, an extremely limited set of public-school districts can operationally make use of these two low-income options. The overwhelming majority of the nation's school districts find the two new options to be unworkable in practice. First, school districts would be limited to using their CARES Act funds only in their Title I schools – which comprise nearly 60,000 of the nation's nearly 100,000 public schools. Nearly 40 percent of the nation's public schools, therefore, would be prohibited from receiving any of these emergency CARES Act education funds under these two purported options. Second, for any school districts would be

precluded for replenishing any local financial savings derived from the expenditure of CARES Act funds in their Title I schools and using local funds for other district operations. This would also preclude backfilling district revenue losses from the pandemic, such as underwriting ongoing districtwide employee salaries in non-Title I schools, in line with the CARES Act section 18006. Further, despite no "supplement not supplant" provisions included in the education section of the CARES Act, the Department bootstraps a ESEA Title I "supplement not supplant" violation into the Interim Final Rules in 34 CFR 76.665(c)(3) to make both of the two "low-income" proportionate share calculation options unworkable despite the congressional intent to underwrite a broad range of normal operational costs with these emergency funds.

Recommendation: Amend 34 CRF 76.655(d) as follows:

- 1) In paragraph (1) strike "must use one of the following measures" after "an LEA" in the first instance it appears and insert "shall follow ESEA section 1117(a)(4)(A) and (c)(1).";
- 2) In paragraph (1) also strike subparagraphs (i) and (ii);
- 3) In paragraph (2) insert before the period "in accordance with the provisions of ESEA section 1117"; and
- 4) Strike paragraph (3).

The Department's Interim "Equity" Rule Omits a Necessary Reference in Paragraph (1) to "Eligible" Private School Students as the Population Base for the Equitable Distribution of CARES Act Funds, and Includes a Redundant and Unnecessary Paragraph (2) that Effectively Repeats the Erroneous Preceding "Proportionate Share" Regulation.

The Council questions the necessity for the 34 CFR 76.665(d) subsection of the Interim Rule, which adds nothing of substance to the regulation and effectively repeats the ESEA Title I section 1117(a)(3) already referenced under CARES section 18005(a) "in the same manner as provided under section 1117". Nonetheless, if retained in a final regulation, the Rule should reference "eligible" private school students and teachers in first paragraph. Further, paragraph (2) of the interim rule is redundant and unnecessary since it, in essence, repeats the proportionate share regulation that immediately precedes it in 34 CFR 76.665(c).

<u>Recommendation</u>: In 34 CFR 76.665(d)(1) strike "(1)" and insert "eligible" before "private school students and teachers"; and strike redundant paragraph (2) entirely.

<u>The Department's "Public Control" Rule Does Not Create an Ambiguity that Justifies the</u> <u>Department's Divergent Interpretations of the Equitable Services Provisions of ESEA Title</u> <u>I Referenced in the CARES Act</u>.

Although section 18005(b) of the CARES Act does not directly reference ESEA Title I section 1117, the cornerstone principle of the public control of services, property, materials, and equipment utilized in the delivery of equitable services to eligible private school students is well-understood after decades of historical practice dating back to the original enactment of the Elementary and Secondary Education Act of 1965. In following those institutionalized practices of public control of federal funds, a direct cross-reference to the existing practices under section 1117 of ESEA is a practical, straightforward, and understandable addition to the Interim Rule.

<u>Recommendation</u>: In 34 CFR 76.665(f) insert "in accordance with section 1117(d) of the ESEA" after "LEA".

Conclusion

The Department's Interim Final Rule and its earlier guidance contrive a set of equitable services options that are <u>not</u> designed "in the same manner as section 1117 of ESEA" but are clearly "in a different manner" than expressly directed under section 18005 of the CARES Act.

This wholesale reinterpretation of long-settled equitable services practices is inconsistent with the applicable statutes and an abuse of agency authority. Although the Department may have a policy preference for overcompensating private schools with federal funds, there is no authority to do so. Congressional leaders on both sides of the aisle, state and local education officials, major national education organizations, and even the non-partisan Congressional Research Service acknowledge the Department's misinterpretation of this CARES Act provision and ESEA [see http://blogs.edweek.org/edweek/campaign-k-12/CRS%20Analysis%200f%20CARES%20Act%27s%20Equitable%20Services%20Provision %20%282%29.pdf].

The Department's claim of ambiguity – though nonexistent in the CARES Act – that purportedly permits the agency to pick and choose which subsections and provisions of ESEA Title I section 1117 it prefers to follow and which it will ignore lacks substance. And, the stubborn adherence to a misguided policy and unsupported interpretation favoring private schools is costing the federal government, as well as school districts and state governments, both time and money during this public health and economic crisis.

The Department's ever-changing interpretations dating from its April nonbinding guidance to its promised interpretative rule in May and its July 1 publication of the Interim Final Rule has delayed implementation of emergency K-12 funding, and it has resulted in state agencies and school districts having to change expenditure plans, consultation timelines, and funding obligations at the end of the school year and into the next fiscal year. The Department's indecision and self-inflicted, three-month delay prior to interim rulemaking mitigates against any claim of an emergency APA notice and comment exception.

The responsible course for the Department is to withdraw both the Interim Final Rule and guidance and allow normal equitable services practices under Title I section 1117 to be carried out in accordance with the plain language of the CARES Act -- without further federal Education Department rulemaking or guidance.

While the Department's regulating equitable services under the CARES Act seems unnecessary from any operational perspective and is arguably outside its rulemaking authority, the Council has also offered a series of regulatory revisions -- in the alternative to withdrawing the Rule -- that would function in accordance with a proper interpretation of the CARES Act and section 1117 of ESEA.

Please let us know if there are questions regarding the Council's comments and recommendations.

Sincerely,

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Jeffrey Simering, Director of Legislation Council of the Great City Schools

 HUSCH BLACKWELL LLP Donald J. Mizerk Esq., (CA Bar No. 208477) John W. Borkowski (IL Bar No. 6320147) (pro hac pending) 120 South Riverside Plaza, Suite 2200 Chicago, Illinois 60606 Phone: (312) 526-1538 Fax: (312) 655-1501 don.mizerk@huschblackwell.com Attorneys for Amicus Curiae COUNCIL OF THE GREAT CITY SCHOOLS IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA 		Case 3:20-cv-04478-JD Documen	nt 47-1 File	ed 07/24/20	Page 1 of 92
	2 3 4 5 6 7 8 9	HUSCH BLACKWELL LLP Donald J. Mizerk Esq., (CA Bar No. 208477) John W. Borkowski (IL Bar No. 6320147) (pro 120 South Riverside Plaza, Suite 2200 Chicago, Illinois 60606 Phone: (312) 526-1538 Fax: (312) 655-1501 don.mizerk@huschblackwell.com Attorneys for Amicus Curiae COUNCIL OF THE GREAT CITY SCHOOLS IN THE UNITED STAT	hac pending TES DISTF	g) RICT COURT	Γ
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STATEMENT OF INTEREST

Amicus curiae, the Council of the Great City Schools ("Council"), is a coalition of 76 of the nation's largest urban public school systems and is the only national organization exclusively representing the needs of urban public schools. Founded in 1956 and incorporated in 1961, the Council serves as the national voice for urban educators and provides a forum to share best practices. The Council is composed of school districts with enrollments greater than 35,000 students located in cities with a population exceeding 250,000. Districts located in the largest city of any state are also eligible for membership based on urban characteristics. The Council's member districts have a combined enrollment of over 8.2 million students. Headquartered in Washington, D.C., the Council promotes urban education through research, instruction, management, technology, legislation, communications, and other special projects.

The Council and its members are deeply concerned that the U.S. Department of Education's ("Department") recently announced interim final rule ("Rule") regarding the provision of equitable services under emergency relief funds will divert hundreds of millions of dollars of desperately needed funds away from their primary intended recipients, public schools serving at-risk students. See CARES Act Programs; Equitable Services to Students and Teachers in Non-Public Schools, 85 Fed. Reg. 39,479 (July 1, 2020). Through the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act" or "Act"), Congress in March 2020 appropriated approximately \$16 billion that could be used to support elementary and secondary education, including \$13 billion specifically to allow school districts to address needs arising out of the COVID-19 pandemic. The Act expressly required those funds to be allocated pursuant to well-established formulas under Title I of the Elementary and Secondary Education Act ("ESEA"), 20 U.S.C. § 6301 et seq., including a requirement for school districts to reserve funding to provide "equitable services" to students and teachers in private schools based on the number of low-income students residing in the district and attending private schools. In disregard of this clear directive, the Rule adopted by the Department would force school districts to allocate funds not based on low-income private school students residing in the districts, but based on all students attending private schools in the district wherever they live. The Department has

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unlawfully adopted an interpretation of the CARES Act equitable services requirement that is directly contrary to both the plain language of the Act and to Congressional intent.

The Council submits this brief to underscore the outrageousness of the Department's actions and their potentially devastating impact on public school districts struggling to find ways to operate safely and effectively during the COVID-19 pandemic.

SUMMARY OF ARGUMENT

The Department has tried to unlawfully rewrite important emergency legislation to support its own spending priorities rather than those of Congress. In particular, the Department seeks to divert hundreds of millions of dollars that Congress intended to support public schools grappling with the pandemic, including thousands of schools in Council member districts, to private schools, regardless of the financial need of private school students.

In the CARES Act, Congress appropriated approximately \$13 billion directly for use by elementary and secondary schools and directed school districts to allocate a portion of that money to provide equitable services to private schools based on the number of low-income students residing in the district and attending private schools. While an early version of the bill would have allocated funds to private schools based on their total enrollment of district resident students, Congress rejected that approach and instead directed that funds be allocated based on a well-established Title I formula, which has been in use for many years. This made sense in part because Congress already had allocated significant resources to private schools, but not to most public schools, in the form of forgivable loans under the Paycheck Protection Program ("PPP"), CARES Act § 1102, and also had made a variety of tax credits available to private schools but not public school districts.

Moreover, congressional leaders on both sides of the aisle have made clear that Congress intended the requirement that school districts provide "equitable services" under the CARES Act to be based on low-income private school students residing in their districts and not on all private school students regardless of their affluence or their residence. Likewise, the non-partisan Congressional Research Service concluded this is the proper interpretation of the CARES Act.

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Not only is the Department's attempt to rewrite the CARES Act substantively wrong, it has also been done in a chaotic manner that itself has been damaging to public school districts. More than a month after the Act was passed, the Department first issued non-binding regulatory guidance directing that equitable services should be provided to private schools based on their total enrollment. *See* Providing Equitable Services to Students and Teachers in Non-Public Schools Under the CARES Act Programs, (April 30, 2020) ("Guidance"). Many states and school districts, seeing that this "interpretation" directly contradicted the language of the Act, indicated that they would not follow it in making their allocations under that CARES Act. In response, two months later, and more than three months after the enactment of the Act, the Department, without notice and comment, adopted the Rule that effectively required the immediate adoption and implementation of its "interpretation" of the CARES Act's equitable services requirement as first set forth in the Guidance. As a result, more than three months after the enactment of the Act, most states and school districts have not yet been able to allocate the desperately needed resources appropriated by Congress to schools.

Even more significantly, the approach demanded by the Department will divert hundreds of millions of dollars from public schools to private schools, regardless of the financial need of their students. The effect on Council members, their schools, and the students they serve will be devastating. This money is needed to fund counselors, social workers and nurses and to purchase equipment like computers, faces masks, thermometers, hand sanitizer and COVID-19 tests. The need to protect the safety of students and faculty today is paramount. Moreover, many of the schools in Council member districts serve disadvantaged communities where schools must address the digital divide in order to equitably provide on-line educational opportunities. The Department's unlawful rewrite of the CARES Act severely undermines this critical work.

BACKGROUND

The CARES Act authorized the Department to create three categories of Education Stabilization Funds ("ESF") grants that would be administered through state education agencies ("SEAs"). One of these, the Elementary and Secondary School Emergency Relief ("ESSER") CARES Act § 18003, provides CARES Act funds earmarked specifically for school districts.

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THE COUNCIL OF THE GREAT CI**106**CHOOLS AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION (3:20-cv-04478-JD) The ESSER Fund was designed to provide flexible support directly to school districts, as outlined in a non-exhaustive list of broad possible uses in the CARES Act. *Id.* at § 18003(d).¹

The purpose of section 18003 of the CARES Act was to provide financial support to schools, students, and teachers in light of the COVID-19 pandemic. Most of this money is directed to states and public school districts, but—as with other federal grants—a certain portion of the funding must be used to provide equitable services to non-public school students and teachers. The CARES Act, in section 18005, *expressly* states that the funding must be allocated "in the same manner" as it is allocated in section 1117 of the ESEA, which has long been commonly known as the Title I funding formula. Yet, the Department's initial Guidance, and then its Rule, both suggest and then effectively mandate a different, more generous, formula for the funding of private schools with money Congress allocated for public schools.

ARGUMENT

The Department Unlawfully Replaced the Equitable Services Allocation Method Adopted by Congress with Its Own Preferred Approach.

The CARES Act, as enacted, is clear that the allocation for private schools is to be based on their low-income population residing in the relevant school district just like Title I equitable service calculations. Indeed, Congress did not adopt a draft bill that specifically would have provided equitable services for private school students and teachers based on total private school enrollment, as the Department's Rule attempts to do. Moreover, Congress rejected that allocation methodology justifiably as low-income and minority communities, like those served by Title I, have been disproportionately affected by the pandemic, and because the CARES Act and other emergency legislation also provide additional resources to private schools that are not available to public school districts. Finally, there is bi-partisan and non-partisan support for the view that

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¹ CARES Act, PL 116-136, 134 Stat 281. Because the CARES Act was codified in scattered titles of the United States Code, including as statutory notes, and for ease of reference, all CARES Act provisions enacted in Public Law 116-136, 134 Stat. 281, are cited herein simply as CARES Act § _____. CARES Act sections 18003 and 18005 are codified at 20 U.S.C. § 3401 note.

Congress intended the allocations to be done according to the Title I formula, just like the Act
 says.

A. The Department's funding formula erroneously considers *all* private school students rather than only *low-income* students residing in the district.

Allocation of CARES Act funds with respect to private schools is statutorily and expressly tied to the well-established formula set forth in Title I. Under the CARES Act, school districts receiving funding under the Act "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." CARES Act § 18005 (emphasis added). Section 1117 of the ESEA, or Title I, requires schools to provide equitable services "[t]o the extent consistent with the number of *eligible* children . . . in the school district . . . who are enrolled in private" school. 20 U.S.C. § 6320(a)(1) (emphasis added). Title I requires that "[e]xpenditures for educational services and other benefits to eligible private school children shall be equal to the proportion of funds allocated to participating school attendance areas based on the number of children from lowincome families who attend private schools." Id. § 6320(4)(A)(i) (emphasis added). Congress and the Department have long been aware of this methodology and, as recently as October 2019, the Department instructed school districts to "[e]nsure that its expenditures for equitable services [under Section 1117 of Title I] are equal to the proportion of funds generated by children from low-income families who reside in participating Title I public school attendance areas and attend private schools."²

The Department's directive in two of the three ostensible options under its interim final rule—that CARES Act funds should be provided to private schools on the basis of the *number of students attending private school within the school district's boundaries,* regardless of where those students live, rather than on the basis of the *number of low-income students residing in the school district's jurisdiction*—is expressly contrary to the statute for two reasons.

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² U.S. Dep't of Educ., *Providing Equitable Services to Eligible Private School Children, Teachers, and Families Updated Non-Regulatory Guidance* (Oct. 7, 2019), <u>https://www2.ed.gov/about/inits/ed/non-public-education/files/equitable-services-guidance-100419.pdf</u> (emphasis added) ("October 2019 Guidance").

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i.

Congress expressly declined to require public school districts to allocate equitable services funding on the basis of *all* students in private schools rather than "eligible" or low-income students.

First, the use of *all* students rather than *low-income* students is not supported by the legislative history of the Act. An early version of the bill would have expressly allocated funds to private schools based on their total enrollment. The enacted CARES Act rejected this approach, instead calling for the use of the Title I formula. Under that earlier version of the bill (as under the Department's Rule), hundreds of millions of dollars would have been diverted away from public schools who truly need those funds and towards private schools who do not. Congress refused to adopt this approach when it chose instead to enact a bill that specifically refers to Section 1117 of the ESEA, recognizing that funds to support private schools should be based on the number of *low-income* students, not based on *all* students at private schools.³

Specifically, an early draft of the appropriations provision of the CARES Act, received by amicus curiae on March 22, 2020, included a section titled "Assistance to Non-Public Schools," which provided as follows:

SEC. 18005. (a) IN GENERAL.— A local educational agency receiving funds under sections 802 or 803 shall provide equitable services to students and teachers in non-public schools, as determined in consultation with representatives of nonpublic schools. The level of such services shall reflect the proportion of students residing within the boundaries of the local educational agency who attend nonpublic schools.

See Exhibit A, Declaration of Jeff Simering; Exhibit A-1, HEN20279 (emphasis added). This language is not present in the enacted bill. Rather, the enacted CARES Act mandates that the familiar Title I formula be used:

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.

Significantly, Section 8501 of the ESEA, which does, in fact, direct equitable services to all eligible private school students regardless of residence status, is not referenced in the CARES Act.

CARES Act § 18005(a) (emphasis added). Congress knew how to write an allocation formula like the one that the Department wants. Indeed, it did write one. It just chose not to enact that version into law.

The directive to use the formula set forth in section 1117 of the ESEA—which, as explained above, requires equitable services to be provided to private schools in a proportionate share reflecting the number of low-income students residing within the boundaries of the school district or "local educational agency" ("LEA")—permits less money to flow to private schools than would have occurred under the previous draft of the CARES Act; the proportionate share is not based on *all* the students residing in the district's jurisdiction or even the Title I schools' attendance areas that attend private schools, but only those low-income students who do.

The difference between these two versions of the bill—the earlier draft basing equitable services on *the proportionate share of all private school students residing in the LEA* and the later enacted bill basing equitable services on *the number of low-income students residing in participating Title I attendance areas*—is of critical importance. The Department's Rule may track early development of the CARES Act, but entirely fails to follow its *enacted* provisions.

Moreover, there are two formulas in ESEA. In section 1117, equitable services are provided based on the number of low-income students. In contrast, the equitable services provision in section 8501 does *not* require school districts to base private schools' proportional share on the number of low-income children living in the district who attend private school. *See* 20 U.S.C. § 7881(b). Again, if Congress had wanted equitable services to be provided based on *all* students in private schools, it would have enacted the earlier-drafted formula, or referenced section 8501 of ESEA which applies to part C of Title I, part A of Title II, part A of Title IV, and part B of Title IV, rather than section 1117 which applies only to part A of Title I. The choice to use section 1117 was clear and unambiguous.

In enacting the CARES Act, Congress thus declined to use a formula which would allow for *more* money to flow through public schools to serve private schools than is allowed by the longstanding method set forth in section 1117 of the ESEA. The Department's position is not

only contrary to the plain language of the CARES Act, but also to clear Congressional intent as
 demonstrated by the Act's context and legislative history.

ii. Congress also required that equitable services funding be allocated on the basis of student residence.

Second, the Department's position that the proportionate share is based on *the number of students who attend a private school that is located in the district*—rather than the *number of low-income students residing in the district who attend a private school*—impermissibly requires that the proportionate share be based not on which students *live* in the district, but which students *attend* private schools in the district. As with the use of *all* private school students in the formula rather than only *low-income* students, the use of *students who attend private school in the district, regardless of where the students reside* leads to more money diverted to private schools. It is also plainly inconsistent with the text of the CARES Act and the ESEA.

This distinction matters: LEAs receive local tax revenue from persons living in their district, but not from those living outside it. Under the Department's interpretation, public schools are required to take money dedicated to the students who both reside in *and* attend school in their district and allocate it instead to students who may reside elsewhere—and pay taxes elsewhere—but attend *private schools* in the district. Ignoring the residency requirement of Section 1117 of the ESEA, as expressly required by the CARES Act, reflects the Department's arbitrary and unlawful interpretation.

Congress expressly chose to require that equitable services be provided to private schools "in the same manner" as that required in Title I, or section 1117 of ESEA. The Department cannot override the statutory text of the CARES Act, and its interpretation must be declared arbitrary and capricious.

B. There were good reasons for Congress to choose the specific allocation formula that it did.

First, it is well documented that the COVID-19 pandemic is disproportionately affecting low-income and minority communities. As the primary source of federal support for elementary and secondary education, Title I targets precisely these communities, many of whom are located

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in Council member districts. It also makes sense, for this same reason, to allocate resources based on *low-income* students rather than all students and to focus on the students in private schools *residing* in these urban areas rather than those that may be commuting to those private schools from affluent suburbs. Indeed, in some Council member districts near state borders, students commute from other states to attend expensive private schools. Thus, allocating resources where they are most needed, which Congress did, makes sense.

Second, allocating these CARES Act funds to private schools based on their total enrollment and thereby dramatically increasing their proportionate allocation would have been unreasonable and unfair for Congress to do, because private schools are eligible for other federal resources that public school districts are not. For example, the CARES Act also created the Paycheck Protection Program ("PPP"), through which the Small Business Administration ("SBA") provided loans to certain small businesses, including private schools. CARES Act § 1102. These loans will be fully forgiven by the SBA. CARES Act § 1106. Under the PPP, all small businesses, as well as all tax-exempt non-profit organizations described in section 501(c)(3) of the Internal Revenue Code, are eligible to receive loans. CARES Act § 1102(a)(2)(D).⁴ The 500-employee cap as well as the inclusion of Section 501(c)(3) nonprofits opened the door for private schools to secure PPP loans to the tune of millions of dollars. Just in Council member school districts alone, over 75 private schools each received over a million dollars.⁵

 Here are a	few exampl	les of suc	h school	ls:°	

School Name	City, State	PPP Loan Range
St. Ann's School	NYC, NY	\$5–\$10 million
Columbia Grammar and Preparatory School	NYC, NY	\$5–\$10 million

 ⁴ See also Business Loan Program Temporary Changes; Paycheck Protection Program, 85 Fed.
 Reg. 20811 (April 15, 2020) (the SBA interim final rule regarding implementation of CARES
 Act §§ 1102, 1106).

⁶ See Exhibit B (citations contained therein).

⁵ Stephen Rich et al., *Explore the SBA Data on Businesses that Received PPP Loans*, THE WASHINGTON POST (July 6, 2020),

https://www.washingtonpost.com/graphics/2020/business/sba-ppp-

 ²⁷ data/?utm_campaign=wp_main&utm_medium=social&utm_source=twitter&itid=lk_inline_man
 ²⁸ ual_5; see also Exhibit B.

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School Name	City, State	PPP Loan Range
Poly Prep Country Day School	NYC, NY	\$5–\$10 million
Albuquerque Academy	Albuquerque, NM	\$2–\$5 million
Head-Royce School	Oakland, CA	\$2–\$5 million
Francis Parker School	San Diego, CA	\$2–\$5 million
De Paul College Prep	Chicago, IL	\$1–\$2 million
Cincinnati Hills Christian Academy	Cincinnati, OH	\$2-\$5 million
Sidwell Friends School	Washington, D.C.	\$5–\$10 million
St. Louis University High School	St. Louis, MO	\$2-\$5 million
Bishop Lynch High School	Dallas, TX	\$2–\$5 million
Antonian College Preparatory High School	San Antonio, TX	\$1–\$2 million
Christopher Columbus High School	Miami, FL	\$2–\$5 million
Central Catholic High School	Portland, OR	\$2–\$5 million

In addition to the benefit of these substantial sums in forgivable loans, private schools are also eligible for tax credits that are not available to public school districts. For example, private schools benefit from payroll tax credits under the Families First Coronavirus Response Act (the "FFCRA"), signed by President Trump on March 18, 2020. PL 116-127, March 18, 2020, 134 Stat 178, Division G, §§ 7001–7005. The FFCRA provides small and midsize employers refundable tax credits that reimburse them, dollar-for-dollar, for the cost of providing paid sick and family leave wages to their employees for leave related to COVID-19. Id. §§ 7001 ("Payroll Credit for Required Paid Sick Leave"), 7003 ("Payroll Credit for Required Paid Family Leave"). Similarly, private schools, but not public school districts, also benefit from the Employee Retention Credit, which is a refundable tax credit against certain employment taxes equal to 50 percent of the qualified wages an eligible employer pays to employees after March 12, 2020, and before January 1, 2021. CARES Act, § 2301. Eligible employers can get immediate access to the credit by reducing employment tax deposits they are otherwise required to make. Id. For each employee, wages (including certain health plan costs) up to \$10,000 can be counted to determine the amount of the 50% credit. Id. § 2301(a)(b)(1). Congress clearly has provided many significant COVID-19-related financial benefits to private schools that it has not provided to public school districts.

Thus, for at least two obvious reasons, it made sense for Congress to reject a bill that would have allocated CARES Act resources to private schools based on their total enrollment and to instead mandate the Title I allocation methodology. In contrast, the Rule adopted by the

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1 Department is not only unlawful (as discussed above in section I.A.) but also unfair and 2 unreasonable (as discussed further below in sections II and III).

C. There is bi-partisan support that Congress's intent was that funds be allocated based on the Title I formula.

Even if in some manner the relevant text of the CARES Act were ambiguous—which it is not—and the legislative history were unpersuasive—which it is not—the drafters of the bill themselves have clearly indicated that it was their intent in drafting and passing the bill that equitable services be provided to private schools using the Title I funding formula.

For example, on May 20, 2020, three Democratic congressional leaders—Representative Bobby Scott, Representative Rosa DeLauro, and Senator Patty Murray—wrote to Secretary DeVos, stating:

[T]he Department broke with statutory requirements of the CARES Act and longstanding precedent of the equitable services provision in section 1117 of ESEA by issuing guidance that directs LEAs to use emergency relief funds for the provision of services to students at private schools regardless of their wealth or residence. This action also contradicts the Department's equitable services non-regulatory guidance issued on October 7, 2019.

Exhibit C.⁷ The members, all of whom are Congressional committee chairs or ranking members on committees specific to education and/or appropriations, went on to say, "[t]he 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." *Id.* This Congressional intent was confirmed by senior Republican Senator Lamar Alexander, chairman of the Senate Committee on Health, Education, Labor, and Pensions and former U.S. Secretary of Education, the next day. On May 21, 2020, Senator Alexander was asked about the

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 ⁷ Letter from Robert C. "Bobby" Scott, Rosa L. DeLauro, and Patty Murray, U.S. Congress, to Betsy DeVos, Sec'y, U.S. Dep't of Educ. (May 20, 2020) (available at https://edlabor.house.gov/imo/media/doc/2020-5-

²⁸ Z0%20Ltr%20to%20DeVos%20re%20Equitable%20Services.pdf and attached hereto at Exhibit C).

Department's Guidance, and said, "I thought, and I think most of Congress thought, that money 2 from the CARES Act would be distributed in the same way that Title I is distributed."8

Moreover, the non-partisan Congressional Research Service ("CRS") undertook an extensive analysis of the text of the CARES Act and its legislative history and concluded that "a straightforward reading of section 18005(a) based on its text and context suggest that the CARES Act requires LEAs [school districts] 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." Memorandum from Congressional Research Service to House Comm. on Educ. and Labor 2 (July 1, 2020) (attached hereto as Exhibit D). The CRS further concluded that the relevant number for this calculation is the "number of private-school children from low-income families residing in the LEA's participating public school attendance areas." *Id.* at 3.

Thus, Congress clearly intended that the funds provided to school districts under the CARES Act be proportionately shared with private schools based on the number of low-income students residing in the school district's Title I school attendance areas. This clear Congressional intent, supported by the statutory text itself as well its context and legislative history, is controlling. The Department does not have any authority to depart from that clear intent or to rewrite the plain language of the Act.

II. The Chaotic Manner in which the Department has Acted Has Delayed the Distribution of Critical Resources and Placed School Districts in Legal Jeopardy.

Besides being an unlawful abuse of agency authority resulting in significant harms including the potential deprivation of hundreds of millions of dollars of much-needed funds for our nation's most vulnerable students, as detailed in Section III below-the Department's arbitrary and *ad hoc* actions also have led to considerable confusion that has delayed the distribution of critical resources. The Department's interpretation of the Act has constantly

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Andrew Ujifusa, Sen. Alexander Splits from Betsy DeVos on COVID-19 Aid to Help Private Schools, EDUCATION WEEK (May 21, 2020), https://blogs.edweek.org/edweek/campaign-k-12/2020/05/alexander-devos-COVID-aid-private-schools-CDC-reopening.html.

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shifted since its enactment. For example, the Rule issued on July 1, 2020 contains new 2 substantive requirements that differ both from those in the Act (enacted in March), the Department's initial notice, the Department's April 30, 2020 Guidance. Moreover, by virtue of 3 its interim nature, the Rule also creates the possibility for yet additional changes in the 4 5 Department's policy after the 30-day comment period. Throughout this period of uncertainty, 6 however, the Department has consistently done one thing: presented school districts with an impossible choice between compliance with its current "interpretation" or with the actual terms 7 of the Act. If school districts do the former, they forfeit hundreds of millions of dollars to private 8 9 schools and also run the risk of violating certifications that they will follow the allocation requirements of the Act. If they do the latter, they risk penalties from the Department. The 10 11 Department's actions over the last four months thus have created an untenable situation.

A. The Guidance created unnecessary confusion for school districts and put them at legal risk.

Congress passed the CARES Act on March 27, 2020. Section 18002(a) of the Act mandated: "[T]he Secretary shall make Emergency Education Relief grants to the Governor of each State with an approved application"; "shall issue a notice inviting applications not later than 30 days of enactment of this Act"; and "shall approve or deny applications not later than 30 days after receipt." CARES Act § 18002(a) (emphasis added).

Accordingly, on April 23, 2020, the Department published a notice which included a "Deadline for Transmittal of Certification and Agreement" of "[n]o later than July 1, 2020." See U.S. Dep't of Educ., Notice Announcing Availability of Funds and Deadline for the Elementary and Secondary School Emergency Relief Fund at 2 (April 23, 2020)⁹ (the "Notice"). The Notice also indicated that "[e]ach SEA's Certification and Agreement will be processed as it is received and funds will be obligated on a rolling, expedited basis with the expectation that State educational agencies (SEAs) and local educational agencies (LEAs) will also use every effort to expend the funds quickly to address exigent student needs." Id. The Notice emphasized the

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⁹ Available at https://oese.ed.gov/files/2020/04/ESSER-Fund-Notice-Final.pdf.

1 urgency of applying for and utilizing the emergency funding to address challenges of educating 2 students in a remote learning environment, stating:

Consistent with section 18003(d) of the CARES Act, LEAs may use ESSER funds to address the impact that COVID19 has had, and continues to have, on elementary and secondary schools across the Nation. The Department encourages SEAs that use funds for remote learning to make strategic investments that promote student achievement through long-term improvements in infrastructure and operations so that students may receive educational services whether or not school campuses are open or closed.

Id. at 4. With respect to equitable services, the Notice restated the text of section 18005(a), without any indication that it would be deviating from the approach recently reaffirmed¹⁰ in its 2019 Title I equitable services guidance. See Id. at 6 ("An SEA must ensure that an LEA that receives an ESSER Fund subgrant provides equitable services to students and teachers in nonpublic schools located within the LEA in the same manner as provided under section 1117 of the ESEA ") (emphasis added).¹¹

Consistent with the Act, the Notice included "Certification and Agreement" instructions, requiring each applicant to "provide an assurance that it will comply with all requirements that apply to the ESSER Fund," including the statute's equitable services provision. Relevant here, the certification form required applicants for CARES Act funds to:

- "allocate [ESSER] 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";
- "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"; and
- "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

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¹⁰ See October 2019 Guidance, supra n. 2.

¹¹ Although the equitable services provision of the Notice indicated that, "[t]he Department will provide additional guidance to LEAs on equitable services requirements," id., no reasonable state or school district could have predicted the Department's arbitrary conditions imposed on the provision of ESSSER funds first in the Guidance on April 30 and then in the Rule issued on July 1.

manner as provided under section 1117 of the ESEA, as determined through timely and meaningful consultation with representatives of non-public schools."¹²

Thus, as of April 23, 2020, school districts and states were led to believe by the plain language of the Act and by the form released by the Department that equitable services allocations under the CARES Act would employ the Title I methodology. Initial planning proceeded based on that understanding and many states and school districts, including Council members, executed certifications that they would comply. It was not until the non-binding Guidance was issued on April 30, 2020 (more than a month after the Act was enacted) that school districts had any idea the Department might encourage a different approach.

As a result, school districts face legal risk if they fail to follow the allocation method set forth in the Act, as they have certified that they will. On the other hand, if they follow the Act and not Department's "interpretation" as originally announced in the Guidance, they face potential penalties from the Department and possible challenges from private schools based on the Department's position. Either way, the Department has put school districts in an impossible situation.

B. The Rule effectively mandates the Department's flawed interpretation and increases confusion and hardship for school districts.

Recognizing the significant hardships the Guidance imposed on school districts, multiple educational associations, spearheaded by the Council of Chief State School Officers ("CCSSO"), alerted the Department of its flawed interpretation of the CARES Act and put the Department on notice of the significant confusion and harm the Guidance was causing for both states and school districts. *See* Letter from Carissa Moffat Miller, Exec. Dir., CCSSO, to Betsy DeVos, Sec'y, U.S. Dep't of Educ. (May 5, 2020).¹³ Rather than mitigate the damage already done by withdrawing and/or amending the Guidance, the Department doubled down, accusing the CCSSO of

¹² U.S. Dep't of Educ., *Certification and Agreement for Funding under the Education Stabilization Fund Program Elementary and Secondary School Emergency Relief Fund (ESSER Fund)* at 2–3 (April 2020), https://oese.ed.gov/files/2020/04/ESSERF-Certification-and-Agreement-2.pdf.

¹³ Available at https://ccsso.org/sites/default/files/2020-05/DeVosESLetter050520.pdf.

"improperly discriminat[ing] against an entire class of children," despite the fact that Congress, not the CCSSO, had selected the allocation formula.¹⁴ 2

Therefore, many states and school districts subsequently decided to follow the statute and 3 to expressly reject the approach outlined in the Guidance. According to one report,¹⁵ a number of 4 5 states led by both Republican and Democratic governors rejected the Department's interpretation. For example, Oklahoma, Mississippi, Indiana, Maine, Washington, Pennsylvania, 6 7 New Mexico and Wisconsin, all began calculating allocations according to the plain text of the statute. New Mexico, for example, in a letter from its Public Education Department to 8 9 superintendents and charter school heads stated it would follow the plain language of the CARES Act stating "[t]his advisory aligns with the plain language of the CARE Act and is consistent 10 with longstanding equitable services calculations under Title I criteria, as well as U.S. 11 Department of Education's interpretations of the [ESEA] over decades and as recently as 12 October 2019." Mem. from State of New Mexico Public Educ. Dep't 5 (May 14, 2020) (attached 13 14 hereto as Exhibit E).

In early June, ten states indicated they would or were likely to follow the Department's guidance.¹⁶ States such as Colorado, Illinois and Ohio have followed the Department's cautionary directive in its letter response to CCSSO¹⁷ and advised school districts to calculate the

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¹⁴ See Letter from Betsy DeVos, Sec'y, U.S. Dep't of Educ., to Carissa Moffat Miller, Exec. Dir., CCSSO (hereinafter (May 22. 2020) "DeVos Letter") https://blogs.edweek.org/edweek/campaign-k-

²¹ 12/Secretary%20DeVos%20Response%20to%20Carrisa%20Moffat%20Miller%205%2022%20

^{20.}pdf: see also Andrew Uiifusa, DeVos to Release Rule Cementing COVID Aid Push for Private 22 School Students, EDUCATION WEEK (May 26, 2020), https://blogs.edweek.org/edweek/campaign-23 k-12/2020/05/devoscovid-aid-private-school-students-rule.html)

¹⁵ See Bianca Quilantan, Weekly Education: States Push Back Against Steering Coronavirus 24 Funds Schools. POLITICO (June 2020), to Private 1. https://www.politico.com/newsletters/morning-education/2020/06/01/meet-acts-new-top-25 executive-788066. 16 *Id*.

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¹⁷ See DeVos Letter, supra n. 13, at 1 ("If they or their district superintendents insist on acting contrary to the Department's stated position, they should, at minimum, put into an escrow account the difference between the amount generated by the proportional-student enrollment formula and the Title I, Part A formula.").

equitable share based on students in poverty, but to set aside the difference in funding in an escrow account.¹⁸ Other states remained unsure and are still waiting to see what happens.

In response, however, more than three months after the CARES Act was enacted, the Department concluded its Guidance was inadequate and it adopted the Rule. On July 1, 2020, the Department published the Rule in the Federal Register without notice and comment and made it effective immediately. 85 Fed. Reg. 39,479. In so doing, the Department added yet another layer of confusion and complexity to Congress's simple mandate to "make Emergency Education Relief grants to the Governor of each State with an approved application." *See* CARES Act § 18002(a).

Indeed, instead of merely codifying the already flawed and inequitable approach suggested by the Guidance, the Rule effectively created two ostensible choices for school districts with respect to how to calculate the proportional share of CARES Act funds for equitable services. However, neither of these "choices" is viable. Rather, both choices are effectively "poison pills," as explained in detail in the Plaintiffs' brief. See Dkt. 25-3 at 7:27–8:28. Under the Rule, school districts can either (1) follow the Department's preferred approach, in violation of the Act, and forfeit a substantial share of their funds for the benefit of private schools, but maintain their congressionally-granted discretion with respect to how to spend the remaining funds; or (2) maintain the full funding intended for public schools under the CARES Act, but give up the ability to serve all of their students and adhere to severe restrictions on how the money can be spent.

Neither option is allowed by the Act, as discussed above, and neither one is workable for school districts. First, the funds allocated are desperately needed by school districts trying to reopen during the pandemic. COVID-19 has drastically affected public education in the United States. School districts across the nation were ordered to close and transition to online learning in the spring, incurring significant additional expenses to ensure all students (particularly lowincome students like many of those served by Council members) had adequate access to necessary technology. Since then, states throughout the country have faced declining revenue

¹⁸ Quilantan, *supra* n. 14.

and corresponding budget cuts, including billions of dollars in reduction to funding for public 2 education. These cuts come at the same time when the additional costs of re-opening schools safely, according to protocols recommended by the Center for Disease Control ("CDC"), are 3 estimated by the CCSSO to amount to somewhere between \$158 and \$245 billion.¹⁹ School 4 5 districts cannot afford to lose any resources at this time.

Similarly, it is impractical for school districts, including Council members, to give up their ability under the CARES Act to use these funds with flexibility in any school in which they are needed. Some of the emergency funds authorized by Congress are desperately needed precisely to make up for lost state and local revenue, an approach complicated if not made unworkable by the Rule, particularly if a school district follows the Act's allocation method rather than the Department's. Likewise, as discussed in Section III below, resources to open schools safely like personal protective equipment for schools opening for in-person instruction or technology to support online instruction are needed at all schools and not only Title I schools, but the Rule would restrict districts from using the funds in this manner, unless they adopt the Department's allocation method. As a result, the Rule does not give school districts any actual choice.

The Rule also increases the legal pressure on school districts because it purports to be legally binding, even though it directly contradicts the Act. And, to make matters worse, as an interim rule, the Rule itself is subject to further modification by the Department. In sum, the Rule exacerbates the problems for school districts caused by the Guidance and further underscores the arbitrary nature of the Department's approach to equitable services under the CARES Act.

С. The Department's inconsistent interpretation also has resulted in delay in the distribution of critical resources.

In addition to causing unnecessary confusion and uncertainty regarding an otherwise clear and unambiguous statutory entitlement, the Department's unclear and shifting "guidance"

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¹⁹ Letter from Carissa Miller, Exec. Dir., CCSSO, to Lamar Alexander, U.S. Congress (June 24, 2020) (available at https://ccsso.org/sites/default/files/2020-06/HELPLetterFinal.pdf).

has resulted in unacceptable delay in school districts' ability to apply for and access these muchneeded resources.

First, because of the changing interpretations and the introduction of entirely new formulas for calculating the proportionate share under the Guidance and then the Rule, there is little to no consensus or clarity regarding the actual dollar amounts available for school districts to rely on in order to plan appropriately for their use. Because of the Department's actions, the academic (and fiscal) year during which the pandemic first began disrupting delivery of inperson education and other operations has now expired without school districts having access to congressionally-appropriated emergency funds to cover expenditures back to March. In addition, with each new interpretation, school districts have been required to re-analyze and re-assess current budgets, undermining school administrators' ability to focus on the real emergencies at hand: initially, the continuation of high-quality education with schools closed and, now, the safe return of students and teachers to schools (if possible) in the midst of a global pandemic.

Second, under the CARES Act, as under Title I, school districts must engage in a consultation process with private schools in order to provide appropriate services to students in those private schools.²⁰ With each new interpretation from the Department, school districts have had to delay, restart, or repeat this consultation process, which has harmed not only students in public school districts, but also disadvantaged students in private schools who should be benefitting from these resources. In some states, like Texas, state educational authorities have gone so far as to expressly require school districts to restart a consultation requirement based on the Department's July 1 Rule.²¹ As mandated by the Act, it is critical for school districts to

 ²⁰ See CARES Act § 18005(a) (requiring LEAs to provide equitable services "in consultation with representatives of non-public schools"); see also Notice, supra note n.7, at 6 ("An SEA must ensure that an LEA that receives an ESSER Fund subgrant provides 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.") (emphasis added).

 ^{26 ||&}lt;sup>21</sup> See Texas Educ. Agency, Providing Equitable Services to Students and Teachers in Participating Private Non-Profit Schools Under the CARES Act Programs 3 (updated July 9, 2020), <u>https://tea.texas.gov/sites/default/files/covid/COVID-19-CARES-Act-Equitable-Services-</u> <u>FAQ.pdf</u> ("If consultation has already been completed and the district is changing the calculation option, the consultation process must be reopened. The revised consultation process must be

engage in a meaningful consultation process with private school representatives to ensure that
 the funds are utilized in an effective way.

The Department's chaotic deployment of its preferred policy position through the Guidance and then the Rule has unnecessarily delayed that process to the detriment of school districts and private schools nationwide.

III. The Interim Final Rule Adopted by the Department Would Divert Hundreds of Millions of Dollars from Public Schools to Private Schools with Devastating Consequences for School Districts and their Students.

If the approach to CARES Act equitable services allocations suggested in the Guidance and mandated by the Rule is allowed to stand, it would divert hundreds of millions of dollars away from public school districts that are already facing massive budget cuts and exacerbate the challenges of operating safely and effectively during an ongoing global pandemic. The consequences of this diversion would be devastating for students and teachers nationwide, including the millions in Council member districts.

A. The Amount of Funds Diverted is Substantial.

The approach towards equitable service allocations suggested and then mandated by the Department would dramatically increase the percentage of the funds appropriated by Congress under the CARES Act to support elementary and secondary education that flow to private schools, regardless of the number of low-income students they serve. For example, the proportion of CARES Act allocations going to private schools would increase in member districts polled by the Council, in one district by as much at 1280%. *See* Exhibit. F, Declaration of Manish Naik; Exhibit F-1. The diversion of funds to private schools, regardless of need, would dramatically reduce the funds available to public school districts like members of the Council. In polling its members this week, the Council received 16 reliable responses which indicated that the dollar amount lost to private schools in these districts would range from about \$628,000 to \$6,485,000. *See* Exhibit F ¶ 3-6; Exhibit F-1. The total amount lost by these

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documented. TEA recommends extending consultation timeline to ensure the new requirements are discussed with private school officials.").

districts would be approximately \$33,337,000. *Id.* Three other Council members, the New York City Department of Education, the Chicago Public Schools, and the San Francisco Unified School District, all of whom are Plaintiffs in this case, disclosed in written testimony that they would lose about \$53,000,000, \$10,170,000, and \$1,740,000 respectively. *See* Exhibit F ¶¶ 7, 9 (citing Dkt. 35-2, Declarations of Lindsey Oates, Dr. Janice K. Jackson and Meaghan Wallace). If the amount of CARES Act funding lost through the Department's approach was similar in other school districts relative to their total low-income population, the Council projects that its member districts would lose a total of about \$292,000,000 of these much-needed, emergency resources. *Id.* ¶ 11.

Moreover, the Council's 76 members, though relatively large in size are just a small fraction of the public school districts in the United States. An analysis of the effect of the Department's approach on the 185 school districts in Texas alone, for example, indicates that those districts would collectively lose about \$38 million in CARES Act funds.²²

The allocation method effectively mandated by the Rule would also divert resources from private schools that serve a large number of low-income students. In Cleveland, for example, where a large number of low-income students attend private schools because of Ohio's voucher program, Council member the Cleveland Metropolitan School District ("CMSD") estimates that most private schools will lose money under the Department's methodology, favoring a select few who serve few low-income students. *Id.* ¶¶ 13-14. Overall the cumulative effect of the allocating funds for equitable services based on total enrollment in Cleveland's private schools would be to divert about \$822,952 away from CMSD's public schools, reallocate approximately \$890,000 away from 47 non-public schools with high poverty, and redirect approximately \$1.7 million to 16 private schools with low numbers of high poverty students. *Id.* ¶¶ 14-15.

The overall effect of the Department's approach is thus to divert hundreds of millions of dollars of critically needed funds away from public school districts serving low-income

²² Morgan Craven and Roy L. Johnson, *An Analysis of How the Department of Education's Equitable Services Rule Will Harm Texas Students and School Districts*, IDRA ISSUE BRIEF (July 16, 2020), <u>https://www.idra.org/wp-content/uploads/2020/07/Cutting-Public-School-Relief-</u> Funds-to-Subsidize-Private-Schools-IDRA-Issue-Brief-July-16-2020.pdf ("IDRA Issue Brief").

THE COUNCIL OF THE GREAT CI**124**CHOOLS AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION (3:20-cv-04478-JD)

communities and millions more away from private schools serving high percentages of low income students. This is not how Congress wanted to support educators' efforts to address the
 pandemic.

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B. The Diversion would Deprive Millions of Public School Students of Critical Resources and Life-Saving Services during the Pandemic.

The diversion of these substantial funds away from school districts is depriving millions of students of exactly the resources these funds were supposed to support. The funds made available through the CARES Act were intended, once allocated, to be used for purposes such as purchasing sanitization and cleaning supplies, purchasing personal protective equipment for teachers and students, and planning for and coordinating long-term closures including by providing portable meals and technology services. These are critical resources necessary during this pandemic that are being deprived from millions of students in Council member districts.

The Council polled its member districts and asked them to list the consequences of the losses suffered due to the diversion of significant funds away from public schools and into the hands of private schools. Exhibit F, ¶¶ 3-4. Here are five salient examples:

- **Broward County Public Schools**: Because \$540,000 has been diverted to private school funding, the District was not able meet the technology needs of schools as they transitioned to a virtual environment. It also had to reduce funds for professional development and instructional materials.
- **Baltimore City Public Schools**: If the District must provide the additional \$2,419,639 to private schools this will reduce the number of students that can receive a Chromebook to support distance learning by 6,050. Alternatively, the District would have to reduce the number of students that can be provided a semester of tutoring by 3,252.
- Charleston County School District: This District was not able to provide the childcare services that the district's teachers needed to support online instruction. It also will not be

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able to purchase sufficient PPE to support reopening. In addition, it will struggle to provide Wi-Fi devices for students living in areas with limited internet capability.

- District of Columbia Public Schools: The \$1.8M this District will lose could purchase 2,100 additional laptop devices for low-income students to support their virtual learning.
 \$400,000 could provide mentoring and tutoring services for 400 at-risk students. \$1.2M could purchase internet connectivity for one year for 5,000 low-income students.
- **Portland Public Schools:** This District would need to cut more than \$628,000 from needed Chromebooks, safety supplies and materials, and other resources as well.

The analysis of Texas school districts discussed earlier shows a similar impact across the school districts in that state. The study concludes that the \$38 million lost by those districts could "have been used to fund hundreds of counselors, social workers and nurses and to purchase equipment like facemasks and hand sanitizer. It could have been used to support remote learning and other critical services for students and teachers." IDRA Issue Brief at 1.

As positive COVID-19 test results rise throughout numerous places in the country, school districts are faced with an impossible choice made even more difficult by this diversion of funds: do we start school in-person without enough face masks and personal protective equipment or do we start school remotely when often large portions of the student body have neither internet connectivity or laptop devices to allow them to work remotely? This dilemma was intended to be at least partially alleviated by the availability of CARES Act funds. Instead, the Department's unlawful Guidance and Rule exacerbate the problem by depriving public schools of necessary funds. If the language of the CARES Act itself is properly followed, then Council member districts would have significantly more funds available to help address current conditions by providing resources necessary for safe in-person instruction and/or equitable remote learning.

The challenges facing public school districts today are real and the potential consequences are grave. School districts are addressing unprecedented issues with scarce resources. The Department's attempt to divert hundreds of millions of dollars should not be

allowed to make these difficult tasks even more challenging. The funds these districts stand to
 lose under the Department's arbitrary interpretation, if freed up by this Court's injunction, would
 allow them better to address the challenges of the COVID-19 pandemic, as Congress intended.

CONCLUSION

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For all of these reasons, the Council of the Great City Schools respectfully suggests that Plaintiffs' motion for preliminary injunction should be granted.

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	8	Dated: July 24, 2020	Respectfully submitted,
	9		HUSCH BLACKWELL LLP
	10		/s/ Donald J. Mizerk
	11		Donald J. Mizerk (CA Bar No. 208477)
	12		John W. Borkowski (IL Bar No. 6320147) Mary Deweese (IL Bar No. 6326512)
			Pro hac vice motions pending
LLP 2200	13		120 South Riverside Plaza, Suite 2200
Suite Suite 538	14		Chicago, Illinois 60606
XWE Plaza, ois 60			Phone: (312) 526-1538 Fax: (312) 655-1501
ACI Prside (312)	15		don.mizerk@huschblackwell.com
H BL h Riv hicag	16		john.borkowski@huschblackwell.com
HUSCH BLACKWELL LLP 120 South Riverside Plaza, Suite 2200 Chicago, Illinois 60606 Phone: (312) 526-1538			mary.deweese@huschblackwell.com
H -	17		
	18		Paige Duggins-Clay (TX Bar No. 24105825)
	19		Pro hac vice motion pending
	17		111 Congress Avenue, Suite 1400
	20		Austin, Texas 78701 Phone: (512) 472-5456
	21		Fax: (512) 472-3450
	21		paige.duggins-clay@huschblackwell.com
	22		
	23		Aleksandra O. Rushing (MO Bar No. 68304)
	~		Shmuel B. Shulman (MO Bar No. 71175)
	24		Pro hac vice motions pending
	25		190 Carondelet Plaza, Suite 600 St. Louis, Missouri 63141
	26		Phone: 314-345-6275
	20		Fax: 314-480-1505 aleks.rushing@huschblackwell.com
	27		shmuli.shulman@huschblackwell.com
	28		
			24
			2 4

CERTIFICATE OF SERVICE

The undersigned certifies that on the 24th day of July, 2020, a copy of the above and foregoing document was filed with the Clerk of Court using the CM/ECF system which sent electronic notification of such filing to all those individuals currently electronically registered with the Court.

/s/ Donald J. Mizerk

IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION (3:20-cv-04478-JD)

EXHIBIT A

	Case 3:20-cv-04478-JD Documen	t 47-1 Filed 07/24/20	Page 32 of 92	
1 2 3 4 5 6 7 8 9	HUSCH BLACKWELL LLP Donald J. Mizerk Esq., (CA Bar No. 208477) John W. Borkowski (IL Bar No. 6320147) (<i>pro hac pending</i>) 120 South Riverside Plaza, Suite 2200 Chicago, Illinois 60606 Phone: (312) 526-1538 Fax: (312) 655-1501 don.mizerk@huschblackwell.com Attorneys for Amicus Curiae COUNCIL OF THE GREAT CITY SCHOOLS IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA			
10 11 12 13 14 15 15 15 15 15 15 15 15 15 15	STATE OF MICHIGAN, STATE OF CALIFORNIA, DISTRICT OF COLUMBIA, STATE OF MAINE, STATE OF MARYLAND, STATE OF MAINE, STATE OF MARYLAND, STATE OF NEW MEXICO, STATE OF WISCONSIN, THE BOARD OF EDUCATION FOR THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, BOARD OF EDUCATION FOR THE CITY OF CHICAGO, CLEVELAND MUNICIPAL SCHOOL DISTRICT, AND SAN FRANCISCO UNIFIED SCHOOL DISTRICT,	Civil Case No.3:20-cv DECLARATION OF J SIMERING IN SUPPO COUNCIL OF THE G SCHOOLS AMICUS O	IEFFREY DRT OF THE REAT CITY	
 19 20 21 22 23 24 25 	Plaintiffs, v. ELISABETH D. DEVOS, in her official capacity as the United States Secretary of Education, and UNITED STATES DEPARTMENT OF EDUCATION, Defendants.	Judge: Hon. James Dona Trial Date: None set Action Filed: July 7, 202		
25 26 27 28	1	130		

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I, Jeffrey Simering, do hereby swear upon my oath that the following statements are true and correct to the best of my knowledge, information and belief, and that I could competently testify as follows if called upon to do so:

1. I am the Director of Legislative Services for the Council of Great City Schools. I have served in this position since 1994.

2. My responsibilities include interacting with Congress on education-related legislation and appropriations as a registered lobbyist, interacting with various federal executive departments and agencies on education policy and financial assistance to schools, working with other education associations and coalitions on both federal legislation and administrative policies, and advising urban school districts that are members of the Council of the Great City Schools on the implementation of federal education laws.

3. On March 22, 2020, I received a draft of Division B of the CARES Act from the Committee for Education Funding, a coalition of some 100 education organizations that engages in and coordinates lobbying activities to increase federal education funding. The draft is identified as HEN20279 and stamped S.L.C., meaning it is an Office of Senate Legislative Counsel draft. This draft had no bill or amendment number and was not dated.

- 4. Exhibit A-1 to this declaration contains a true and accurate copy of an excerpt (pp. 1, 97-104) from the draft of Division B of the CARES Act I received on March 22, 2020.
- 5. Based on my review of the legislative history of the CARES Act, the HEN20279 draft was circulated among selected senators on March 22, 2020 and included both a \$20 billion appropriation for an Education Stabilization Fund and an equitable services provision [section 18005] to ensure proportionate services were provided to private

1

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school students. This Division B draft was circulated together with a Division A draft of the CARES Act containing tax and other health and economic relief provisions.

- 6. The HEN20279 draft of Division B of the CARES Act included the appropriations provisions for the pending third major congressional coronavirus relief legislation. The draft included specific Education Stabilization funding for school districts as well as included an "equitable services" provision [section 18005] designed to provide services in contrast to direct funding for private school students who reside in the school district jurisdictional area.
- 7. At Section 18005(a) of the draft bill (p. 102), local educational agencies (LEAs) were directed to provide equitable services to students and teachers in non-public schools based based on the "the proportion of students residing within the boundaries of the [LEA] who attend non-public schools." Operationally under this draft, the ratio of "all" private school students to "all" students (both public and private) residing in the school district's jurisdiction provides the basis on which to determine the proportionate share of the CARES Act education funds to be expended on the private school students.
- 8. The initial Senate version of the CARES Act was introduced on March 19, and titled S.3548. This initial version did not contain federal elementary and secondary education funding nor contain an equitable services provision. An alternative House bill was introduced on March 23, and titled H.R. 6379. H.R. 6379, Division A, Title VIII, contained a \$50 billion education appropriation as a State Fiscal Stabilization Fund, but did not contain an equitable services provision.
- 9. On March 25, Senator McConnell ultimately introduced Amendment 1578 in the nature of a substitute to H.R. 748, which became the final version of the CARES Act. Procedurally, the Senate took from the desk a previously House-passed bill, H.R. 748 (to

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repeal the excise tax on high cost employer-provided health insurance plans), replacing the House bill's contents with Senator McConnell's CARES Act Amendment 1578 and passing it on March 27. The House of Representatives then passed the Senate amendment to H.R. 748 on March 27. This was later signed by the President that same day, becoming Public Law 116-136. The enacted CARES Act includes a \$30.75 billion Education Stabilization Fund and a provision [section 18005] that equitable services be provided to private school teachers and students "in the same manner as provided under sec. 1117 of ESEA." [Congressional Record Vol. 166, #59, pp. 2143-43].

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on: July 23, 2020

Jeffrey Simering

EXHIBIT A - 1

1DIVISION B—EMERGENCY AP-2PROPRIATIONSFOR3CORONAVIRUS HEALTH RE-4SPONSE AND AGENCY OPER-5ATIONS

6 The following sums are hereby are appropriated, out
7 of any money in the Treasury not otherwise appropriated,
8 for the fiscal year ending September 30, 2020, and for
9 other purposes, namely:

- 10 TITLE I
- 11 DEPARTMENT OF AGRICULTURE

12 OFFICE OF INSPECTOR GENERAL

13 For an additional amount for "Office of Inspector 14 General", \$750,000, to remain available until September 15 30, 2021, to prevent, prepare for, and respond to coronavirus, domestically or internationally: *Provided*, 16 17 That the funding made available under this heading in 18 this Act shall be used for conducting audits and investiga-19 tions of projects and activities carried out with funds made 20 available in this Act to the Department of Agriculture to 21 prevent, prepare for, and respond to coronavirus, domestically or internationally; Provided further, That such 22 23 amount is designated by the Congress as being for an

the Governor does not award within one year of receiving
 such funds and the Secretary shall reallocate such funds
 to the remaining States in accordance with subsection (b).
 ELEMENTARY AND SECONDARY SCHOOL EMERGENCY
 RELIEF FUND

6 SEC. 18003. (a) GRANTS.—From funds reserved
7 under section 101(b)(2), the Secretary shall make elemen8 tary and secondary school emergency relief grants to each
9 State educational agency.

10 (b) ALLOCATIONS TO STATES.—The amount of each 11 grant under subsection (a) shall be allocated by the Sec-12 retary to each State in the same proportion as each State 13 received under Title II-A of the Elementary and Sec-14 ondary Education Act ("ESEA") of 1965 in the most re-15 cent fiscal year.

16 (c) SUBGRANTS TO LOCAL EDUCATIONAL AGEN-17 CIES.—Each State shall allocate not less than 80 percent of the grant funds awarded to the State under this section 18 19 as subgrants to local educational agencies (including char-20 ter schools that are local educational agencies) in the State in proportion to the amount of funds such local edu-21 22 cational agencies and charter schools that are local edu-23 cational agencies received under title I of the ESEA of 24 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:

4 (1) Any activity authorized by the ESEA of 5 1965 (20 U.S.C. 6301 et seq.), the Individuals with 6 Disabilities Education Act (20 U.S.C. 1400 et seq.) 7 ("IDEA"), the Adult Education and Family Lit-8 eracy Act (20 U.S.C. 1400 et seq.), the Carl D. Per-9 kins Career and Technical Education Act of 2006 10 (20 U.S.C. 2301 et seq.) ("the Perkins Act"), or 11 subtitle B of title VII of the McKinney-Vento Home-12 less Assistance Act (42 U.S.C. 11431 et seq).

(2) Coordination of preparedness and response
efforts of eligible entities with State, local, Tribal,
and territorial public health departments, and other
relevant agencies.

17 (3) Providing principals and others school lead18 ers with the resources necessary to address the
19 needs of their individual schools.

20 (4) Activities coordinated with State, local,
21 Tribal, and territorial public health departments to
22 detect, prevent, or mitigate the spread of infectious
23 disease or otherwise respond to a qualifying emer24 gency.

(5) Developing and implementing procedures
 and systems to improve the preparedness and re sponse efforts of eligible entities.

4 (6) Training and professional development for
5 staff of the eligible entity on sanitation and mini6 mizing the spread of infectious diseases.

7 (7) Purchasing supplies to sanitize and clean
8 the facilities of an eligible entity, including buildings
9 operated by local educational agencies.

10 (8) Planning for long-term closures, including 11 planning for how to provide meals to eligible stu-12 dents, how to provide technology for virtual instruc-13 tion to all students, how to provide guidance for car-14 rying out requirements under the Individuals with 15 Disabilities Education Act (20 U.S.C. 1401 et seq.) 16 and how to ensure other educational services can 17 continue to be provided consistent with all Federal, 18 State, and local requirements.

(9) Purchasing educational technology (including hardware, software, and connectivity) for students who are served by the eligible entity, including
low-income students and students with disabilities,
which may include assistive technology or adaptive
equipment.

(10) Providing mental health services and sup ports.

3 (11) Other activities that are necessary to
4 maintain the operation of and continuity of services
5 in local educational agencies, including hiring third6 party entities to provide such services, and con7 tinuing to employ existing staff of the local edu8 cational agency.

9 (e) STATE FUNDING.—With funds not otherwise allo-10 cated under subsection (c), a State may reserve not more 11 than 1/2 of 1 percent for administrative costs and the re-12 mainder to carry out grants or contracts for emergency 13 needs as determined by the chief education officer of the 14 State to address issues responding to coronavirus.

15 (f) REALLOCATION .—A State shall return to the 16 Secretary any funds received under this section that the 17 State does not award within 1 years of receiving such 18 funds and the Secretary shall reallocate such funds to the 19 remaining States in accordance with subsection (b).

20 HIGHER EDUCATION EMERGENCY RELIEF FUND

21 SEC. 18004. (a) IN GENERAL.—The Secretary shall
22 allocate funding under this section as follows:

(1) 90 percent to each eligible institution ofhigher education to prevent, prepare for, and re-

1	spond to coronavirus, domestically or internationally
2	by apportioning it—
3	(A) 75 percent according to the relative
4	share of full-time equivalent enrollment of Fed-
5	eral Pell Grant recipients; and
6	(B) 25 percent according to the relative
7	share of full-time equivalent enrollment of stu-
8	dents who were not Federal Pell Grant recipi-
9	ents.
10	(2) 5 percent for parts A and B of title III,
11	part A of title V, and subpart 4 of part A of title
12	VII to address needs directly related to coronavirus.
13	(3) 5 percent for part B of title VII of the Higher
14	Education Act for institutions of higher education to
15	address needs directly related to coronavirus.
16	(b) DISTRIBUTION.—The funds made available to
17	each institution under subsection $(a)(1)$ shall be distrib-
18	uted by the Secretary in the same manner as the Secretary
19	otherwise distributes Federal Pell Grant funding to each
20	institution under the Higher Education Act of 1965 (20
21	U.S.C. 1001 et seq.).
22	(c) Uses of Funds.—An institution of higher edu-
23	cation receiving funds under this section may use the
24	funds received to cover any costs associated with the clo-
25	and an element changes to the delivery of instruction

25 sure or significant changes to the delivery of instruction

due to the coronavirus and shall use no less than 50 per cent of such funds to provide emergency grants to stu dents for expenses directly related to coronavirus and the
 disruption of campus operations.

5 Assistance to Non-Public Schools

6 SEC. 18005. (a) IN GENERAL.—A local educational 7 agency receiving funds under sections 802 or 803 shall 8 provide equitable services to students and teachers in non-9 public schools, as determined in consultation with rep-10 resentatives of non-public schools. The level of such serv-11 ices shall reflect the proportion of students residing within 12 the boundaries of the local educational agency who attend 13 non-public schools.

14 (b) PUBLIC CONTROL OF FUNDS.—The control of 15 funds for the services and assistance provided to a nonpublic school under subsection (a), and title to materials, 16 17 equipment, and property purchased with such funds, shall 18 be in a public agency, and a public agency shall administer 19 such funds, materials, equipment, and property and shall 20 provide such services (or may contract for the provision 21 of such services with a public or private entity).

22 Continued Payment to Employees

SEC. 18006. A local educational agency, State, or
other entity that receives funds under this heading shall,
to the greatest extent practicable, continue to pay its em-

ployees and contractors during the period of any disrup-1 2 tions or closures related to coronavirus. 3 DEFINITIONS 4 SEC. 18007. Except as otherwise provided in this 5 title, as used in this title— 6 (1) the terms "elementary education" and "sec-7 ondary education" have the meaning given such 8 terms under State law; 9 (2) the term "institution of higher education" 10 has the meaning given such term in section 102 of 11 the Higher Education Act of 1965 (20 U.S.C. 12 1002);(3) the term "Secretary" means the Secretary 13 14 of Education; 15 (4) the term "State" means each of the 50 16 States, the District of Columbia, and the Common-17 wealth of Puerto Rico; 18 (5) any other term used that is defined in sec-19 tion 8101 of the Elementary and Secondary Edu-20 cation Act of 1965 (20 U.S.C. 7801) shall have the 21 meaning given the term in such section. 22 GALLAUDET UNIVERSITY 23 For an additional amount for "Gallaudet University", 24 \$7,000,000, to remain available through September 30, 25 2021, to prevent, prepare for, and respond to coronavirus,

domestically and internationally, including to help defray 1 2 the expenses directly caused by coronavirus and to enable 3 grants to students for expenses directly related to 4 coronavirus and the disruption of university operations: 5 *Provided*, That such amount is designated by the Congress 6 as being for an emergency requirement pursuant to sec-7 tion 251(b)(2)(A)(i) of the Balanced Budget and Emer-8 gency Deficit Control Act of 1985.

9 STUDENT AID ADMINISTRATION

10 For an additional amount for "Student Aid Adminis-11 tration", \$40,000,000, to remain available through Sep-12 tember 30, 2021, to prevent, prepare for, and respond to 13 coronavirus, domestically and internationally, for carrying 14 out part D of title I, and subparts 1, 3, 9 and 10 of part 15 A, and parts B, C, D, and E of title IV of the HEA, and 16 subpart 1 of part A of title VII of the Public Health Serv-17 ice Act: *Provided*, That such amount is designated by the 18 Congress as being for an emergency requirement pursuant 19 to section 251(b)(2)(A)(i) of the Balanced Budget and 20 Emergency Deficit Control Act of 1985.

21 HOWARD UNIVERSITY

For an additional amount for "Howard University",
\$13,000,000, to remain available through September 30,
2021, to prevent, prepare for, and respond to coronavirus,
domestically and internationally, including to help defray

EXHIBIT B

AYCHECK PROTECTION PROGRAM ("PPP") LOANS TO PRIVATE SCHOOLS	Select Examples
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Location	School Name	PPP Loan Amount	Citation
Albuquerque,			S Rich, J Fox, J Crump, A Gregg, A Blanco, & A Ba Tran, SBA data: Business that received PPP
NM	Albuqueruque Academy	\$2 - \$5 million	loans, Washington Post (Jul. 6, 2020). ¹
Arlington, TX	Newman International Academy	\$2 - \$5 million	S Rich, J Fox, J Crump, A Gregg, A Blanco, & A Ba Tran, SBA data: Business that received PPP loans, Washington Post (Jul. 6, 2020).
Atlanta, GA	Atlanta International School	\$2 - \$5 million	S Rich, J Fox, J Crump, A Gregg, A Blanco, & A Ba Tran, SBA data: Business that received PPP loans, Washington Post (Jul. 6, 2020).
Aurora, CO	Regis Jesuit High School	\$2 - \$5 million	S Rich, J Fox, J Crump, A Gregg, A Blanco, & A Ba Tran, SBA data: Business that received PPP loans, Washington Post (Jul. 6, 2020).
Austin, TX	Hyde Park Baptist School	\$1 - \$2 million	S Rich, J Fox, J Crump, A Gregg, A Blanco, & A Ba Tran, SBA data: Business that received PPP loans, Washington Post (Jul. 6, 2020).
Austin, TX	Regents School of Austin	\$1 - \$2 million	S Rich, J Fox, J Crump, A Gregg, A Blanco, & A Ba Tran, SBA data: Business that received PPP loans, Washington Post (Jul. 6, 2020).
Baltimore, MD	The Park School of Baltimore	\$2 -\$5 million	S Rich, J Fox, J Crump, A Gregg, A Blanco, & A Ba Tran, SBA data: Business that received PPP loans, Washington Post (Jul. 6, 2020).
Baltimore, MD	St. Elizabeth School	\$1 -\$2 million	S Rich, J Fox, J Crump, A Gregg, A Blanco, & A Ba Tran, SBA data: Business that received PPP loans, Washington Post (Jul. 6, 2020).
Bloomfield Hills, MI	The Roeper School	\$1-\$7 million	Ruth Conniff, Small business loan data show big payday for private schools that also get public funds. Wisconsin Examiner (Jul. 10, 2020). ²
Buffalo NV	Nichols School of Buffalo	¢1 - ¢2 million	S Rich, J Fox, J Crump, A Gregg, A Blanco, & A Ba Tran, SBA data: Business that received PPP Iname Washington Post (Ind. 6, 2020)
6	Buckingham Browne &		J Dwinell, & J Battenfeld, Payroll Protection Program loan list a who's who of Massachusetts
Cambridge, MA	Nichols School	\$2- \$5 million	employers, Boston Herald (Jul. 9, 2020, 7:39 AM). ³
Chicago, IL	DePaul College Prep	\$1 - \$2 million	S Rich, J Fox, J Crump, A Gregg, A Blanco, & A Ba Tran, SBA data: Business that received PPP loans, Washington Post (Jul. 6, 2020).
	Cincinnati Country Day	- - - - - - -	S Rich, J Fox, J Crump, A Gregg, A Blanco, & A Ba Tran, SBA data: Business that received PPP
Cincinnati, UH	School Cianianati Hilla Chuistian	noillim ୧၃ - ۲၃	loans, Washington Post (Jul. 6, 2020).
Cincinnati, OH	Uncinnati Hills Unristian Academy	\$2 - \$5 million	S Rich, J Fox, J Crump, A Gregg, A Blanco, & A Ba Tran, SBA data: Business that received PPP Ioans, Washington Post (Jul. 6, 2020).
Cleveland, OH	St. Joseph Academy	1 1	S Rich, J Fox, J Crump, A Gregg, A Blanco, & A Ba Tran, SBA data: Business that received PPP loans, Washington Post (Jul. 6, 2020).
Dallas, TX	Bishop Lynch High School	\$2 - \$5 million	S Rich, J Fox, J Crump, A Gregg, A Blanco, & A Ba Tran, SBA data: Business that received PPP loans, Washington Post (Jul. 6, 2020).
Dallas, TX	June Shelton School and Evaluation Center	\$2 - \$5 million	S Rich, J Fox, J Crump, A Gregg, A Blanco, & A Ba Tran, SBA data: Business that received PPP loans, Washington Post (Jul. 6, 2020).

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Location	School Name	PPP Loan Amount	Citation
			S Rich, J Fox, J Crump, A Gregg, A Blanco, & A Ba Tran, SBA data: Business that received PPP
Denver, CO	Strive Preparatory Schools \$5- \$10 million	\$5- \$10 million	loans, Washington Post (Jul. 6, 2020).
Denver, CO	Denver Academy	\$1 -\$2 million	S Rich, J Fox, J Crump, A Gregg, A Blanco, & A Ba Tran, SBA data: Business that received PPP loans, Washington Post (Jul. 6, 2020).
			Heather Catallo, Private schools receive millions in PPP loans from federal government, WXYZ
Detroit, MI	Detroit County Day School \$2-\$5 mill	\$2-\$5 million	(Jul. 17, 2020, 9:09 PM). ⁴
	University of Detroit		
	Jesuit High School and		S Rich, J Fox, J Crump, A Gregg, A Blanco, & A Ba Tran, SBA data: Business that received PPP
Detroit, MI	Academy	\$1 - \$2 million	loans, Washington Post (Jul. 6, 2020).
	All Saints Episcopal School		S Rich, J Fox, J Crump, A Gregg, A Blanco, & A Ba Tran, SBA data: Business that received PPP
Fort Worth, TX	of Fort Worth	\$2 - \$5 million	loans, Washington Post (Jul. 6, 2020).
	Southwest Christian		S Rich, J Fox, J Crump, A Gregg, A Blanco, & A Ba Tran, SBA data: Business that received PPP
Fort Worth, TX	School, Inc.	\$1 - \$2 million	loans, Washington Post (Jul. 6, 2020).
Grosse Pointe			Ruth Conniff, Small business loan data show big payday for private schools that also get public
Woods, MI	University Liggett School	\$2-\$5 million	funds, Wisconsin Examiner (Jul. 10, 2020).
			J Dwinell, & J Battenfeld, Payroll Protection Program loan list a who's who of Massachusetts
Groton, MA	Lawrence Academy	\$2 - \$5 million	employers, Boston Herald (Jul. 9, 2020, 7:39 AM).
	St. Francis Episcopal		S Rich, J Fox, J Crump, A Gregg, A Blanco, & A Ba Tran, SBA data: Business that received PPP
Houston, TX	School of Houston	\$2 - \$5 million	loans, Washington Post (Jul. 6, 2020).
	First Baptist Academy of		S Rich, J Fox, J Crump, A Gregg, A Blanco, & A Ba Tran, SBA data: Business that received PPP
Houston, TX	Houston	\$1 -\$2 million	loans, Washington Post (Jul. 6, 2020).
	Westside Neighborhood		S Rich, J Fox, J Crump, A Gregg, A Blanco, & A Ba Tran, SBA data: Business that received PPP
Los Angeles, CA	School	\$2 -\$5 million	loans, Washington Post (Jul. 6, 2020).
	The City and Country		S Rich, J Fox, J Crump, A Gregg, A Blanco, & A Ba Tran, SBA data: Business that received PPP
Manhattan, NY	School	\$2 - \$5 million	loans, Washington Post (Jul. 6, 2020).
	Christopher Columbus		S Rich, J Fox, J Crump, A Gregg, A Blanco, & A Ba Tran, SBA data: Business that received PPP
Miami, FL	High School	\$2 - \$5 million	loans, Washington Post (Jul. 6, 2020).
	Miami Country Day		S Rich, J Fox, J Crump, A Gregg, A Blanco, & A Ba Tran, SBA data: Business that received PPP
Miami, FL	School	\$2 - \$5 million	loans, Washington Post (Jul. 6, 2020).
	Scheck Hillel Community		S Rich, J Fox, J Crump, A Gregg, A Blanco, & A Ba Tran, SBA data: Business that received PPP
Miami, FL	School	\$2 - \$5 million	loans, Washington Post (Jul. 6, 2020).
Miami. FL	Westminster Christian Private School	\$2 - \$5 million	S Rich, J Fox, J Crump, A Gregg, A Blanco, & A Ba Tran, SBA data: Business that received PPP Ioans, Washington Post (Jul. 6, 2020).

AYCHECK PROTECTION PROGRAM ("PPP") LOANS TO PRIVATE SCHOOLS	Select Examples
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Location	School Name	PPP Loan Amount	Citation
	Marquette University		S Rich, J Fox, J Crump, A Gregg, A Blanco, & A Ba Tran, SBA data: Business that received PPP
Milwaukee, WI	High School	\$1 - \$2 million	loans, Washington Post (Jul. 6, 2020).
Milwaukee, WI	Academy of Excellence	\$350K - \$1 million	Ruth Conniff, Small business Ioan data show big payday for private schools that also get public \$350K - \$1 million funds, Wisconsin Examiner (Jul. 10, 2020).
Milwaukee, WI	Divine Savior Holy Angels High School	\$1 - \$2 mllion	Ruth Conniff, Small business loan data show big payday for private schools that also get public funds, Wisconsin Examiner (Jul. 10, 2020).
Milwaukee, WI	Atlas Preparatory Academy	\$350K - \$1 million	Ruth Conniff, Small business loan data show big payday for private schools that also get public funds, Wisconsin Examiner (Jul. 10, 2020).
Minneapolis, MN	Minneapolis, MN Minnehaha Academy	\$2 - \$5 million	S Rich, J Fox, J Crump, A Gregg, A Blanco, & A Ba Tran, SBA data: Business that received PPP loans, Washington Post (Jul. 6, 2020).
Nashville, TN	Franklin Road Academy	\$2 - \$5 million	S Rich, J Fox, J Crump, A Gregg, A Blanco, & A Ba Tran, SBA data: Business that received PPP loans, Washington Post (Jul. 6, 2020).
Newton, MA	The Fessenden School	\$2 - \$5 million	J Dwinell, & J Battenfeld, Payroll Protection Program Ioan list a who's who of Massachusetts employers, Boston Herald (Jul. 9, 2020, 7:39 AM).
иус, иү	St. Ann's School	\$5-\$10 million	E Bowden, & L Eustachewich, Elite NYC private schools received millions in PPP loans: SBA, New York Post (Jul. 7, 2020, 3:41 PM). ⁵
иус, иу	Poly Prep Country Day School	\$5-\$10 million	E Bowden, & L Eustachewich, Elite NYC private schools received millions in PPP loans: SBA, New York Post (Jul. 7, 2020, 3:41 PM).
иус, иү	Packer Collegiate Institute \$5-\$10 million	\$5-\$10 million	E Bowden, & L Eustachewich, Elite NYC private schools received millions in PPP loans: SBA, New York Post (Jul. 7, 2020, 3:41 PM).
ΝΥС, ΝΥ	Berkeley Carroll School	\$5-\$10 million	E Bowden, & L Eustachewich, Elite NYC private schools received millions in PPP loans: SBA, New York Post (Jul. 7, 2020, 3:41 PM).
ΝΥС, ΝΥ	Columbia Grammar & Preparatory School	\$5-\$10 million	E Bowden, & L Eustachewich, Elite NYC private schools received millions in PPP loans: SBA, New York Post (Jul. 7, 2020, 3:41 PM).
ΝΥС, ΝΥ	United Nations International School	\$5-\$10 million	E Bowden, & L Eustachewich, Elite NYC private schools received millions in PPP loans: SBA, New York Post (Jul. 7, 2020, 3:41 PM).
ΝΥС, ΝΥ	Fordham Preparatory School	\$2-\$5 million	E Bowden, & L Eustachewich, Elite NYC private schools received millions in PPP loans: SBA, New York Post (Jul. 7, 2020, 3:41 PM).
иус, иу	Grace Church School	\$2-\$5 million	E Bowden, & L Eustachewich, Elite NYC private schools received millions in PPP loans: SBA, New York Post (Jul. 7, 2020, 3:41 PM).
ΝΥС, ΝΥ	Brooklyn Friends School	\$2-\$5 million	E Bowden, & L Eustachewich, Elite NYC private schools received millions in PPP loans: SBA, New York Post (Jul. 7, 2020, 3:41 PM).
ΝΥС, ΝΥ	Friends Seminary	\$2-\$5 million	E Bowden, & L Eustachewich, Elite NYC private schools received millions in PPP loans: SBA, New York Post (Jul. 7, 2020, 3:41 PM).

Location	School Name	PPP Loan Amount	Citation
NYC. NY	Bav Ridge Prep School	\$1-\$2 million	E Bowden, & L Eustachewich, Elite NYC private schools received millions in PPP loans: SBA, New York Post (Jul. 7, 2020, 3:41 PM).
		-	E Bowden, & L Eustachewich, Elite NYC private schools received millions in PPP loans: SBA, New
NYC, NY	Blue School	\$1-\$2 million	York Post (Jul. 7, 2020, 3:41 PM).
NYC, NY	Staten Island Academy	\$1-\$2 million	E Bowden, & L Eustachewich, Elite NYC private schools received millions in PPP loans: SBA, New York Post (Jul. 7, 2020, 3:41 PM).
Oakland, CA	Head-Rovce School	\$2 - \$5 million	S Rich, J Fox, J Crump, A Gregg, A Blanco, & A Ba Tran, SBA data: Business that received PPP loans, Washington Post (Jul. 6, 2020).
Oakland, CA	Redwood Day School	\$1 - \$2 million	S Rich, J Fox, J Crump, A Gregg, A Blanco, & A Ba Tran, SBA data: Business that received PPP Ioans, Washington Post (Jul. 6, 2020).
Oklahoma City,	Bishop McGuiness	بې د ۲ بې	S Rich, J Fox, J Crump, A Gregg, A Blanco, & A Ba Tran, SBA data: Business that received PPP
OK.	Latholic High School	uoiiiim 2¢ - t¢	ioans, wasnington Post (Juli 6, 2020). S Rich TEox Triumo A Greag A Blanco & A Ba Tran SRA data: Rusiness that rereived PDP
Pittsburgh, PA	Shady Side Academy	\$2 - \$5 million	loans, Washington Post (Jul. 6, 2020).
	Notre Dame Preparatory		
	School and Marist		Heather Catallo, Private schools receive millions in PPP loans from federal government, WXYZ
Pontiac IVI	Academy	51.7 million	(Juli. 17, 2020, 9:09 PM).
	Central Catholic High		S Rich, J Fox, J Crump, A Gregg, A Blanco, & A Ba Tran, SBA data: Business that received PPP
Portland, OR	School	\$2 - \$5 million	loans, Washington Post (Jul. 6, 2020).
Portland, OR	St. Mary's Academy	\$1 - \$2 million	S Rich, J Fox, J Crump, A Gregg, A Blanco, & A Ba Tran, SBA data: Business that received PPP loans, Washington Post (Jul. 6, 2020).
Rochester, NY	Alendale Columbia School \$1 - \$2 million	\$1 - \$2 million	S Rich, J Fox, J Crump, A Gregg, A Blanco, & A Ba Tran, SBA data: Business that received PPP Ioans, Washington Post (Jul. 6, 2020).
	Christian Brother High		S Rich, J Fox, J Crump, A Gregg, A Blanco, & A Ba Tran, SBA data: Business that received PPP
Sacramento, CA	School of Sacramento	\$2 - \$5 million	loans, Washington Post (Jul. 6, 2020).
	Antonian College		G Dist I Frant Comments A Comments A Down of A Do Toon CDA dotter Developments that and DDD
San Antonio, TX	Preparatory High School	\$1- \$2 million	o nich, i rok, i chump, a shegg, a planco, a a ba man, oba uata. business matheceived FFF Ioans, Washington Post (Jul. 6, 2020).
	Central Catholic High		S Rich, J Fox, J Crump, A Gregg, A Blanco, & A Ba Tran, SBA data: Business that received PPP
San Antonio, TX	School	\$1 - \$2 million	loans, Washington Post (Jul. 6, 2020).
			S Rich, J Fox, J Crump, A Gregg, A Blanco, & A Ba Tran, SBA data: Business that received PPP
San Diego, CA	Francis Parker School	\$2 - \$5 million	loans, Washington Post (Jul. 6, 2020).
	St. Augustine's School of		S Rich, J Fox, J Crump, A Gregg, A Blanco, & A Ba Tran, SBA data: Business that received PPP
San Diego, CA	San Diego	\$1 - \$2 million	loans, Washington Post (Jul. 6, 2020).

VCHECK PROTECTION PROGRAM ("PPP") LOANS TO PRIVATE SCHOOLS Select Examples

Location School Name PPP Loan Amount Citation Record for an example Sacred Heart Cathedral S Rich, J Fox, J Cump, A Gregg, A Blanco, & A Ba Tran, SBA data: B Stan Francisco, CA Preparatory S Rich, J Fox, J Cump, A Gregg, A Blanco, & A Ba Tran, SBA data: B Stan Francisco, CA Preparatory S Rich, J Fox, J Cump, A Gregg, A Blanco, & A Ba Tran, SBA data: B Stan Francisco, CA Preparatory S Rich, J Fox, J Cump, A Gregg, A Blanco, & A Ba Tran, SBA data: B Stan Francisco, CA Preparatory S Rich, J Fox, J Cump, A Gregg, A Blanco, & A Ba Tran, SBA data: B Str, Louis, MO Cor Jesu Academy S Rich, J Fox, J Cump, A Gregg, A Blanco, & A Ba Tran, SBA data: B Str, Louis, MO S Louis University High S Rich, J Fox, J Cump, A Gregg, A Blanco, & A Ba Tran, SBA data: B Str, Louis, MO S Louis University High S Rich, J Fox, J Cump, A Gregg, A Blanco, & A Ba Tran, SBA data: B Str, Louis, MO S Louis, MO S Louis University High S Rich, J Fox, J Cump, A Gregg, A Blanco, & A Ba Tran, SBA data: B Str, Louis, MO S Louis, MO S Louis University High S Rich, J Fox, J Cump, A Gregg, A Blanco, & A Ba Tran, SBA data: B Str, Louis, MO S Louis University High S Rich, J Fox, J Cump, A Gregg, A Blanco, & A Ba Tran, SBA data: B Str, Louis, OK S Louis, MO S Louis Cump, A Gregg, A Blanco, & A Ba Tran, SBA data: B Str, Louis, OK S Louis, MO S Louis Cump, A Gregg, A Barra, SBA data: B Str, Louis, D Cump, A Gregg, A Barra, SBA data: B Str, Louis, OK S Louis, MO				Select Examples
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¹ S Rich, J Fox, J Crump, A Gregg, A Blanco, & A Ba Tran, SBA data: Business that received PPP loans, Washington Post (Jul. 6, 2020), https://www.washingtonpost.com/graphics/2020/business/sba-ppp- data/?utm_campaign=wp_main&utm_medium=social&utm_source=twitter&itid=lk_inline_manual_5 ² Ruth Conniff, Small business loan data show big payday for private schools that also get public funds, Wisconsin Examiner (Jul. 10, 2020 https://wisconsinexaminer.com/2020/07/10/small-business-loan-data-show-big-payday-for-private-schools-that-also-get-public-funds/				
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³ J Dwinell, & J Battenfeld, Payroll Protection Program loan list a who's who of Massachusetts employers, Boston Herald (Jul. 9, 2020, 7:39 AM),

Heather Catallo, Private schools receive millions in PPP loans from federal government, WXYZ (Jul. 17, 2020, 9:09 PM), https://www.bostonherald.com/2020/07/08/payroll-protection-loan-list-a-whos-who-of-massachusetts-employers/

https://www.wxyz.com/news/coronavirus/private-schools-receive-millions-in-ppp-loans-from-federal-government

nyc-private-schools-received-millions-in-ppp-loans-sba/

EXHIBIT C

Congress of the United States Washington, D.C. 20515

May 20, 2020

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

Dear Secretary DeVos:

We write regarding the April 30, 2020 guidance issued by the U.S. Department of Education (Department) that seeks to repurpose hundreds-of-millions of taxpayer dollars intended for public school students to provide services for private school students, in contravention of both the plain reading of the statute and the intent of Congress. The Coronavirus Aid, Relief, and Economic Security Act (CARES Act), requires local educational agencies (LEA) receiving funds to use a portion of such funds to provide services to low-income students attending private schools that are equitable to services provided to students in public schools in the same manner as under section 1117 of Title I of the Elementary and Secondary Education Act (ESEA). However, the Department broke with statutory requirements of the CARES Act and longstanding precedent of the equitable services provision in section 1117 of ESEA by issuing guidance that directs LEAs to use emergency relief funds for the provision of services to students at private schools regardless of their wealth or residence. This action also contradicts the Department's equitable services non-regulatory guidance issued on October 7, 2019.¹ We ask that you immediately revise your April 30 guidance, including Question 10 of the guidance document, to conform with section 1117 of ESEA as required by the CARES Act.

The Department's new policy will direct districts to allocate additional resources and services to wealthier private school students, thereby leaving a smaller amount of funds available to serve public school students. In fact, the Department recently clarified that its redefinition of the equitable services provision was designed to provide more money for equitable services than is required to be provided for such services under section 1117 of ESEA, with a spokesperson claiming that "only providing money for low-income private school students would place private school teachers and students at an unfair disadvantage."² Given that the guidance contradicts the clear requirements of the CARES Act, it will cause confusion among States and LEAs that will be uncertain of how to comply with both the Department's guidance and the plain language of the CARES Act.³

The CARES Act requires LEAs to use emergency relief funds to provide equitable services based only on the number of low-income students at private schools.⁴

The CARES Act provides over \$13 billion in K-12 education aid, which goes to states and LEAs based on their Title I, Part A (Title I-A) funding allocation. Since 1965, Title I-A has served as a vital source of support for

² Rebecca Kleln, *Betsy DeVos Makes Moves to Quietly Prop Up Private Schools*, HuffPost, May 7, 2020, https://www.huffpost.com/entry/betsy-devos-school-privatization_n_5eb3335ac5b6526942a16176.

³ The Elementary and Secondary Education Act of 1965, as amended, § 1115(c), 20 U.S.C. § 6315(c).

⁴ See generally U.S. Department of Education, *Title I, Part A of the Elementary and Secondary Education Act of 1965, as Amended by the Every Student Succeeds Act: Providing Equitable Services to Eligible Private School Children, Teachers, and Families Updated Non-Regulatory Guidance* (October 7, 2019).

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disadvantaged students in schools with high concentrations of students from low-income families. A LEA's Title I-A allocation is determined by a variety of factors, primarily the number and concentration of low-income students within the LEA. Under ESEA section 1117, LEAs must set aside a share of their Title I-A funds to serve disadvantaged students attending private schools. The amount of the set aside is based on the number of low-income students attending private schools who reside in participating school attendance areas within the LEA attendance area.⁵

In this context, Congress required any LEA receiving emergency coronavirus relief funds under sections 18002 and 18003 of the CARES Act⁶ to provide equitable services "in the same manner as provided under section 1117 of the Elementary and Secondary Education Act of 1965."⁷ 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.⁸ However, on April 30, the Department issued an interpretation of this requirement that, if implemented, would require LEAs to provide equitable services based on the number of all private school students, regardless of their families' income level. This interpretation expands the amount of funding that LEAs must dedicate to providing equitable services to private school students, reduces public school students' share of funds, defies Congressional intent, and conflicts with the statutory requirements of the CARES Act.

The Department's CARES Act Equitable Services guidance reinterprets ESEA diverting essential coronavirus relief funds away from public school students to private school students.

Despite the clear direction from the CARES Act that LEAs must "provide equitable services in the same manner as provided under section 1117 of the ESEA," and the consistent interpretation of this section across decades and administrations,⁹ the Department issued guidance re-interpreting equitable services under section 1117, solely as applied to the CARES Act. Simply put, the Department is directing LEAs to provide equitable services in a *different* manner from that provided under section 1117 of ESEA, in direct contravention of the plain text of the CARES Act.

For context, there are two "equitable services" provisions in ESEA, section 1117, referenced in the CARES Act, and section 8501, absent from the CARES Act. Section 1117 directs LEAs to provide equitable services only based on the number of low-income students, residing in eligible school attendance areas within the LEA, who attend private schools.¹⁰ Section 8501 directs LEAs to provide equitable services to **all** eligible private school students in various programs.¹¹ Congress included the section 1117 reference of ESEA, located within Title I of ESEA, because the majority of K-12 funding allocated under the CARES Act is allocated via the Title I formula. By referencing section 1117, Congress explicitly and clearly directed LEAs to only provide equitable services based on the number of low-income students, **not** all eligible private school students, as would have been required had the CARES Act referenced section 8501. However, the Department's guidance for CARES

⁵ The Elementary and Secondary Education Act of 1965, as amended, § 1117(a)(4)(A)(i), 20 U.S.C. § 6320(a)(4)(A)(i)).

⁶ This provision applied to both Governor's Emergency Education Relief Funds as well as Elementary and Secondary School Emergency Relief Funds. Section 18005.

⁷ The Coronavirus Aid, Relief, and Economic Security Act, § 18005(a).

⁸ Id.

⁹ See, e.g., U.S. Department of Education, *Ensuring Equitable Services to Private School Children: A Title I Resource Tool Kit* (Sept. 2006).

¹⁰ See U.S. Department of Education, *Title I, Part A of the Elementary and Secondary Education Act of 1965, as Amended by the Every Student Succeeds Act: Providing Equitable Services to Eligible Private School Children, Teachers, and Families Updated Non-Regulatory Guidance*, page 19-20 (October 7, 2019).

¹¹ The Elementary and Secondary Education Act of 1965, as amended, § 8501(b), 20 U.S.C. 7881(b).

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Act equitable services chooses to ignore this explicit direction from Congress and instead directs LEAs to provide equitable services¹² based on the enrollment of "all students—public and non-public—without regard to poverty, low achievement, or residence in a participating Title I public school attendance area," thus drastically inflating the amount of CARES Act funds that Congress required to be provided to equitable services.

According to America's school boards, superintendents, principals, teachers, and other stakeholders, the Department's guidance will ensure that "wealthy children in private schools are... used to generate the equitable services share of [CARES Act funding] for their private schools at the direct expense of low-income children remaining in public schools."¹³ Similarly, the Council of Chief State School Officers (CCSSO) told the Department that this guidance "could significantly harm the vulnerable students who were intended to benefit the most from the critical federal COVID-19 education relief funds Congress has provided."¹⁴

For example, if states follow this unauthorized guidance, Louisiana projects that it will spend more than 10 percent of its \$286 million allocation in Elementary and Secondary School Emergency Relief Funds on students attending private schools.¹⁵ According to CCSSO, this is 267 percent more than it would have directed to private school students under the Department's longstanding interpretation of equitable services in section 1117 of ESEA, as explicitly required by the CARES Act.¹⁶ In total, Louisiana would spend \$23 million on equitable services for private school students under the Department's new guidance, depriving public school students, including low-income students in public schools, of \$14.4 million.

Similarly, Pennsylvania estimated that the Department's guidance "would roughly double Equitable Services reservations... [and] would impact districts of every type—large urban, small urban, suburban, and rural." In one Pennsylvania district the Department's guidance would amount to an increase of more than 4000 percent "in support flowing from most disadvantaged to more advantaged students." The Pennsylvania Secretary of Education referred to these outcomes as "clearly inequitable."¹⁷

We ask you immediately revise your April 30 guidance, including Question 10 of the guidance document to come into compliance with the CARES Act and section 1117 of ESEA. Further, it is imperative that the Department provide transparency about its interpretation of the equitable services provision and its inconsistency with long-standing requirements related to equitable services. To that end, we request the Department please provide the following no later than June 3, 2020.

- 1) All internal Department communications regarding the interpretation of section 18005 of the CARES Act.
- 2) All communications between the Department and non-Department entities regarding the interpretation of section 18005 of the CARES Act.

¹² See U.S. Department of Education, Providing Equitable Services to Students and Teachers in Non-Public Schools Under the CARES Act Programs, page 4-6 (Apr. 30, 2020).

¹³ The School Superintendents Association et al, Letter to Secretary DeVos (May 5, 2020).

¹⁴ The Council of Chief State School Officers, Letter to Secretary DeVos (May 5, 2020).

¹⁵ See Enclosure 1, State of Louisiana Department of Education, Louisiana CARES Equitable Share Estimates.

¹⁶ The Council of Chief State School Officers, Letter to Secretary DeVos (May 5, 2020).

¹⁷ Pedro A. Rivera, Pennsylvania Secretary of Education, Letter to Assistant Secretary for Elementary and Secondary Education, Frank T. Brogan (May 7, 2020) available at <u>http://blogs.edweek.org/edweek/campaign-k-12/Letter%20to%20Secretary%20Brogan%20%282%29.pdf</u>.

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- 3) The name and number of states and LEAs that have requested information regarding the Department's interpretation of section of the CARES Act.
- 4) All requests made to the Department to revise, reinterpret, or otherwise reconsider its April 30, 2020 CARES Act equitable services guidance, including the names of the requesting individuals, organizations, or entities.
- 5) The amount of funds from the Education Stabilization Fund that would be allocated to equitable services for students attending non-public schools under the Department's October 7, 2019 equitable services guidance and the amount of funds from the Education Stabilization Fund that would be allocated to equitable services for students attending non-public schools under the Department's April 30, 2020 CARES Act equitable services guidance.

Please send all official information relating to this request to Tylease Fitzgerald, Majority Chief Clerk for the House Committee on Education and Labor, Amanda Beaumont, Minority Staff for the Senate Committee on Health, Education, Labor, and Pensions, Philip Tizzani, Majority Staff for the House Appropriations Subcommittee on Labor, Health and Human Services, Education, and Related Agencies, and Mark Laisch, Minority Staff for the Senate Appropriations Subcommittee on Labor, Health and Human Services, and Education, and Related Agencies.

Sincerely,

ROBERT C. "BOBBY" SCOTT Chair Committee on Education and Labor U.S. House of Representatives

PATTY MURRAY Ranking Member Committee on Health, Education, Labor and Pensions U.S. Senate

Ranking Member Subcommittee on Labor, Health and Human Services, Education, and RelatedAgencies Committee on Appropriations U.S. Senate.

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ROSA L. DELAURO Chair Committee on Appropriations Subcommittee on Labor, Health, Human Services, and Related Agencies U.S. House of Representatives

EXHIBIT D



MEMORANDUM

July 1, 2020

To: House Committee on Education and Labor

From:

Subject: Analysis of the CARES Act's Equitable Services Provision

This memorandum¹ responds to your request for an analysis of section 18005 of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act)—the equitable services section—which concerns assistance to non-public elementary and secondary school students and teachers.² Specifically, the memorandum analyzes whether section 18005(a) requires local educational agencies (LEAs),³ such as public school boards, to reserve funding for services to private school students and teachers using the method for determining the "proportional share" set forth in section 1117 of the Elementary and Secondary Education Act of 1965 (ESEA); that is, based on the number of children from *low-income* families (low-income children) attending private schools.⁴ On July 1, 2020, the Department of Education (Department) issued an interim final rule (IFR) authorizing—and in certain circumstances directing— LEAs to use an alternative method to determine the proportional share based on *total enrollment* in private schools, reasoning that the CARES Act did not mandate "a rigid application of section 1117."⁵

Part I of the memorandum begins by summarizing the equitable services requirements in the CARES Act and the ESEA. Part II discusses the competing interpretations of section 18005(a) that have emerged since

¹ Information in this memorandum is drawn from publicly available sources and is of general interest to Congress. As such, all or part of this information may be provided by CRS in memoranda or reports for general distribution to Congress. Your confidentiality as a requester will be preserved in any case.

² Pub. L. No. 116-136, div. B, § 18005 (Mar. 27, 2020). Because the slip law is not yet available, this memorandum is based on the text of the Act as shown in the enrolled bill. *See* H.R. 748, 116th Cong., https://www.congress.gov/116/bills/hr748/BILLS-116hr748enr.pdf [hereinafter CARES Act].

³ The CARES Act defines an LEA by reference to 20 U.S.C. § 7801. CARES Act § 18007(8). In general, an LEA is "a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary schools or secondary schools in a city, county, township, school district, or other political subdivision of a State, or of or for a combination of school districts or counties that is recognized in a State as an administrative agency for its public elementary schools or secondary schools." 20 U.S.C. § 7801(30).

⁴ See No Child Left Behind Act of 2001, tit. I, § 101, Pub. L. No. 107-110, 115 Stat. 1439, 1508 (adding § 1120, later renumbered to § 1117, to the ESEA) (codified as amended at 20 U.S.C. § 6320).

⁵ CARES Act Programs; Equitable Services to Students and Teachers in Non-Public Schools, 85 Fed. Reg. 39,479, 39,480 (interim final rule with request for comments) (effective July 1, 2020) [hereinafter IFR]; *see also* Dep't of Educ., *Secretary DeVos Issues Rule to Ensure CARES Act Funding Serves All Students*, ED.GOV (June 25, 2020) (issuing draft text of the IFR).

the CARES Act's enactment, including the Department's position as set forth in the IFR. Part III analyzes the meaning of section 18005(a). It first discusses the possible meanings of key terms used in that section before analyzing the provision's meaning as a whole. Part III then considers the provision's context within the CARES Act and against the broader background of the ESEA's equitable services requirements. This part concludes with a discussion of the limited legislative history of the equitable services services section in the CARES Act.

As discussed in detail below, a straightforward reading of section 18005(a) based on its text and context suggests that the CARES Act 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. However, for the reasons discussed in Part IV, if, in a legal challenge to the IFR, a court were to instead find that section 18005(a) is not clear on this point, additional analysis is required to evaluate what, if any, deference a court might accord to the Department's contrary interpretation.⁶

I. Equitable Services Requirements in the CARES Act and the ESEA

The CARES Act established three emergency relief funds to be administered by the Secretary of Education, two of which—the Governor's Emergency Education Relief (GEER) Fund and the Elementary and Secondary School Emergency Relief (ESSER) Fund—are relevant to this discussion.⁷ Both funds may be used to provide grants to states for various authorized purposes, and both are subject to an equitable services requirement as discussed below.

CARES Act and Section 18005

The GEER Fund provides funds, based on a statutory formula, to state governors to "provide emergency support" to LEAs that a state educational agency has deemed "most significantly impacted by coronavirus" to support the LEAs' "on-going functionality" and continued provision of educational services to their students.⁸ The CARES Act does not further specify any particular formula under which GEER Fund grants are to be distributed to LEAs.

Under the ESSER program, at least 90% of grants made to state educational agencies must be subgranted to LEAs in proportion to the amount of funds those LEAs received in the most recent fiscal year under part A of title I of the ESEA (Title I-A funds).⁹ Ordinarily, LEAs receive Title I-A allocations based in part on the number of students from families below the federal poverty level;¹⁰ they use such allocations to provide "assistance to meet the special needs of educationally disadvantaged children" and fund "supplementary educational and related services to low-achieving and other students attending elementary and secondary schools with relatively high concentrations of students from low-income families."¹¹ While the CARES Act provides that an LEA receives ESSER funds based on its most recent Title I-A share, the statute allows the LEA to use those ESSER funds for a broader set of purposes than ordinary Title I-A funds, including for: "[a]ny activity authorized by the ESEA of 1965"; a range of coronavirus response

⁶ See infra "Conclusion and Additional Considerations."

⁷ CARES Act §§ 18002–18004; *see also* CRS Report R46378, *CARES Act Education Stabilization Fund: Background and Analysis*, by Rebecca R. Skinner et al.

⁸ CARES Act § 18002(c)(1).

⁹ *Id.* § 18003(c).

¹⁰ 20 U.S.C. § 6333(a), (c)(1).

¹¹ CRS Report R45141, Analysis of the Elementary and Secondary Education Act Title I-A Allocation Formulas: Factors, Design Elements, and Allocation Patterns 1, by Rebecca R. Skinner and Leah Rosenstiel.

measures; support for "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"; and necessary activities to maintain the LEA's operations and continuity of services.¹²

Section 18005(a) of the CARES Act—the equitable services provision—requires an LEA receiving GEER or ESSER funds (relief funds) to "provide equitable services *in the same manner as* provided under section 1117 of the ESEA . . . to students and teachers in non-public schools, as determined in consultation with representatives of non-public schools."¹³

ESEA and Sections 1117 and 8501

Ordinarily, ESEA section 1117 (codified at 20 U.S.C. § 6320) requires an LEA to use a portion of its Title I-A funds to provide certain services to eligible children in the school district served by that LEA¹⁴ who are enrolled in private elementary and secondary schools.¹⁵ The portion of an LEA's Title I-A funds to be used under section 1117 is based on the number of private-school children from low-income families residing in the LEA's participating public school attendance areas.¹⁶ Although poverty data is used to determine private schools' *proportional share*, the Department of Education does not consider poverty to be a criterion for *eligibility to receive services*.¹⁷ Instead, "eligible children" for purposes of section 1117 include certain students at risk of failing to meet the state's academic standards and "[c]hildren who are economically disadvantaged, children with disabilities, migrant children or English learners."¹⁸ A Department regulation further specifies that eligible children must also reside in a Title I-A public school attendance area within that LEA and attend private schools inside or outside that LEA.¹⁹ Under the ESEA, the services and benefits covered by section 1117 are: "special educational services, instructional services ..., counseling, mentoring, one-on-one tutoring, or other benefits under [Title I-A] (such as ... mobile educational services and equipment) that address their needs."²⁰

¹² CARES Act § 18003(d).

¹³ *Id.* § 18005(a) (emphasis added). The CARES Act defines "non-public school" as "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." *Id.* § 18007(6). Because CARES Act section 18007 incorporates the meaning of terms defined in section 8101 of the ESEA, *id.* § 18007(8), non-public schools are limited to *nonprofit* elementary and secondary schools. *See* 20 U.S.C. § 7801(19), (45). For simplicity, this memorandum refers to "non-public schools" as "private schools."

¹⁴ For brevity, the memorandum refers to attendance areas within an LEA's boundaries as being "within the LEA" and schools located outside that area as being "outside the LEA."

¹⁵ See 20 U.S.C. § 6320(a)(1).

¹⁶ *Id.* § 6320(a)(4)(A); *see also* 34 C.F.R. § 200.64(a)(1).

¹⁷ See DEP'T OF EDUC., PROVIDING EQUITABLE SERVICES TO ELIGIBLE PRIVATE SCHOOL CHILDREN, TEACHERS, AND FAMILIES 30 (Oct. 7, 2019), https://www2.ed.gov/about/inits/ed/non-public-education/files/equitable-services-guidance-100419.pdf [hereinafter Title I-A Equitable Services Guidance].

¹⁸ 20 U.S.C. § 6315(c); *see also id.* § 6320 (directing LEAs to provide equitable services "[t] the extent consistent with the number of eligible children identified under section 1115(c) [(20 U.S.C. § 6315(c))]").

¹⁹ 34 C.F.R. § 200.62(b); Title I-A Equitable Services Guidance, *supra* note 17, at 8.

²⁰ 20 U.S.C. § 6320(a)(1)(A).

ESEA section 1117 imposes a number of requirements,²¹ most of which are directed at LEAs and which are divided into five subsections.²² Because the structure and wording of these requirements is important to the statutory interpretation analysis, the relevant requirements are summarized below.

Subsection (a) sets out "general requirement[s]" relating to the nature of the services that LEAs must provide to private school students and the method for determining the amount of funding to allocate to services for private school students.²³

Paragraph (1), captioned "In general," states that LEAs must:

- "provide" the special educational and instructional services listed above;
- to "eligible children identified under section 1115(c) in the school district served by [the LEA] who are enrolled in private elementary schools and secondary schools";²⁴
- "on an equitable basis";
- "individually or in combination, as requested by the [appropriate private school] officials to best meet the needs of such children";²⁵ and
- "after timely and meaningful consultation with appropriate private school officials."

Paragraphs (2) and (3) specify that services and benefits must be:

- "secular, neutral, and nonideological";
- "equitable in comparison to services and other benefits" for participating public school children; and
- "provided in a timely manner."

Paragraph (4), captioned "Expenditures," states, inter alia, that expenditures for services and benefits to eligible private school students must be "equal to the proportion of funds allocated to participating school attendance areas based on the number of children from *low-income* families who attend private schools."²⁶

²¹ Provisions in section 1117 that use the word "shall" appear to introduce a mandatory requirement, whereas provisions that use the word "may" appear to give the agency discretion to choose between two or more options. *Compare, e.g.*, 20 U.S.C. § 6320(b)(1) (stating that an LEA "*shall* consult with appropriate private school officials during the design and development of such agency's programs") (emphasis added), *with id.* § 6320(a)(5) (stating that an LEA "*may* provide services under this section directly or through contracts with public and private agencies, organizations, and institutions"). *See* Kingdomware Techs., Inc. v. United States, 136 S. Ct. 1969, 1977 (2016) ("When a statute distinguishes between 'may' and 'shall,' it is generally clear that

^{&#}x27;shall' imposes a mandatory duty."). Accordingly, this memorandum uses the term "must" in paraphrasing provisions that use the word "shall" where the context indicates that the provision is mandatory.

²² 20 U.S.C. § 6320(a)–(e).

²³ Id. § 6320(a).

²⁴ The language "such children" in (a)(1)(A) appears to refer back to the opening phrase: "To the extent consistent with the number of eligible children identified under section 1115(c) in the school district served by [an LEA] who are enrolled in private elementary schools and secondary schools." 20 U.S.C. § 6320(a)(1). *Cf.* Sullivan v. Finkelstein, 496 U.S. 617, 627 (1990) ("The phrase 'such additional evidence' [in the second half of the sixth sentence] refers in turn to the 'additional evidence' mentioned in the first half of the sixth sentence.").

 $^{^{25}}$ Section 1117 also requires the LEA to "ensure that teachers and families of the children participate, on an equitable basis, in services and activities developed pursuant to section 1116 [(20 U.S.C. § 6318)]," relating to parent and family engagement. 20 U.S.C. § 6320(a)(1)(B).

²⁶ *Id.* § 6320(a)(4)(A)(i) (emphasis added).

Paragraph (5), captioned "Provision of Services," states that the LEA may provide services "directly or through contracts with public and private" entities.

Subsection (b) contains detailed "consultation" requirements for LEAs, beginning with the mandate to "consult with appropriate private school officials during the design and development of such agency's programs" with "the goal of reaching agreement on how to provide equitable and effective programs for eligible private school children."²⁷ Among other topics, the consultation process must include:

- "the size and scope of the equitable services to be provided to the eligible private school children, the proportion of funds that is allocated under subsection (a)(4)(A) for such services, and how that proportion of funds is determined";²⁸ and
- "the method or sources of data that are used under subsection (c) and section 1113(c)(1) to determine the number of children from low-income families in participating school attendance areas who attend private schools."²⁹

Subsection (c), titled "Allocation for equitable service to private school students," gives an LEA "final authority . . . to calculate the number of children, ages 5 through 17, who are from low-income families and attend private schools" through one of four calculation methods.³⁰

Subsection (d) on the "Public control of funds," while not directed at LEAs specifically, mandates in paragraph (1) that a public agency control and administer Title I-A funds.³¹ Paragraph (2) of this subsection, captioned "Provision of services," requires services under section 1117 to be provided by employees of a public agency or through a public agency's contract with another entity that is independent of the private school or a religious organization.³²

Subsection (e) provides a bypass mechanism through which the Secretary of Education must arrange for the provision of equitable services to eligible children if an LEA is prohibited by law from providing equitable services to private school children or has substantially failed, or is unwilling, to do so.³³

Section 1117 is not the only equitable services requirement in the ESEA. As discussed in more detail in Part III's section on "Statutory Context," section 1117 provides the equitable services requirements for Title I-A funds, while section 8501 of the ESEA contains similar requirements for programs under other titles of the ESEA. However, unlike section 1117, section 8501 does *not* require LEAs to base private schools' proportional share on the number of low-income children living in Title I-A attendance areas who attend private schools.³⁴ Instead, section 8501 provides that "[e]xpenditures for educational services and other benefits provided under this section for eligible private school children, their teachers, and other educational personnel serving those children *shall be equal, taking into account the number and educational needs of the children to be served, to the expenditures for participating public school children.*"³⁵

- ²⁷ *Id.* § 6320(b)(1).
- ²⁸ *Id.* § 6320(b)(1)(E).
- ²⁹ Id. § 6320(b)(1)(F).
- ³⁰ *Id.* § 6320(c).
- ³¹ *Id.* § 6320(d)(1).
- ³² *Id.* § 6320(d)(2).
- ³³ *Id.* § 6320(e).

³⁴ See id. § 7881(a)(4)(A).

³⁵ *Id.* (emphasis added).

In interpreting section 18005(a) of the CARES Act, disputes have arisen as to what it means for LEAs to "provide equitable services *in the same manner* as provided under section 1117 of the ESEA."³⁶ In guidance issued on April 30, 2020 (April 30th guidance), the Department interpreted section 18005(a) of the CARES Act to give the Department discretion to harmonize the Act's equitable services provision with its counterpart in the ESEA.³⁷ To give "meaning to" the ESEA's equity provision—that services and benefits for eligible private school children be "*equitable in comparison*" to services and other benefits for public school children—the Department concluded that it must account for "the significantly broader eligibility and uses of funds authorized under the CARES Act as compared to [ESEA] Title I, Part A."³⁸ In the April 30th guidance, the Department initially advised LEAs to base the proportional share on *total enrollment* in participating private schools in the LEA, rather than the number of *low-income* children living in Title I-A attendance areas in the LEA and attending private schools inside or outside the LEA.³⁹

In response to objections from "[a] number of states," the Department later revised its instructions in the July 1, 2020 IFR to offer LEAs options for determining the proportional share.⁴⁰ Under the IFR, an LEA that spends CARES Act relief funds *only* on services for schools participating in Title I-A has three options for determining the proportional share.⁴¹ Specifically, an LEA receiving CARES Act relief funds may determine the proportional share:

(1) based on total enrollment in participating private schools,⁴² consistent with the April 30th guidance;

(2) using the proportional share the LEA calculated under section 1117(a)(4)(A) for the 2019–2020 school year,⁴³ which would have been based on low-income children living in Title I-A attendance areas and attending private schools inside or outside the LEA; or

(3) based on the number of low-income children attending private schools located in the LEA that plan to participate in CARES Act programs.⁴⁴

³⁸ Id.

³⁶ CARES Act § 18005(a). See Cory Turner, DeVos Faces Pushback Over Plan to Reroute Aid to Private School Students, NPR (May 21, 2020), https://www.npr.org/sections/coronavirus-live-updates/2020/05/21/860352150/devos-faces-pushback-over-plan-to-reroute-aid-to-private-school-students.

³⁷ See DEP'T OF EDUC., PROVIDING EQUITABLE SERVICES TO STUDENTS AND TEACHERS IN NON-PUBLIC SCHOOLS UNDER THE CARES ACT PROGRAMS at 3 (Apr. 30, 2020), https://web.archive.org/web/20200625160043/https://oese.ed.gov/files/2020/04/ FAQs-Equitable-Services.pdf [hereinafter April 30th Guidance] ("This requirement, on its face, necessitates that the Department interpret how the requirements of section 1117 apply to the CARES Act programs, given that an LEA under the CARES Act programs may serve all non-public school students and teachers without regard to family income, residency, or eligibility based on low achievement.").

³⁹ *Id.* at 4, 6. *See, e.g.*, TEX. EDUC. AGENCY, PROVIDING EQUITABLE SERVICES TO STUDENTS AND TEACHERS IN PARTICIPATING PRIVATE NON-PROFIT SCHOOLS UNDER THE CARES ACT PROGRAMS (updated June 4, 2020), https://tea.texas.gov/sites/default/ files/covid/COVID-19-CARES-Act-Equitable-Services-FAQ.pdf ("Using the proportion of students who are enrolled in participating [private] schools [located within the LEA's boundaries], the LEA determines the amount of funds available for equitable services based on that proportional share of the LEA's total allocation under each CARES Act program separately.").

⁴⁰ IFR, 85 Fed. Reg. at 39,480.

⁴¹ *Id.* at 39,482 (explaining that "the LEA has two options in addition to using enrollment to determine the proportional share").

⁴² *Id.* at 39,488 (to be codified at 34 C.F.R. § 76.665(c)(1)(i), (c)(1)(ii)).

⁴³ *Id.* (to be codified at 34 C.F.R. § 76.665(c)(1)(i)(A)).

⁴⁴ *Id.* (to be codified at 34 C.F.R. § 76.665(c)(1)(i)(B)). This option differs from the current method for determining the Title I-A proportional share, which is based on the number of low-income students *living in Title I-A attendance areas in the LEA* who attend private school, regardless of whether their private school is located *inside or outside of the LEA*. *See id.* at 39,481 (stating that "[u]nder Title I, funds for equitable services are generated by students from low-income families who reside in a

However, if an LEA provides services with CARES Act relief funds to *any* non-Title I-A school, the LEA *must* base the proportional share on total enrollment in participating private schools.⁴⁵ The Department concluded that it is authorized to promulgate these regulations "in the exercise of [its] interpretive discretion," because the CARES Act's "in the same manner as" language is "facially ambiguous."⁴⁶

In contrast to the Department's interpretation, some federal lawmakers and state officials have argued that the CARES Act *requires* LEAs to base relief funds for equitable services on the number of low-income children attending private schools, and that the Department does not have discretion to depart from this allocation method.⁴⁷ In support of this view, they cite the expenditure provision in ESEA section 1117(a)(4),⁴⁸ which, as noted, bases eligible private school students' proportional share of services on the number of low-income children attending private schools.⁴⁹

III. Analysis of Section 18005(a)

Interpreting section 18005(a) begins with the section's text, starting with the meaning of key phrases from that text.⁵⁰ These phrases must not be analyzed in isolation, but instead be read with a view toward how they "relate to each other" and their place in the overall statutory scheme.⁵¹ Legislative history can inform the analysis but generally will not override an interpretation that is clearly expressed in the statutory text.⁵²

Meaning of Key Language

CARES Act section 18005(a)'s meaning depends, in large part, on the meaning of the phrases "*provide equitable services*" and "*in the same manner as provided under section 1117*." However, the Act does not define key terms such as "provide," "equitable services," or "manner."⁵³ The Supreme Court has said that when a statutory term is not defined, it generally should be given its "ordinary meaning"—typically, its dictionary definition.⁵⁴ Whether a term's dictionary definition applies—or which one of several possible

⁴⁵ *Id.* at 39,488 (to be codified at 34 C.F.R. § 76.665(c)(1)(ii)).

⁴⁶ *Id.* at 39,481.

⁴⁷ See, e.g., Letter to LEA Superintendents et al. from Jennifer McCormick, Superintendent of Public Instruction, Ind. Dep't of Educ. 1 (May 12, 2020), https://www.doe.in.gov/sites/default/files/grants/final-language-equitable-share-cares-51220.pdf ("This final decision ensures that the funds are distributed according to Congressional intent and a plain reading of the law, which prioritizes communities and schools with high-poverty who are at most risk and in need of the additional funds."); Minn. Dep't of Educ., *CARES Act Funding Information*, https://education.mn.gov/MDE/dse/health/covid19/cares/ (last visited July 1, 2020) ("[T]here has been some confusion around the language and intent of the CARES Act and the guidance provided by the U.S. Department of Education. The state of Minnesota has decided to follow the intent and language of the law and distribute the federal funds to nonpublic schools, according to the number of children living in low-income households to prioritize those students with the greatest need.").

⁴⁸ *See* Letter to Betsy DeVos, Sec. of Educ., from Robert C. Scott, Chair, H. Comm. on Educ. & Labor et al. 2 n.5 (May 20, 2020), https://edlabor.house.gov/imo/media/doc/2020-5-20%20Ltr%20to%20DeVos%20re%20Equitable%20Services.pdf.

⁴⁹ 20 U.S.C. § 6320(a)(4)(A).

⁵¹ *Babb*, 140 S. Ct. at 1168 ("To explain the basis for our interpretation, we will first define the important terms in the statute and then consider how they relate to each other."). *See infra* "Statutory Context."

⁵² Bostock v. Clayton Cty., 590 U.S. ---, No. 17-1618, slip op. at 24 (2020). See infra "Legislative History."

participating Title I public school attendance area and attend a non-public school (citing 20 U.S.C. § 6320(a)(4)(A)(i) and 34 C.F.R. § 200.64(a))).

⁵⁰ See Babb v. Wilkie, 140 S. Ct. 1168, 1172 (2020) (stating that to resolve a dispute over the proper interpretation of a statute, the Court "start[s] with the text of the statute"). See infra "Meaning of Key Language."

⁵³ See CARES Act § 18007 (defining terms for purposes of §§ 18001–06).

⁵⁴ See Kouichi Taniguchi v. Kan Pac. Saipan, Ltd., 566 U.S. 560, 566 (2012) ("When a term goes undefined in a statute, we give the term its ordinary meaning.").

definitions was intended—depends on the context in which the term is used.⁵⁵ For example, a term's ordinary meaning may not apply if the word or phrase is a term of art because it has a technical or settled meaning in the relevant subject area or legal field.⁵⁶

"Provide Equitable Services"

The first question is what it means for an LEA to "provide equitable services," a phrase which is not defined in the CARES Act or the ESEA.⁵⁷ The word "provide" can have different meanings depending on the context. Most commonly, it means either: (1) "to supply or make available (something wanted or needed)" (e.g., "*provide* the children with free balloons"); or (2) "to have as a condition" or "stipulate" (e.g., "the contract *provides* that certain deadlines will be met").⁵⁸ Because the object of "provide" is "equitable services," the context of the provision suggests that Congress intended the first meaning (i.e., to supply or make available). Neither the CARES Act nor the ESEA expressly defines "equitable services," and the Supreme Court has not interpreted the phrase.⁵⁹ However, two separate sections of the ESEA contain "equitable services" requirements: sections 1117 and 8501.⁶⁰ Both sections require LEAs to provide services to eligible children attending private schools that are "equitable in comparison to services and other benefits for [participating] public school children."⁶¹ And both sections appear to use the term "equitable services" as a shorthand for this concept in subsequent provisions of the same section.⁶²

Accordingly, section 18005(a)'s directive for LEAs to "provide equitable services" appears to mean, at a minimum, that LEAs must "supply or make available" services to private school students that are "equitable in comparison to services and other benefits for [participating] public school children."⁶³ "Equitable," in ordinary usage, means "having or exhibiting equity"—that is, "freedom from bias or favoritism"—or "dealing fairly and equally with all concerned."⁶⁴ Thus, standing alone, the directive to "provide equitable services" suggests that LEAs must provide unbiased, fair, and equal services to private school students, which could speak to the quality *or* the quantity of those services. However, CARES Act section 18005(a) expressly references ESEA section 1117, and as explained *infra* in the section on

⁵⁵ See Yates v. United States, 574 U.S. 528, 537 (2015) (plurality opinion) ("Ordinarily, a word's usage accords with its dictionary definition. In law as in life, however, the same words, placed in different contexts, sometimes mean different things.").

⁵⁶ See, e.g., Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291, 297 (2006) (declining to interpret "costs" according to its "ordinary usage" as expenses incurred because "costs' is a term of art that generally does not include expert fees" (internal quotation marks and citation omitted)); Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 740 (1989) (noting that the term "scope of employment" is a "widely used term of art in agency law").

⁵⁷ See CARES Act § 18007; 20 U.S.C. § 7801.

⁵⁸ Provide, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/provide (last visited July 1, 2020).

⁵⁹ See CARES Act § 18007. But cf. Wheeler v. Barrera, 417 U.S. 402, 407 n.6, 415 n.11, 419 (1974) (interpreting 45 C.F.R. § 116.19(b), which at that time required LEAs to provide "comparable" services to private school students) ("The choice of programs is left to the State with the proviso that comparable (not identical) programs are also made available to eligible private school children.").

⁶⁰ 20 U.S.C. §§ 6320, 7881.

⁶¹ *Id.* §§ 6320(a)(3)(A), 7881(a)(3)(A).

 $^{^{62}}$ *E.g.*, 20 U.S.C. § 6320(b)(1)(E), (J), (b)(4), (c) (caption only); *id.* § 7881(a)(3)(B), (c)(1)(E), (H), (c)(4). See IBP, Inc. v. Alvarez, 546 U.S. 21, 34 (2005) (observing "the normal rule of statutory interpretation that identical words used in different parts of the same statute are generally presumed to have the same meaning").

⁶³ See Azar v. Allina Health Servs., 139 S. Ct. 1804, 1812 (2019) (reasoning that when the same term is used "in the same or related statutes," courts do not "lightly assume" that Congress intended for the term to have different meanings across those provisions).

⁶⁴ *Equitable*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/equitable (last visited July 1, 2020); *Equity*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/equity (last visited July 1, 2020).

"Statutory Context," ESEA section 1117 includes a significant amount of detail on how LEAs are to provide services to eligible private school students in an unbiased, fair, and equal manner in the context of Title I-A. Therefore, the term "equitable services" may be interpreted with the context of the ESEA in mind, and with an eye towards how "equitable services" are understood in that section specifically.⁶⁵

"In the Same Manner as Provided Under Section 1117"

Because the phrase "in the same manner" does not appear to be a term of art with a settled meaning,⁶⁶ one must consider the ordinary meaning of the words "same" and "manner" before construing them together and alongside the reference to section 1117.⁶⁷ The ordinary meaning of the word "same" appears to be settled as meaning "identical." *Merriam-Webster* defines the word "same," in the first instance, as: (1) "resembling in every relevant respect"; and (2) "conforming in every respect—used with *as*."⁶⁸ The legal dictionary *Black's Law Dictionary* similarly defines the word as "identical or equal" or "resembling in every relevant respect."⁶⁹ Section 18005(a) uses the term "same" in conjunction with the word "as"—"in the *same* manner *as* provided under section 1117"—suggesting the "conforming in every respect" definition might apply here.⁷⁰ But the adjective "same" also modifies the noun "manner" and must be considered in that context.⁷¹

The ordinary meaning of the word "manner" is not nearly as uniform as the meaning of "same."⁷² *Merriam-Webster* defines "manner" in three different ways, as: (1) "a characteristic or customary mode of

⁶⁷ See Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997) ("The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.").

⁶⁸ Same, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/same (last visited July 1, 2020).

⁶⁹ Same, BLACK'S LAW DICTIONARY (11th ed. 2019).

⁶⁵ See United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., 484 U.S. 365, 371 (1988) (explaining that a "provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear"). *Cf.* FCC v. AT&T Inc., 562 U.S. 397, 407–08 (2011) ("The meaning of 'personal privacy' in Exemption 7(C) [of the Freedom of Information Act (FOIA)] is further clarified by the rest of the statute. Congress enacted Exemption 7(C) against the backdrop of pre-existing FOIA exemptions, and the purpose and scope of Exemption 7(C) becomes even more apparent when viewed in this context.").

⁶⁶ See, e.g., Ass'n of Irritated Residents v. EPA, 790 F.3d 934, 948 (9th Cir. 2015) (suggesting that "'in the same manner" could be "a procedural or substantive requirement"); United States v. Lewis Cty., 175 F.3d 671, 677–78 (9th Cir. 1999) (reasoning that "[t]he requirement that federally-held property be subject to taxation 'in the same manner' as other property" could "refer to the time when the tax is due, the manner of valuation, or any number of other elements of the state taxing process" (quoting 7 U.S.C. § 1984)). *But see* Wilder's S.S. Co. v. Low, 112 F. 161, 164 (9th Cir. 1901) ("[T]he phrase 'in the same manner' has a well-understood meaning in legislation, and that meaning is not one of restriction or limitation, but of procedure. It means by similar proceedings, so far as such proceedings are applicable to the subject-matter.").

⁷⁰ See Same, MERRIAM-WEBSTER UNABRIDGED, https://unabridged.merriam-webster.com/unabridged/same (last visited July 1, 2020) (giving as examples of this usage: "eat the *same* rations as the captain" and "gave him the *same* answer as before").

⁷¹ *Cf.* Booth v. Churner, 532 U.S. 731, 738–39 (2001) (interpreting the phrase "until such administrative remedies as are available have been exhausted" and reasoning: "While the modifier 'available' requires the possibility of some relief for the action complained of . . ., the word 'exhausted' has a decidedly procedural emphasis. It makes sense only in referring to the procedural means, not the particular relief ordered. . . . [O]ne 'exhausts' processes, not forms of relief").

⁷² For example, in 2020, a panel of the U.S. Court of Appeals for the D.C. Circuit interpreted the Federal Death Penalty Act's requirement that executions be conducted "in the manner prescribed' by state law," exploring whether "manner" referred only to the execution method or to both the method and the "precise procedures" for carrying it out. *In re* Fed. Bureau of Prisons' Execution Protocol Cases, 955 F.3d 106, 111 (D.C. Cir. 2020) (per curiam), *cert. denied sub nom.* Bourgeois v. Barr, No. 19-1348 (June 29, 2020). The judges turned to dictionary definitions of the word "manner" but ultimately emphasized the context in which Congress used this language. *See id.* (Katsas, J., concurring) (arguing that the statute's "text, structure, and history show that 'manner' refers only to the method of execution"); *id.* (Rao, J., concurring) (arguing that "manner'. . . cannot be interpreted in isolation" because it "is a broad, flexible term whose specificity depends on context"); *id.* (Tatel, J., dissenting) (agreeing "with Judge Rao that the term 'manner' refers to more than just general execution method" but analyzing the statutory context

acting" (e.g., "custom"); (2) "a mode of procedure or way of acting" (e.g., "fashion");⁷³ or (3) a "method of artistic execution or mode of presentation" (e.g., "style").⁷⁴ While the 2019 edition of *Black's Law* Dictionary does not define "manner," a previous edition defined the term as a "way, mode, method of doing anything, or mode of proceeding in any case or situation."⁷⁵ Ballentine's Law Dictionary also lists "method" as a possible meaning.⁷⁶ While these definitions differ, they all connote the *way* someone or something operates.⁷⁷ And courts gauging the ordinary meaning of the phrase "in the same manner as" appear to agree. For instance, in a 1998 decision, the U.S. Court of Appeals for the First Circuit (First Circuit) interpreted a federal law allowing a court to enforce a restitution order "in the same manner as a judgment in a civil action."⁷⁸ The defendant in a criminal action argued that to enforce a restitution order against him, the United States first had to obtain a judgment in a civil action.⁷⁹ The court disagreed, opining that "[s]uch a reading impermissibly reads the 'in the same manner as' language out of the statute."⁸⁰ The court held that a "restitution order may be enforced in *like manner* as a civil judgment; it need not be reduced first to a civil judgment."81 To determine how an order could be enforced in a "like manner," the court consulted the rule of civil procedure governing "the mechanism" for enforcing a judgment for monetary payment.⁸² As the First Circuit decision illustrates, use of the "same manner" does not suggest that equitable services under the CARES Act and Title I-A share all of the same characteristics: only that they must be provided in a "like manner" or according to the same "mechanism."83

A question remains as to whether the manner or way of providing equitable services should be assessed by looking at (1) how LEAs *customarily* provide services under section 1117, with, perhaps, LEAs' past practices as Title I-A funding recipients serving as that custom, or (2) the specific *procedures* in section 1117 itself. Because section 18005(a) expressly references section 1117, the more likely meaning—one that gives effect to that cross-reference—is that LEAs must follow the "methods" or "procedures" for providing equitable services specified in section 1117. In *NFIB v. Sebelius*, the Supreme Court interpreted an Affordable Care Act provision stating that the "penalty" for noncompliance with the Act's individual mandate "shall be assessed and collected *in the same manner as* an assessable penalty under subchapter B of chapter 68," which, in turn, specified that penalties "shall be assessed and collected in the same manner as taxes."⁸⁴ The Supreme Court agreed with the government that this language was "a directive only to the Secretary of the Treasury to use the same 'methodology and procedures' to collect

⁸² Id. at 5.

and purpose to determine whether state procedures were included).

⁷³ The unabridged version adds to this usage "the mode or method in which something is done or happens." *Manner*, MERRIAM-WEBSTER UNABRIDGED, https://unabridged.merriam-webster.com/unabridged/manner (last visited July 1, 2020).

⁷⁴ Manner, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/manner (last visited July 1, 2020).

⁷⁵ In re Fed. Bureau of Prisons' Execution Protocol Cases, 955 F.3d at 114 (Katsus, J., concurring) (quoting Manner, BLACK'S LAW DICTIONARY (6th ed. 1990)).

⁷⁶ Manner, BALLENTINE'S LAW DICTIONARY (2010) ("Way of performing or executing; method; custom; habitual practice.").

⁷⁷ See In re Fed. Bureau of Prisons' Execution Protocol Cases, 955 F.3d at 130 (Rao, J., concurring) ("'Manner' may therefore refer to a general way of doing something or the more specific way in which an action is carried out.").

 $^{^{78}}$ See United States v. Timilty, 148 F.3d 1, 3 (1st Cir. 1998) (internal quotation marks omitted) (quoting 18 U.S.C. § 3663(h)(1)(B)).

⁷⁹ Id.

⁸⁰ Id.

⁸¹ Id.

⁸³ Cf. id. at 3, 5.

⁸⁴ Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 545 (2012) (internal quotation marks omitted) (quoting 26 U.S.C. § 5000A(g)(1) (emphasis added); 26 U.S.C. § 6671(a)).

phrase "in the same manner" references a specific provision in law, that specific reference supplies the methods or procedures for the agency to follow. Accordingly, the phrase "in the same manner as provided under section 1117" in section 18005(a) means, at a minimum, that LEAs must provide equitable services in the same *way* as under section 1117, and likely means according to identical *methods* or *procedures*.⁸⁸

In its recent IFR, the Department reasons that "Congress did not need to add the words 'in the same manner' if it simply intended to incorporate 'section 1117 of the ESEA of 1965' by reference in the CARES Act," suggesting that Congress did not intend to require "mechanistic[]" compliance with *all* of section 1117's requirements.⁸⁹ To avoid rendering the words "in the same manner" superfluous, the Department construes the phrase to authorize the Department to "harmonize" section 1117's requirements with other statutory provisions and to bypass requirements that are, in the Department's view, "inconsistent" with the appropriations for relief funds in the CARES Act.⁹⁰

The Department correctly gives effect to the language "in the same manner";⁹¹ but reading the phrase "in the same manner as provided under section 1117" to allow the Department to read certain procedural requirements *out of* section 1117 is not the most natural reading of that language.⁹² Moreover, interpreting "same manner" to incorporate section 1117's process-oriented requirements does not render the word "manner" superfluous. Reading "in the same manner" as "in the same way" preserves key distinctions between CARES Act relief funds and Title I-A funds. As the Department points out, CARES Act relief funds can be used for a broader range of services than the Title I-A special education and instructional services and materials discussed in section 1117.⁹³ And, as the Department further observes, the beneficiaries of equitable services under the CARES Act do not appear to be limited to "eligible children" within the meaning of section 1117.⁹⁴ By directing LEAs to provide equitable services "in the same

⁸⁹ IFR, 85 Fed. Reg. at 39,481.

90 Id. at 39,479, 39,482.

⁹¹ See Maine Cmty. Health Options v. United States, 590 U.S. ---, 140 S. Ct. 1308, 1323 (2020) (noting that the Court hesitates to adopt an interpretation of a congressional enactment that renders other statutory language superfluous).

⁸⁵ Id.

⁸⁶ Id.

⁸⁷ Id.

⁸⁸ See United States v. Young, 458 F.3d 998, 1007 (9th Cir. 2006) ("Congress knows how to define terms when it wants to give them specific definitions at odds with everyday understanding.").

⁹² See Gabelli v. SEC, 568 U.S. 442, 448 (2013) (applying the "most natural reading of the statute" instead of the alternative construction advanced by the government).

⁹³ See 20 U.S.C. § 6320 (authorizing funds to private school students for "special educational services, instructional services, ..., counseling, mentoring, one-on-one tutoring, or other benefits *under this part* ... that address their needs" (emphasis added)); IFR, 85 Fed. Reg. at 39,481 ("[T]he CARES Act is a separate appropriation allowing separate permissible uses of taxpayer funds.").

⁹⁴ See 20 U.S.C. § 6320(a)(1)(A) (stating that "to the extent consistent with the number of *eligible children identified under section 1115(c)* in the school district served by a local educational agency who are enrolled in private elementary schools and secondary schools, a local educational agency shall . . . provide *such children*, on an equitable basis . . . special educational services, instructional services . . ., or other benefits . . . that address their needs"); IFR, 85 Fed. Reg. at 39,480 (reasoning that "services under the CARES Act programs can be available for all students—public and non-public—without regard to poverty, low achievement, or residence in a participating Title I public school attendance area").

manner as" provided under section 1117, Congress likely meant to indicate *how* LEAs should provide equitable services with relief funds rather than *for what* or *to whom*—questions largely addressed in the sections establishing the relief funds.⁹⁵ But it does not necessarily follow from this observation that "manner" refers to all the ways in which LEAs provide services under section 1117 *except for* how LEAs determine the proportional share,⁹⁶ particularly when, as explained below, statutory context suggests that the method of determining the proportional share is part of the "manner" of providing services.⁹⁷

Statutory Context

To determine whether CARES Act section 18005(a)'s reference to the manner of providing services under ESEA section 1117 includes that section's expenditure determination, it is necessary to look at CARES Act section 18005 as a whole, ESEA section 1117 as a whole, and section 1117's place in the broader context of the ESEA's equitable-services requirements.⁹⁸

CARES Act Section 18005

As shown in the annotated text below, section 18005 addresses two requirements—consultation and public control of funds—that are also covered in section 1117.

ASSISTANCE TO NON-PUBLIC SCHOOLS

SEC. 18005. (a) IN GENERAL.—A[n] [LEA] 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, [1] as determined in consultation with representatives of non-public schools.

(b) [2] 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).

While some of the language in the consultation clause and the public control subsection echoes section 1117's text, such redundancy may reflect Congress's emphasis of these requirements. And differences between the CARES Act relief funds and Title I-A funds may account for the separate treatment of these provisions. As explained below, these observations about section 18005's structure do not undermine, and in some instances seem to reinforce, the view that "manner" refers to section 1117's procedures, including its method for determining the proportional share.

⁹⁵ *Cf.* United States v. Timilty, 148 F.3d 1, 3 (1st Cir. 1998) ("A restitution order may be enforced in *like manner* as a civil judgment; it need not be reduced first to a civil judgment.").

 $^{^{96}}$ See IFR, 85 Fed. Reg. at 39,481 (stating that: "By definition, the provisions in section 1117 relating to funding and eligibility for services, e.g., section 1117(a)(1)and(4) and (b)(1)(E) and (J)(ii), are inapposite in a CARES Act frame. However, the provisions in section 1117 relating to the 'manner' in which services are delivered, e.g., section 1117(a)(2), (3), and (b)(1)(A)-(D), (F)-(I), and (K), arguably do fit within and can be applied under the CARES Act.").

⁹⁷ For this reason, the Department's observation that Congress could have used a different formulation—"as provided in"—to achieve a result the Department thinks Congress *did not intend* is beside the point. *See id.* In any event, even if Congress's meaning could have been conveyed with fewer words, that does not necessarily mean that the text of section 18005(a), as written, is ambiguous. *See* Lamie v. U.S. Tr., 540 U.S. 526, 536 (2004) (favoring a construction in which the text is plain but contains surplusage versus one in which there is no surplusage but the text is ambiguous).

⁹⁸ See United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., 484 U.S. 365, 371 (1988) ("Statutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme").

Consultation

While the effect of section 18005(a)'s consultation clause is not entirely clear, to the extent it suggests anything about providing services in the same "manner" as section 1117, it is that determining the proportional share based on low-income children is normally part of the Title I-A consultation process. It is possible that, in referring to consultation separately, Congress intended to impose a general meet-andconfer requirement in place of section 1117(b)'s specific consultation requirements.⁹⁹ Another plausible reading is that Congress intended to emphasize the need for consultation in accordance with section 1117 as part of the process of providing equitable services. The structure of the consultation clause—"as determined in consultation with representatives of non-public schools"-appears to track the general directive in section 1117(a) that LEAs provide services to eligible private school students "after timely and meaningful consultation with appropriate private school officials."¹⁰⁰ Those general references to consultation have little meaning without section 1117(b), which specifies the topics to be covered in the consultation.¹⁰¹ Notably, those topics include a discussion of "the size and scope of the equitable services to be provided to the eligible private school children, the proportion of funds that is allocated under subsection (a)(4)(A) for such services, and how that proportion of funds is determined."¹⁰² But the "proportion of funds" is not left entirely to the public and private school officials' discretion. In particular, the consultation must include "the method or sources of data that are used under subsection (c) and section 1113(c)(1) to determine the number of children from low-income families in participating school attendance areas who attend private schools."¹⁰³ And the parties must discuss:

whether to provide equitable services to eligible private school children-

(i) by creating a pool or pools of funds with all of the funds allocated under subsection (a)(4)(A) based on *all the children from low-income families* in a participating school attendance area who attend private schools; or

(ii) in the agency's participating school attendance area who attend private schools with the proportion of funds allocated under subsection (a)(4)(A) based on *the number of children from low-income families* who attend private schools.¹⁰⁴

⁹⁹ It is unclear whether the Department views section 18005(a)'s consultation clause as displacing or incorporating section 1117(b). In the IFR, the Department cites the consultation clause as evidence that Congress did not intend to incorporate section 1117's requirements "wholesale." IFR, 85 Fed. Reg. at 39,481. However, the Department also concludes in the IFR that "[c]onsultation must be 'in the same manner' as conducted under section 1117" and adopts all of section 1117's consultation requirements *except for* those relating to determining the proportional share based on low-income children. *Id.* at 39,482; *see also id.* at 39,488 (to be codified at 34 C.F.R. § 76.665(b)(2)) (stating that "[c]onsultation must occur in accordance with section 1117(b) of the ESEA, except to the extent inconsistent with the CARES Act and this section, such as section 1117(b)(1)(E) and (J)(ii)").

¹⁰⁰ 20 U.S.C. § 6320(a)(1)(A). The comma separating the consultation clause suggests that the language "as determined in consultation with representatives of non-public schools" modifies the whole requirement that LEAs "provide equitable services in the same manner as provided under section 1117 . . . to students and teachers in nonpublic schools." *Cf.* Bingham, Ltd. v. United States, 724 F.2d 921, 925 n.3 (11th Cir. 1984) ("Where the modifier *is* set off from two or more antecedents by a comma, the supplementary 'rule of punctuation' states that the comma indicates the drafter's intent that the modifier relate to more than the last antecedent."). Moreover, if the clause modified only the immediately preceding words "students and teachers," it would direct the parties to "determine[]" students and teachers, which makes less sense grammatically than a requirement that the parties agree on the way to provide equitable services.

¹⁰¹ See Rimini Street, Inc. v. Oracle USA, Inc., 586 U.S. ---, 139 S. Ct. 873, 881 (2019) ("If one possible interpretation of a statute would cause some redundancy and another interpretation would avoid redundancy, that difference in the two interpretations can supply a clue as to the better interpretation of a statute. But only a clue. Sometimes the better overall reading of the statute contains some redundancy.").

¹⁰² 20 U.S.C. § 6320(b)(1)(E).

¹⁰³ *Id.* § 6320(b)(1)(F) (emphasis added).

¹⁰⁴ Id. § 6320(b)(1)(J) (emphasis added).

Thus, ordinarily the consultation process under ESEA section 1117 includes the question of *how* to calculate the number of low-income children who attend private schools, but not *whether* to base private schools' proportional share on low-income children, which is a separate statutory requirement addressed in sections (a)(4)(A) and (c).

Public Control of Funds

Congress separately addressed the public control of funds in section 18005(b), authorizing a public agency to "provide" equitable services with CARES Act relief funds itself or to "contract for the provision of such services with a public or private entity."¹⁰⁵ The inclusion of subsection (b) suggests that Congress intended for this more specific public control language to control over ESEA section 1117(d) on the public control of funds;¹⁰⁶ otherwise, subsection (b) would be superfluous.¹⁰⁷ However, it does not follow from this observation that Congress did not intend to require general adherence to section 1117's procedures for providing equitable services, including section 1117's method for determining the proportional share.¹⁰⁸ Congress may have included a separate public control provision for clarity. ESEA section 1117(d) applies only to the "control of funds provided under this part" (i.e., Title I-A funds) and "title to materials, equipment, and property purchased with such funds."¹⁰⁹ CARES Act section 18005(b), in contrast, applies to the "control of funds for the services and assistance provided to a non-public school under subsection (a)" (i.e., CARES Act equitable services), and "title to materials, equipment, and property purchased with such funds."¹¹⁰ Additionally, section 18005(a) imposes the "same manner" requirement directly on LEAs, whereas the public control subsection, as in section 1117 of the ESEA, requires that a "public agency" control and administer the federal funds.¹¹¹

The Rule Against Surplusage

In the Department's view, the "separate consultation requirement in section 18005(a)" and "public control of funds provision in section 18005(b)" signal that Congress did not intend "to incorporate 'section 1117 of the ESEA of 1965' wholesale into the CARES Act"—otherwise these provisions would be superfluous.¹¹² The "rule against surplusage," a canon of statutory interpretation, counsels that the reader "should not interpret any statutory provision in a way that would render it or another part of the statute inoperative or redundant."¹¹³ But the rule assists the reader "only where a competing interpretation gives effect 'to every clause and word of a statute" and "avoids excess language."¹¹⁴ Here, the Department concludes that many of section 1117's consultation requirements describe the "manner" of providing services for purposes of the CARES Act even though section 18005(a) refers to consultation separately.¹¹⁵

¹⁰⁵ CARES Act § 18005(b).

¹⁰⁶ See Gozlon-Peretz v. United States, 498 U.S. 395, 407 (1991) ("A specific provision controls one of more general application.").

¹⁰⁷ Corley v. United States, 556 U.S. 303, 314 (2009) (describing "one of the most basic interpretive canons, that '[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant" (internal citations omitted)).

¹⁰⁸ See infra notes 112–19 and accompanying text.

¹⁰⁹ 20 U.S.C. § 6320(d)(1).

¹¹⁰ CARES Act § 18005(b).

¹¹¹ Compare CARES Act § 18005(b), with 20 U.S.C. § 6320(d).

¹¹² IFR, 85 Fed. Reg. at 39,481.

¹¹³ CRS Report R45153, Statutory Interpretation: Theories, Tools, and Trends 28, by Valerie C. Brannon.

¹¹⁴ Microsoft Corp. v. i4i Ltd. P'ship, 564 U.S. 91, 106 (2011) (citation omitted).

¹¹⁵ IFR, 85 Fed. Reg. at 39,481 ("[T]he provisions in section 1117 relating to the 'manner' in which services are delivered, e.g., section 1117(a)(2), (3), and (b)(1)(A)-(D), (F)-(I), and (K), arguably do fit within and can be applied under the CARES Act.").

Because the Department's construction does not "avoid[] excess language," the overlap between section 18005 and section 1117 is "both inescapable and unilluminating."¹¹⁶

Moreover, the Department does not explain why separately addressing consultation and public control undercuts—rather than *reinforces*—the interpretation that Congress intended to adopt section 1117's method of determining the proportional share. As explained in Part I, section 1117 contains five subsections. If "manner" refers to neither consultation nor public control of funds, that leaves three subsections: subsection (a) "General requirement"; subsection (c) "Allocation for equitable service to private school students"; and subsection (e) "Standards for a bypass."¹¹⁷ Section 1117's expenditure determination is part of subsection (a)'s general requirements.¹¹⁸ And subsection (c) is dedicated entirely to the calculation methods for determining the number of low-income children to be used to determine the equitable share and the complaint process for contested calculations.¹¹⁹ Accordingly, if Congress intended for "manner" to mean something *other than* consultation and public control, then the manner of providing equitable services must be found among section 1117's *remaining* requirements, many of which govern the method for determining the proportional share.

Section 1117

Section 1117's text and structure suggest that the "manner" of providing equitable services is broader than simply the delivery (i.e., supplying) of those services and instead encompasses all of the procedures in section 1117 that govern the way in which LEAs make services available to private schools students. The first subsection in section 1117, titled "General requirement," establishes the basic framework for providing equitable services.¹²⁰ Paragraph (1) states that after consulting with private school officials, an LEA must "provide" services to eligible private school children "on an equitable basis."¹²¹ This paragraph is immediately followed by the three requirements in paragraphs (2) through (4): (2) that services be "secular, neutral, and nonideological"; (3) that services be "equitable in comparison to services and other benefits for [participating] public school children" and "provided in a timely manner"; and (4) that expenditures for services "be equal to the proportion of funds allocated to participating school attendance areas based on the number of children from low-income families who attend private schools."¹²² Each of the requirements in paragraphs (2) through (4), including the expenditure determination, appears to elaborate on *the way* to "provide" services "on an equitable basis."¹²³ Indeed, section 1117 refers to the result of the expenditure determination (i.e., the proportional share) as the "equitable share."¹²⁴ And the Department's Title I-A equitable services regulations state, in a section captioned "Services on an equitable basis," that "[s]ervices are equitable if," in addition to other standards, "the LEA . . . [m]eets the equal expenditure requirements under paragraph (a) of this section"—referring to the proportional share.125

¹¹⁶ Seila Law, LLC v. Consumer Fin. Prot. Bureau, 591 U.S. ---, slip op. at 34 (2020) (plurality opinion) (concluding that the inclusion of a severability clause with respect to one part of a larger statute did not affect the reach of a severability clause applicable to the entire statute despite the redundancy).

¹¹⁷ 20 U.S.C. § 6320(a), (c), (e).

¹¹⁸ Id. § 6320(a)(4)(A).

¹¹⁹ Id. § 6320(c).

¹²⁰ Id. § 6320(a).

¹²¹ Id. § 6320(a)(1)(A).

¹²² Id. § 6320(a)(2)–(4).

¹²³ Id. § 6320(a)(1)(A).

¹²⁴ Id. § 6320(a)(4)(D).

¹²⁵ 34 C.F.R. § 200.64(b); see also id. § 200.64(a)(1) ("Funds expended by an LEA under this subpart for services for eligible

While narrower interpretations of the "manner" of providing services under section 1117 are also possible, there are persuasive reasons to reject these alternative readings. For example, one could read the "manner" of providing services under section 1117 to be limited to that section's directive to provide services "in a timely manner"¹²⁶ or to the two paragraphs expressly captioned "provision of services."¹²⁷ The Department does not take such a constrained view of the text and instead distinguishes the expenditure provision in section 1117(a)(4) from provisions "relating to the 'manner' in which services are *delivered*, e.g., section 1117(a)(2), (3), and (b)(1)(A)–(D), (F)–(I), and (K)," which, in the Department's view, "arguably do fit within and can be applied under the CARES Act."¹²⁸ But had Congress wanted only certain paragraphs of section 1117 to apply to the CARES Act, it could have referenced them directly.¹²⁹ Moreover, many of the provisions the Department cites, instead of specifying *how* services should be delivered, describe the *nature* of the services themselves,¹³⁰ or the required topics for *consultation* before the delivery of services.¹³¹

In its recent IFR, the Department reasons that achieving "equity" under the CARES Act requires a different method for determining the proportional share.¹³² Specifically, the Department states that "[i]f the CARES Act does not limit services based on residence and poverty, then it stands to reason that an LEA should not use residence and poverty to determine the proportional share of available funds for equitable services to non-public school students."¹³³ This argument may elevate a general conception of equity—parity between "similarly situated" students in public and private schools¹³⁴—over the specific procedures set out in section 1117 for providing equitable services. The differences in the populations to be served by relief funds and Title I-A funds would support a different input for determining the proportional share if section 1117's *allocation* method was based on Title I-A's *eligibility* criteria. Under section 1117, however, the expenditure determination and the eligibility criteria to receive services are separate determinations.¹³⁵ Several categories of students at risk of failing to meet the state's academic standards, "children with disabilities," "migrant children," and "English learners."¹³⁶ But under

¹³³ *Id.* at 39,482–43.

¹³⁴ *Id.* at 39,481.

private school children in the aggregate must be equal to the proportion of funds generated by private school children from lowincome families who reside in participating public school attendance areas").

¹²⁶ Section 1117 uses the word "manner" only once in connection with the provision of services, stating that services "shall be provided in a timely manner." 20 U.S.C. § 6320(a)(3)(A). *Cf. id.* § 6320(a)(4)(C) (requiring state educational agencies to notify private school officials of LEAs' expenditures determinations in a "timely manner").

¹²⁷ See 20 U.S.C. § 6320(a)(5), (d)(2); No Child Left Behind Act of 2002, tit. I, § 101, Pub. L. No. 107-110, 115 Stat. 1439, 1509–10.

¹²⁸ IFR, 85 Fed. Reg. at 39,481 (emphasis added).

¹²⁹ See NLRB v. SW Gen., Inc., 580 U.S. ---, 137 S. Ct. 929, 938–39 (2017) ("Congress often drafts statutes with hierarchical schemes—section, subsection, paragraph, and on down the line. Congress used that structure in the [statute] and relied on it to make precise cross-references. When Congress wanted to refer only to a particular subsection or paragraph, it said so." (internal citations omitted)).

¹³⁰ See 20 U.S.C. § 6320(a)(2) ("Such educational services or other benefits, including materials and equipment, shall be secular, neutral, and nonideological.").

¹³¹ See id. § 6320(b)(1)(A)–(B) (requiring consultation to include "issues such as . . . how the children's needs will be identified; [and] . . . what services will be offered").

¹³² IFR, 85 Fed. Reg. at 39,481.

 $^{^{135}}$ Compare 20 U.S.C. § 6320(a)(1) (defining eligibility by cross-referencing § 6315(c), which is broader than low-income children), with *id.* § 6320(a)(4) and (c) (defining proportional share for expenditures expressly in terms of "the number of children from *low-income* families" (emphasis added)).

 $^{^{136}}$ Section 1117 states that LEAs must provide services "[t]o the extent consistent with the number of eligible children identified under section 1115(c) [*id.* § 6315(c)] in the school district served by a local educational agency who are enrolled in private

section 1117(a)(4)(A)(i), an LEA still determines private schools' proportional share based *only* on the number of low-income children attending those schools.¹³⁷ Therefore, even under Title I-A, the proportional share for equitable services is determined based on a metric—low-income status—that is under-inclusive of all eligible children. As a result, the fact that the CARES Act relief funds may serve a wider swath of students and teachers does not necessarily resolve whether Congress intended to depart from section 1117's express directive to count low-income children as the way (i.e., manner) to determine the equitable share.

The Department observes that "Congress has already taken poverty into consideration in allocating CARES Act funds to LEAs" because an "LEA receives ESSER funds based on its proportionate share of Title I funds" and "40 percent of the GEER funds a Governor receives is based on the State's share of Title I formula children."¹³⁸ But ESEA section 1117 itself accounts for family income in the distribution of equitable services *even though* the underlying Title I-A funds originally were allocated to states based in part on family income.¹³⁹ There is no inherent tension in Congress directing the equitable share of a fund that is, at least in part, income-based to be distributed based on income. That, in the Department's words, "Congress targeted both ESSER and GEER funds to high-poverty areas to reflect their need,"¹⁴⁰ suggests, if anything, that calculating the proportional share for services to private school students and teachers based on the proportion of low-income students living in those areas is consistent with the statutory scheme.

ESEA Section 8501

Expanding the lens further to consider the equitable services standards that existed before the CARES Act reinforces the conclusion that, under a straightforward reading of the statute, the CARES Act adopts section 1117's specific method for determining what is an equitable amount of expenditures. As noted, the ESEA contains two equitable services sections: section 1117, which applies to Title I-A funds, and section 8501, which applies to other programs.¹⁴¹ While their eligibility criteria is program-specific, these sections are similarly structured and their general requirements relating to the nature of the services provided and "provision of services" paragraphs largely mirror each other.¹⁴² However, the sections differ in their expenditure determinations. Section 1117's expenditure allocation, as noted, is based on the number of low-income children within the LEA who attend private schools.¹⁴³ In contrast, section 8501's allocation is equal to "the expenditures for participating public school children," accounting for "the number and educational needs of the children to be served."¹⁴⁴ As implemented, this means that in

¹⁴² Compare id. § 6320(a)(2), (a)(3), (a)(5), and (d)(2), with id. § 7881(a)(2), (a)(3), (a)(5), and (d)(2).

¹⁴³ Id. § 6320(a)(1)(A).

elementary schools and secondary schools." *Id.* § 6320(a)(1). Section 1115(c) defines the eligibility criteria. *Id.* § 6315(c). ¹³⁷ *Id.* § 6320(a)(4)(A)(i).

¹³⁸ IFR, 85 Fed. Reg. at 39,482 (citing CARES Act § 18003(c) and § 18002(b)(2)).

¹³⁹ See supra Part I.

¹⁴⁰ IFR, 85 Fed. Reg. at 39,482.

¹⁴¹ Compare id. § 6320, with id. § 7881.

¹⁴⁴ *Id.* § 7881(a)(4)(A). One consultation requirement in subsection (c)(1)(H) references the option of pooling funds for services "based on" low-income children in private schools, but in guidance interpreting the consultation provisions, the Department did not interpret this requirement to engraft an allocation based on low-income onto the general expenditure provision in (a)(4)(A). *See Dep*'T OF EDUC., NON-REGULATORY GUIDANCE: FISCAL CHANGES AND EQUITABLE SERVICES REQUIREMENTS UNDER THE ELEMENTARY AND SECONDARY EDUCATION ACT OF 1965 (ESEA), AS AMENDED BY THE EVERY STUDENT SUCCEEDS ACT (ESSA), at 34 (Nov. 21, 2016), https://www2.ed.gov/policy/elsec/leg/essa/essaguidance160477.pdf [hereinafter Equitable Services Requirements Under ESEA] ("The topics subject to consultation have been expanded to include the following: . . . Whether to provide equitable services to eligible private school participants (1) by creating a pool or pools of funds with all of the funds allocated under programs covered under section 8501(b) or (2) on a school-by-school basis based on each the proportionate share

general, LEAs compare the number of participating public school children with the number of participating private school children.¹⁴⁵ Accordingly, had Congress wanted LEAs to determine private schools' share of CARES Act relief funds based on the number of participating students, rather than the number of low-income children, while retaining language about neutrality and equity,¹⁴⁶ Congress could have cited ESEA section 8501 in CARES Act section 18005.¹⁴⁷

In addressing the costs of implementing the IFR, the Department appears to acknowledge the similarities between section 8501's method of determining the proportional share and the enrollment method promulgated in the IFR:

For LEAs using CARES Act funds to serve students and teachers in both Title I and non-Title I schools, the interim final rule requires the use of enrollment data to determine the proportional share. For the majority of these LEAs, enrollment data should already be available for non-public schools that participate in equitable services under ESEA programs other than Title I. Equitable services under those programs are governed by section 8501 of the ESEA, which requires in determining expenditures for equitable services that an LEA take into account the number of non-public school students to be served. In complying with this requirement, an LEA customarily obtains enrollment data from participating non-public schools. For such LEAs, complying with the interim final rule accordingly imposes no additional burden with respect to those schools.¹⁴⁸

The Department suggests that using total enrollment in participating private schools effectuates Congress's intent to provide "equitable services" under the CARES Act, notwithstanding Congress's specific reference to the "manner" of providing services under section 1117 (i.e., like Title I-A).¹⁴⁹ Yet, it is unclear why, if Congress wanted to equalize expenditures based on participation alone, it did not simply cite the very section applicable to "ESEA programs other than Title I[-A]" in which "an LEA customarily obtains enrollment data from participating [private] schools."¹⁵⁰ That Congress cited section 1117 instead of section 8501 or another ESEA program, tends to support the view that Congress wanted LEAs to use section 1117's method of determining expenditures for private schools' equitable share of services.¹⁵¹

Legislative History

Where a question of federal law turns on statutory language that is unclear, courts have sometimes looked to the legislative history of the provision in question to clarify its meaning.¹⁵² Common sources of legislative history include conference and committee reports, Members' statements during consideration

¹⁴⁸ IFR, 85 Fed. Reg. at 39,485.

of funds available to provide services in each school.").

¹⁴⁵ For example, in the Title II-A program, which is subject to section 8501, the Department has instructed LEAs to "determine[] the amount of funds available for ... equitable services for private school teachers and other educational personnel by calculating, on a per-pupil basis, the amount available for all public and private school students enrolled in participating private elementary and secondary schools in areas served by the LEA (regardless of a student's residency), taking into consideration the number and needs of the children, their teachers and other educational personnel to be served." *See, e.g.*, Equitable Services Requirements Under ESEA, *supra* note 144, at 35.

¹⁴⁶ See, e.g., 20 U.S.C. § 7881(a)(2)–(3)(A).

¹⁴⁷ See Gustafson v. Alloyd Co., 513 U.S. 561, 569 (1995) (instructing that a statute should be "interpreted as a symmetrical and coherent regulatory scheme").

¹⁴⁹ See id. at 39,481.

¹⁵⁰ See id. at 39,485.

¹⁵¹ See Azar v. Allina Health Servs., 587 U.S. ---, 139 S. Ct. 1804, 1813 (2019) ("Congress's choice to include a cross-reference to one but not the other of the APA's neighboring exemptions strongly suggests it acted 'intentionally and purposefully in the disparate' decisions." (citation omitted)).

¹⁵² E.g., Blum v. Stenson, 465 U.S. 886, 896 (1984).

of the legislation, and the record of Congress's deliberations when enacting a law.¹⁵³ However, the Supreme Court has noted that "legislative history is not the law," and while *clear* legislative history can clarify ambiguities in statutory text, ambiguous legislative history cannot "muddy clear statutory language."¹⁵⁴ Additionally, the Court has characterized *post-enactment* legislative history¹⁵⁵ as "not a legitimate tool of statutory interpretation" because it cannot have had an effect on the congressional vote.¹⁵⁶

In the case of the CARES Act, the legislative record appears to be silent as to the intent of section 18005. The legislation originally introduced as the CARES Act, S. 3548, did not contain a title on elementary and secondary education funding and, consequently, did not include any equitable services language.¹⁵⁷ The text of the relief fund provisions, including section 18005, was added in an amendment in the nature of a substitute, and passed by the House and Senate through a different legislative vehicle, H.R. 748, without any committee reports. Although summaries of the bill's final language and floor statements reference the relief funds generally, no mention of the equitable services provision is made.¹⁵⁸

IV. Conclusion and Additional Considerations

For the reasons discussed above, 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. However, if a court were to conclude that the statute is ambiguous with respect to the method of determining the proportional share, that would then require the court to address whether the Department is entitled to deference under *Chevron*¹⁵⁹ or a related doctrine—questions that this memorandum does not analyze.¹⁶⁰

The question addressed in this memorandum—whether the CARES Act can be plausibly read to require LEAs to apply section 1117's method of determining the proportional share—is relevant under a *Chevron* analysis because the first step of that analysis is whether "the intent of Congress is clear" on the issue in question.¹⁶¹ If so, the court does not reach the second question of whether the agency's interpretation was reasonable, because "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."¹⁶² If, however, "the language of the statute is open or ambiguous—that is, if

¹⁵⁹ Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

¹⁶² *Id.* at 842–43.

¹⁵³ See CRS Report R45153, supra note 113, at 36-41.

¹⁵⁴ Bostock v. Clayton Cty., 590 U.S. ---, No. 17-1618, slip op. at 24 (2020); Azar v. Allina Health Servs., 139 S. Ct. at 1814 (citing Epic Sys. Corp. v. Lewis, 584 U.S. ---, 138 S. Ct. 1612, 1631 (2018); Milner v. Dep't of Navy, 562 U.S. 562, 572 (2011)).

¹⁵⁵ Examples of post-enactment legislative history in this case may include statements by Members of Congress expressing their views of a provision after it has become law, or subsequent legislation considered by Congress. *See, e.g.*, Turner, *supra* note 36; H.R. 6800, § 10604 (amending section 18005 of the CARES Act).

¹⁵⁶ Bruesewitz v. Wyeth LLC, 562 U.S. 223, 242 (2011).

¹⁵⁷ Similarly, a competing House version under consideration at the same time as the CARES Act would have created a state fiscal stabilization fund in the Department of Education, but did not include an express equitable services provision akin to section 18005(a). *See* H.R. 6379, 116th Cong. (2020).

¹⁵⁸ Cong. Rec. H1823, H1852, H1862 (Mar. 27, 2020); Senate Appropriations Committee, *\$340 Billion Surge in Emergency Funding to Combat Coronavirus Outbreak*, at 15–16 (Mar. 25, 2020), https://www.appropriations.senate.gov/imo/media/doc/ Coronavirus%20Supplemental%20Appropriations%20Summary_FINAL.pdf.

¹⁶⁰ *Cf.* Ass'n of Irritated Residents v. EPA, 790 F.3d 934, 948 (9th Cir. 2015) ("The statute itself does not clearly state whether 'in the same manner' is a procedural or substantive requirement. Because Congress has not directly spoken to the issue at hand, the court will proceed to the second *Chevron* step.").

¹⁶¹ Chevron, 467 U.S. at 842.

Congress left a 'gap' for the agency to fill," then under *Chevron*, a court must uphold the agency's interpretation "as long as it is reasonable."¹⁶³ Thus, the statutory interpretation analysis in this memorandum is part of the first step, but not necessarily the entirety of the *Chevron* analysis.

In these circumstances, there are at least three additional questions related to deference that must be considered to complete the analysis. Because the IFR took effect before a formal notice-and-comment period, the first question is whether the IFR is entitled to *Chevron* deference.¹⁶⁴ Assuming *Chevron* applies, the second question is whether section 1117 unambiguously forecloses the Department's interpretation. Moreover, assuming the text of section 18005 is ambiguous and a court proceeds to step two, an examination must occur as to whether the Department's interim regulations reflect a "reasonable" interpretation of the CARES Act. And finally, if a court concludes that the IFR is not entitled to *Chevron* deference, a court may still have to consider whether the IFR "merit[s] some deference" under other judicial doctrines.¹⁶⁵ A memorandum analyzing these additional considerations can be prepared upon request.

¹⁶³ Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 550 U.S. 81, 89 (2007) (citing Chevron, 467 U.S. at 842-43).

¹⁶⁴ The Supreme Court has distinguished between "notice-and-comment rulemaking," which is eligible for *Chevron* review, and less formal interpretations like nonbinding guidance documents, which typically are not. Christensen v. Harris Cty., 529 U.S. 576, 587 (2000). While the IFR contains regulations with the force of law and the Department has solicited comments on the IFR, the IFR took effect immediately upon publication before a formal notice-and-comment period. *See* IFR, 85 Fed. Reg. at 39,479. *See generally* OFFICE OF FED. REGISTER, A GUIDE TO THE RULEMAKING PROCESS 9 (2011) (noting that an interim final rule "becomes effective immediately upon publication," but that in "most cases, the agency stipulates that it will alter the interim rule if warranted by public comments"). At least one federal court has analyzed an interim rule under the *Chevron* framework. *See* Nat'l Women, Infants, & Children Grocers Ass'n v. Food & Nutrition Serv., 416 F. Supp. 2d 92, 99 (D.D.C. 2006).

¹⁶⁵ See United States v. Mead Corp., 533 U.S. 218, 234 (2001) ("*Chevron* did nothing to eliminate *Skidmore*'s holding that an agency's interpretation may merit some deference whatever its form, given the 'specialized experience and broader investigations and information' available to the agency, and given the value of uniformity in its administrative and judicial understandings of what a national law requires." (internal citations omitted) (quoting Skidmore v. Swift & Co., 323 U.S. 134, 139–40 (1944))).

EXHIBIT E

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STATE OF NEW MEXICO PUBLIC EDUCATION DEPARTMENT 300 DON GASPAR SANTA FE, NEW MEXICO 87501-2786 Telephone (505) 827-5800 www.ped.state.nm.us

RYAN STEWART, ED.L.D. SECRETARY OF EDUCATION MICHELLE LUJAN GRISHAM GOVERNOR

May 14, 2020

MEMORANDUM

TO: Superintendents and State Charter School Leaders

FROM Gabriel C. Baca, Director – Student, School and Family Support Bureau (signature on file)

RE: Funds available under Coronavirus Aid, Relief and Economic Security (CARES) Act through the Elementary and Secondary School Education Relief Fund (ESSER), Index 24301

Dear Superintendents and State Charter Leaders,

Thank you for providing continued learning opportunities for students and steadfast leadership and support for your hard-working employees and contractors during this time.

The purpose of this memo is to inform you of the opportunity to apply for funds through the Elementary and Secondary School Education Relief Fund (ESSER Fund), a component of the recently enacted Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub.L. 116–136.

Background:

The ESSER Fund is a highly flexible federal program designed to provide local education agencies (LEAs) with funding to meet a diverse array of educational and COVID response related needs. By law, awards from the ESSER Fund are based on LEAs' proportional share of final 2019-20 Title I, Part A allocations received.

Allowable Uses of Funding:

LEAs may use ESSER Fund awards for:

- 1. Purchasing educational technology including assistive technology or adaptive equipment;
- 2. Professional development for educators or families to support remote/distance learning activities;
- 3. Providing mental health services and supports;
- 4. Activities that address the unique needs of low-income children;
- 5. Activities that address the unique needs of students with disabilities;
- 6. Activities that address the unique needs of English learners;
- 7. Activities that address the unique needs of Native American students;
- 8. Activities that address the unique needs of Non-Native American racial and ethnic minorities;

- 9. Support for homeless or foster youth;
- 10. Purchasing supplies to sanitize and clean facilities operated by the LEA;
- 11. Other activities necessary to maintain the operation of and continuity of services in the LEA and continuing to employ existing staff, including purchasing personal protective equipment for students and staff;
- 12. Planning and implementing summer learning and supplemental afterschool program activities;
- 13. Providing resources for principals and others school leaders to address school-specific needs;
- 14. Career and Technical Education;
- 15. Adult Education;
- 16. Family Literacy;
- 17. Coordination of preparedness and response efforts of the LEA with state, local, tribal, and territorial public health departments, and other relevant agencies, to prevent, prepare for, and respond to coronavirus;
- 18. Procedures and systems to improve the preparedness and response efforts of the LEA;
- 19. Training and professional development for LEA staff on sanitation and minimizing the spread of infectious diseases;
- 20. Planning and coordination during long-term closures, including how to provide meals to eligible students, how to provide online learning technology to all students, how to provide guidance on meeting IDEA requirements, and how to ensure other educational services can continue to be provided consistent with federal, state, and local requirements; and
- 21. Other activities authorized under ESEA.

The following are not allowable uses of ESSER funds:

- Lobbying;
- Subsidizing or offsetting executive salaries and benefits of individuals who are not employees of the SEA or LEAs;
- Expenditures related to state or local teacher or faculty unions or associations; and
- Bonuses, merit pay, or similar expenditures, unless related to disruptions or closures resulting from COVID-19.

Statewide Priorities:

With the close of this school year upon us and planning underway for the uncertainties and complexities that we will face in the year to come, the PED is working to align federal and state funding efforts to meet the needs of students, staff, families, and stakeholders during each of the phases outlined below. While the use of the ESSER Fund award is flexible, it is critical that all LEAs keep student and staff safety and teaching and learning at the forefront of decision-making. The PED strongly encourages each LEA to plan for how these resources can be used to ensure that critical program and infrastructure elements are in place to allow for a safe return to school and to mitigate interruptions to the learning process caused by COVID-19. These priorities include:

- **Closing the digital divide** through the purchase and distribution of digital devices, through the support of home internet connectivity for all students, and through the professional development and instructional coaching needed by educators to facilitate remote learning;
- Supporting the social and emotional needs of students, families, and staff;
- Supporting the needs of students with disabilities and at-risk students, both during the building closure and when students transition back into school buildings; and
- **Providing personal protective equipment** for all staff and students, as well as ensuring that schools are fully cleaned, sanitized, and stocked with cleaning supplies.

COMING TOGETHER

Meeting the immediate needs of our children and our communities:	» ensuring food security » graduating our seniors » managing and supporting continuous learning	» planning for summer programming
LOOKING FORWA	RD	
JUNE – AUGUST 202	0	
Collaborating to	» summer programming	» ensuring we continue t

provide support to communities through:	 » leveraging existing resources to bridge and support learning » closing the digital divide » providing essential social and emotional supports 	prioritize the needs of o most at-risk populations » preparing to transition back to our schools
RISING		
SEPTEMBER 2020 AN	ID BEYOND	
New Mexico will "rise" by:	» reimagining safe learning environments	» re-envisioning our practices
nise by.	» strengthening digital teaching and learning	» enhancing our ability to collaborate and communicate
	» continuing to support our most at-risk students	» refining our teaching: plan-teach-assess, apalyze_adapt_reflect

We hope that the ESSER Fund award will enable you to "look forward" and "rise" in ways that work for your local community. As the disruption in our education system is disproportionately impacting our most vulnerable students, including low-income children, children with disabilities, English learners, Native American students, other racial and ethnic minorities, students experiencing homelessness, and foster care youth, we encourage you to especially consider these students as you use the ESSER Fund award for students' education.

Application for Funds:

The PED has endeavored to make the application for funding a simple and straightforward process for LEAs. The application you will submit to gain access to ESSER funding will be completed using SharePoint. Detailed instructions on completing the application are available when you log in to the SharePoint application.

We recommend that you call an emergency board meeting, per your policy, and request approval for the:

- ESSER Fund Application;
- Initial Budget BAR for 2019-20; and
- Initial budget amount for 2020-21.

<u>2019-20 Budget Authority:</u> When you submit your application, you will also submit an "Initial Budget" Budget Adjustment Request (IB BAR) via the Operating Budget Management System (OBMS) to establish budget authority for this fund for 2019-20. Please upload a copy of the 24301 ESSER Planning Allocation Table for SY19-20 with your IB BAR. The table is listed under FY 19-20 Initial Awards and may be downloaded from:

https://webnew.ped.state.nm.us/bureaus/administrative-services/awards-and-carryover/

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Once your application and budget are approved, you may charge allowable pre-award costs to this grant (through journal entry) from as early as March 13, 2020. **This will only be allowable during FY2019-20.** Therefore, if you have eligible expenditures affecting FY19-20, you must seek board approval and submit a BAR for FY19-20.

<u>2020-21 Budget Authority</u>: You may also include 100% of your ESSER Fund award amount in your 2020-21 OBMS budget. This step is necessary in order to establish budget authority for the 2020-21 school year. You will not have to submit a separate application for 2020-21. If you do not include the 24301 ESSER Fund Planning Allocation Table amount for FY20-21 in your 2020-21 initial budget in OBMS, your access to these funds will be delayed during the 2020-21 school year. Pre-award costs cannot be reimbursed in FY20-21.

The total ESSER Fund award cannot exceed 100% of your planning award. *Track expenditures carefully in 2019-20 so that you will not overspend - as you will have 100% budget authority during each fiscal year for the same award.* Final award balances will be calculated after the first reporting period in FY20-21 with carryover award letters to be issued in the fall.

As part of your application, you will be asked to respond to the following:

- 1. Provide a description of the steps the LEA will take to ensure compliance with Section 427 of the General Education Provision Act (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 access to, or participation in, the program(s) for which you are submitting this funding request.
- 2. Describe how the LEA will determine its most important educational needs as a result of COVID19.
- 3. Explain how the LEA intends to use the ESSER Fund award to promote remote learning. Due to the nature of the pandemic and COVID-19 itself, it is likely that we may need to continue, or return to, distance learning in the future. Please explain how your intended use of ESSR funds will support ongoing remote learning.
- 4. Outline the LEA's proposed timeline for providing services and assistance to students and staff in both public and non-public schools.
- 5. Describe how the LEA intends to assess and address student learning gaps resulting from the disruption in educational services.
- 6. Describe how you will utilize the ESSER Fund award to target additional supports and services for your At-Risk student populations (English Learners, Students with Disabilities, Native American Students, Low Income Students, Students with high mobility, and Homeless/Foster Children).

Your Title I Director/Contact has access to the application in Sharepoint today. The application is due June 1, 2020. Extensions will be granted if needed, and you will not lose the funds allocated to your LEA. I encourage you to submit your application and IB/BAR as soon as possible.

This program will be administered by the Student, School and Family Support Bureau. Staff will work with you on your application submission and approval. Please see the attached list for the name of your contact in my bureau.

Program Requirements:

Quarterly reporting on the use of funds will be required of all LEAs. Some details are provided in the assurances included in the application. The United States Department of Education has committed to releasing additional details in the near future.

Please note the following requirement around continuation of employment when receiving ESSER funds:

An entity receiving ESSER funds must, to the greatest extent practicable, continue to compensate its employees and contractors during the period of 800 y disruptions or closures related to COVID19

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.

There is no requirement for site allocations for these funds – LEAs may use their discretion when determining how to allocate funds among school sites. The PED strongly encourages all LEAs to ensure at a minimum that all schools, including locally authorized charter schools, are equipped to provide remote learning through digital technology and that all schools have sufficient PPE for all students and staff and cleaning supplies to open school safely. All expenditures must be reasonable, necessary, and allocable under the CARES Act.

There is no requirement that these funds be used to supplement and not supplant existing funding.

Funds allocated to school districts are subject to equitable services under Sec. 1117 of the <u>Elementary and Secondary</u> <u>Education Act of 1965</u> (ESEA) (and require consultation). Consultation for equitable services must occur as soon as practicable, and must be completed and documented before Requests for Reimbursement (RFRs) will be approved by NMPED for the 2020-21 school year.

New Mexico Public Education Department's Advisory to School Districts for the Determination of Equitable Services Calculations under the CARES Act:

The Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub.L. 116–136, requires school districts that receive awards under the Elementary and Secondary School Emergency Relief (ESSER) Fund to provide equitable services to students and teachers in non-public schools using Title I criteria in the <u>Elementary and Secondary Education Act of 1965</u>. See Section 18005(a) of the <u>CARES Act</u>. In compliance with the <u>CARES Act</u>, school districts are advised to determine equitable services dollar amounts based on the number of children from low-income families in each participating non-public school in the attendance area boundaries of Title I schools within the school district.

This advisory aligns with the plain language of the <u>CARES Act</u> and is consistent with long-standing equitable services calculations under Title I criteria, as well as U.S. Department of Education's (ED) interpretations of the <u>Elementary and</u> <u>Secondary Education Act of 1965</u> over decades and as recently as October 2019. See <u>https://ccsso.org/sites/default/files/2020-05/DeVosESLetter050520.pdf</u>.

<u>ED'S April 30, 2020 non-binding guidance</u>, titled "Providing Equitable Services to Students and Teachers under the Coronavirus Aid, Relief, and Economic Security (CARES) Act Programs", advocates for calculations based on the number of total student enrollment at participating non-public schools instead of the number of students from low-income families at such schools, which is inconsistent with <u>Title I</u>. Since <u>ED'S April 30, 2020 non-binding guidance document</u> presents an alternative interpretation of the <u>CARES Act</u> that does not align with the State's reading of the <u>CARES Act</u>, it is not being followed.

The New Mexico Public Education Department's advisory is permissible under <u>ED'S April 30, 2020 non-binding guidance</u> document, which notes:

"Other than statutory and regulatory requirements included in the document, such as those pursuant to the authorizing statute and other applicable laws and regulations, **the contents of the guidance do not have the force and effect of law and are not meant to bind the public in any way**. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies. **In addition, it does not create or confer any rights for or on any person.**" (Emphasis added.)

In accordance with the New Mexico Public Education Department's advisory, school districts shall take the following steps to calculate equitable services dollar amounts for participating non-public schools under the <u>CARES Act</u>:

- 1) School districts shall contact *all* non-public schools within their geographic boundaries to ask whether they wish to receive equitable services under the <u>CARES Act</u>.
- 2) To help determine which students live within Title I attendance areas and who are from low-income families, non-public schools that wish to receive equitable services under the <u>CARES Act</u> will collect the following data:
 - a. Student addresses;
 - b. Student grade levels; and
 - c. Student poverty information.
- 3) Only those students who live within Title I attendance areas and who are from low-income families will generate an equitable share. Title I attendance areas are determined by the public schools the school district served during the 2019-2020 school year.
- 4) Since children who enroll in non-public schools live in many different school districts, school districts may transfer the equitable share funds to one another to form a "Lead District" that will deliver the equitable services on behalf of the non-public school(s), as in the Title I equitable share process.

If you have any questions about this advisory, please contact me at <u>gabriel.baca2@state.nm.us</u> or (505) 670-8402.

cc: Secretary of Education, Ryan Stewart, Ed.L.D. Deputy Secretary Dr. Hand, Policy, Resource & Accountability Deputy Secretary Dr. Perea Warniment, Teaching, Learning & Assessment Deputy Secretary Delgado, Finance & Operations Deputy Secretary Bobroff, Identity, Equity & Transformation Deputy Secretary Sandoval, Academic Engagement and Student Success Allison Briceño, Managing Director Alan Brauer, Director of Charter Schools Marian Rael, Director of Administrative Services Susan Lucero, Bureau Chief, Administrative Services Division, Fiscal Grants Management Bureau Title I Directors and Contacts Business Managers

EXHIBIT F

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HUSCH BLACKWELL LLP 10 20 South Riverside Plaza, Suite 2200 120 South Riverside Plaza, Suite 2200 Chicago, Illinois 60606 Phone (312) 526-1538 12 12 12 12 12 12 12 12 12 12 12 12 12	STATE OF MICHIGAN, STATE OF CALIFORNIA, DISTRICT OF COLUMBIA, STATE OF MAINE, STAT OF MARYLAND, STATE OF NEW MEXICO, STATE OF WISCONSIN, TH BOARD OF EDUCATION FOR THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, BOARD OF EDUCATION FOR THE CITY OF CHICAGO, CLEVELAND MUNICIPAL SCHOOL DISTRICT, AND SAN FRANCISCO UNIFIED SCHOOL DISTRICT,	E DECLARATION OF MANISH NAIK IN SUPPORT OF THE COUNCIL OF
 19 20 21 22 23 24 25 26 27 28 	Plaintiffs, v. ELISABETH D. DEVOS, in her official capacity as the United States Secretary of Education, and UNITED STATES DEPARTMENT OF EDUCATION, Defendants.	Judge: Hon. James Donato Trial Date: None set Action Filed: July 7, 2020
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I, Manish Naik, do hereby swear upon my oath that the following statements are true and correct to the best of my knowledge, information and belief, and that I could competently testify as follows if called upon to do so:

- I am the Manager of Legislative Services for the Council of Great City Schools ("Council"). I have served in this position since 1999.
- I focus on legislative issues affecting the Council and its 76 member districts, including Title I of the Elementary and Secondary Education Act ("Title I") and federal appropriations.
- 3. The Council sent a survey to general counsel, legislative staff, and Title I directors of its member districts on July 20, 2020. Those district personnel were asked to voluntarily provide information relating to the provision of equitable services under the CARES Act and specifically the impact of different allocation methodologies.
- Sixteen districts responded to the survey in what appeared, based on the data maintained by the Council about those districts, to be a full and accurate manner: Baltimore City Public Schools; Clark County School District; Cleveland Metropolitan School District; DC Public Schools; Jefferson County Public Schools; Kansas City Public Schools; Miami-Dade County Public Schools; Minneapolis Public Schools; Oakland Unified School District; Portland Public Schools; Sacramento City Unified School District; Saint Paul Public Schools; San Antonio Independent School District; San Diego Unified School District; Seattle Public Schools; and the School District of Palm Beach County.
 Based on those survey responses, myself and my colleague, Moses Palacios, the Council's Legislative and Research Manager, created a spreadsheet estimating, for each district, the amount of CARES Act funding that would be dedicated to equitable services based on two possible formulas: the Title I formula at Sec. 1117 of ESEA, as required

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under the CARES Act; and the formula set forth by the Department of Education in its interim final rule regarding equitable services under the CARES Act (the "Rule"). We calculated the difference between the dollar amounts allocated for equitable share under each formula. This difference represents the financial loss suffered by each district as a result of requiring equitable share to be calculated on the basis of all students, rather than low-income students.

6. A true and accurate copy of that spreadsheet is attached hereto as Exhibit F-1.

7. I also reviewed the Amended Complaint and Motion for Preliminary Injunction filed on July 17 and July 20, 2020 by Plaintiffs in *State of Michigan, et al., v. DeVos,* No.3:20-cv-04478-SK (N.D. Cal.), including the declarations attached to the Appendix in Support of Motion for Preliminary Injunction (Doc. 35-2). These declarations include those of Council member districts New York City Department of Education, Chicago Public Schools, and San Francisco Unified School District.

8. The 16 member districts that responded to the Council survey indicated that an additional \$33.37 million in CARES Act funding, above that which would be allocated to private schools using the formula in Section 1117 of ESEA, would be diverted to private schools as a result of the Rule. *See* Exhibit F-1.

9. An additional \$64.9 million above what is required by the Section 1117 formula will be diverted to private schools based on the information provided in the declarations of New York City (\$53 million), Chicago (\$10.17 million), and San Francisco (\$1.74 million).

10. The total loss to these 19 member districts is \$98.28 million. This \$98.28 million is above and beyond the \$135.44 million that would be allocated to private schools if equitable services were based on low-income students, rather than all students.

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11. Based on the Census poverty data used to determine the Fiscal Year 2019 Title I allocations that were the basis for CARES Act funding, these 19 school districts represent approximately 33.7% of all the low-income 5-17 year old children residing in school districts in the Council's membership. The Council estimates that the amount of additional CARES Act funding diverted to private schools based on the formula set forth in the Rule is similar in other urban school districts relative to their total low-income populations. As such, the Council projects that its member districts would lose a total of about \$292 million of the much-needed, emergency resources provided to them under the CARES Act if the formula set forth in the Department's Rule is to be followed.

- 12. On July 20, 2020, member-district Cleveland Metropolitan School District ("CMSD") sent additional information to the Council regarding how the Rule would specifically impact low-income students at both public and private schools in that district.
- 13. A large number of low-income students in the district attend private schools, as a result of Ohio's voucher program. CMSD informed the Council that 75% of private schools in the district would benefit (*i.e.*, receive more CARES Act funding) if the Title I formula were used, instead of the formula set forth in the Department's Rule.
- 14. Specifically, the district estimated that, if the equitable services were allocated on the basis of all students rather than low-income students, the impact on private schools would be as follows: (1) reallocation of approximately \$890,000 away from 47 private schools with a high number of low-income students; and (2) reallocation of approximately \$1.7 million to 16 private schools with a low number of low-income students.
- 15. The Council projects that \$822,952 would be reallocated from public schools to private schools in CMSD. *See* Exhibit F-1.

16. Based on survey results and CMSD's estimates, both public schools in the district *and* the private schools in the district that serve most of the low-income students who attend private schools would be negatively impacted by the diversion of resources to private schools under the Rule.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on: July 24, 2020

Manih Maile

Manish Naik

EXHIBIT F-1

The Council of Great City Schools

e CARES Act	
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District Surv	
Member	

	Estimated	Equitable Services Amount Based on	Equitable Services	Increase in Equitable	
	CARES Act	Low-Income	Amount Based on	Services	Percent
	Allocation	Students	All Students	Amount	Increase
Baltimore City Public Schools	\$ 48,392,781.00	\$ 1,451,783.43	\$ 3,871,422.48	\$ 2,419,639.05	167%
Clark County School District	\$ 83,968,770.00	\$ 714,849.84	\$ 2,311,069.32	\$ 1,596,219.48	223%
Cleveland Metropolitan School District	\$ 31,202,407.12	\$ 4,294,120.62	\$ 5,117,072.80	\$ 822,952.18	19%
District of Columbia Public Schools	\$ 21,749,742.49	\$	\$ 2,802,901.17	\$ 1,888,594.28	207%
Jefferson County Public Schools	\$ 30,378,113.00	\$ 328,032.90	\$ 5,009,148.39	\$ 4,681,115.49	1427%
Kansas City Public Schools	\$ 6,485,116.76	\$ 1,366,388.24	\$ 7,851,505.00	\$	475%
Miami-Dade County Public Schools	\$ 119,240,142.00	\$ 11,096,816.00	\$ 14,143,364.00	\$ 3,046,548.00	27%
Minneapolis Public Schools	\$ 18,705,817.00	\$ 1,426,394.00	\$ 2,576,676.00	\$ 1,150,282.00	81%
Oakland Unified School District	\$ 14,493,191.00	\$ 156,526.46	\$ 2,160,000.00	\$ 2,003,473.54	1280%
Portland Public Schools	\$ 8,276,718.94	\$	\$ 1,202,325.66	\$ 628,117.61	109%
Sacramento City Unified School District	\$ 15,770,510.00	\$ 192,400.00	\$ 1,636,181.00	\$ 1,443,781.00	750%
Saint Paul Public Schools	\$ 19,974,429.00	\$	\$ 1,677,438.45	\$ 1,330,616.11	384%
San Antonio Independent School District	\$ 21,164,881.00	\$ 318,763.00	\$ 1,774,854.00	\$ 1,456,091.00	457%
San Diego Unified School District	\$ 30,512,782.00	\$ 411,923.00	\$ 2,345,268.00	\$ 1,933,345.00	469%
Seattle Public Schools	\$ 10,709,835.00	\$ 364,434.00	\$ 2,048,749.00	\$ 1,684,315.00	462%
The School District of Palm Beach County	\$ 39,918,975.60	\$ 1,516,921.07	\$ 2,317,187.15	\$ 800,266.08	53%
Grand Total	\$ 520,944,211.91	\$ 25,474,689.84	\$ 58,845,162.42	\$ 33,370,472.58	131%
			-		

June 4, 2020

The Honorable Mitch McConnell Majority Leader United States Senate Washington, DC 20510

The Honorable Charles Schumer Minority Leader United States Senate Washington, DC 20510 The Honorable Nancy Pelosi Speaker United States House of Representatives Washington, DC 20510

The Honorable Kevin McCarthy Minority Leader United States House of Representatives Washington, DC 20510

Dear Leader McConnell, Speaker Pelosi, Leader Schumer, and Leader McCarthy:

States, school districts, principals and teachers are committed to serving all students who need supports in our schools no matter which school they attend, including through equitable participation of students in non-public schools in accordance with the current Title I law. Unfortunately, recent actions by the U.S. Department of Education (USED or Department) regarding equitable services for non-public schools under the Coronavirus Aid, Relief, and Economic Security (CARES) Act have undermined this principle and created enormous confusion and caused unnecessary delays in getting emergency education funds to schools. In passing the CARES Act, Congress sought to quickly provide federal support to those sectors most affected by the coronavirus pandemic. With at least 124,000 K-12 schools closed across the country, affecting more than 55 million students, America's schools are in a precarious position and in desperate need of federal support to prevent educational hardships of historic proportions that would affect the country for decades to come. We urge Congress to swiftly reinforce its intent pertaining to Section 18005(a) of the CARES Act by passing legislation rescinding the equitable services guidance, preempting any future notice from USED that is contrary to the legislation, and further clarifying the allocation requirements for equitable services for nonpublic schools consistent with Title I.

USED released guidance on April 30, 2020, that misinterprets how equitable services funding for non-public schools under the CARES Act should be apportioned. The CARES Act includes approximately \$13.23 billion for an Elementary and Secondary School Emergency Relief (ESSER) Fund, which is to be allocated to state and local education agencies (SEAs and LEAs) proportionate to their share of Title I, Part A funding in the prior fiscal year. Section 18005(a) of the CARES Act definitively states that an LEA receiving funds under ESSER, as well as under the Governor's Emergency Education Relief (GEER) Fund, must provide equitable services to students and teachers in non-public schools "in the same manner as provided under section 1117 of the ESEA of 1965." Section 1117(a)(4)(A) of ESEA is similarly explicit: "Expenditures for educational services and other benefits to eligible private school children shall be equal to the proportion of funds allocated to participating school attendance areas based on the number of children from low-income families who attend private schools."

Yet the Department's April 30 non-regulatory guidance disregards Congress' clear mandate in Section 1117 that the *number of low-income students* attending non-public schools in the LEA

should serve as the basis for how equitable services are allocated. Instead, the guidance introduces the idea that the apportionment should be based on the *total number of students* enrolled in non-public schools in the LEA. This not only misinterprets the CARES Act statute, it contradicts well-established interpretations by USED, including as recently as October 2019, that equitable services allocations should be based on the number of low-income students in non-public schools from a particular LEA under section 1117(a)(4)(A)(i) and (c)(1).

Over many decades, USED's rationale for its interpretation of the equitable services allocation for students and teachers in non-public schools has been straightforward: because an LEA's Title I allotment is based on the total number of low-income students whether attending public or non-public schools, the equitable services allocation should also be based on the number of low-income students attending non-public schools from the particular LEA. In effect, the share of low-income students attending non-public schools is used to generate an LEA's overall Title I allocation; accordingly, that same metric should be used to calculate equitable services.

To be clear, we strongly supported the CARES Act with equitable services provisions included and believe that eligible students in non-public schools should receive additional support through the CARES Act. What we don't believe is that all students, at any non-public school, regardless of their family's wealth or the size of their school's endowment, should generate funding help in the same way as disadvantaged students, particularly when that aid comes at the cost of those less advantaged children.

The current crisis has caused enormous disruptions in learning for our students, heightening the urgency to reach and support them at this critical time. We remain concerned that absent congressional action clarifying congressional intent around equitable services, the Department's guidance, coupled with its stated intention to promulgate a rule on the issue, will continue to undermine the efforts of state and local education leaders and further delay the disbursement of these critical relief funds. Education leaders are working tirelessly to ensure that the educational and mental health needs of students are being met during this crisis, but federal support is still urgently needed. We look forward to working with you to provide a quick solution that ensures CARES Act funds are disbursed in the way that Congress intended.

Sincerely,

AASA, The School Superintendents Association Alliance for Excellent Education American Association of Colleges for Teacher Education American Council of School Social Work American Federation of School Administrators American Federation of Teachers American Music Therapy Association American Physical Therapy Association American School Counselor Association ASCD Association of Educational Service Agencies Association of School Business Officials International Children and Adults with Attention-Deficit/Hyperactivity Disorder Council of Administrators of Special Education **Council of Chief State School Officers** Council for Exceptional Children Council of Great City Schools **Council for Learning Disabilities EDGE** Consulting Partners **GLSEN** Higher Education Consortium for Special Education National Association of Councils on Developmental Disabilities National Association of Elementary School Principals National Association of ESEA State Program Administrators National Association of School Psychologists National Association of Secondary School Principals National Association of State Boards of Education National Association of State Directors of Special Education National Center for Learning Disabilities National Center for Parent Leadership, Advocacy, and Community Empowerment National Center for Special Education in Charter Schools National Disability Rights Network National Education Association National Forum to Accelerate Middle-Grades Reform National PTA National Rural Education Advocacy Consortium National Rural Education Association National School Boards Association New America, Education Policy Program School Social Work Association of America Teacher Education Division of the Council for Exceptional Children The Advocacy Institute The Arc of the United States The Education Trust TNTP

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

May 5, 2020

Dear Secretary DeVos,

The undersigned national organizations involved in providing elementary and secondary education to the nation's public school students are deeply concerned with your recently released non-binding guidance Providing Equitable Services to Students and Teachers in Non-Public Schools Under the CARES Act Programs. We strongly urge you to revise the guidance so it aligns with the underlying law.

The CARES Act directs local educational agencies (LEAs) that receive education stabilization funds to provide equitable services to non-public schools in the same manner as provided under Title I of the Elementary and Secondary Education Act (ESEA). Title I has always been premised on supporting schools with high concentrations of students from low-income families in order to direct federal resources to students in need. Title I's equitable services provision is no different. LEAs determine how much Title I money to spend on services for private school students based on poverty levels. This was confirmed by your agency a mere six months ago.¹

The Department's CARES Act equitable services guidance, however, directs LEAs to determine how much CARES Act money to spend on services for private school students based on total enrollments. This is not the same manner as Title I and overlooks that CARES Act funds, specifically Elementary and Secondary School Emergency Relief (ESSER) funds, are allocated to states and LEAs based on their respective share of FY19 Title I dollars. That is, allocation of ESSER funding to both the state and local levels is driven by the concentration of low-income students, and the calculation of the allocation depends on how many low-income students reside in each state and district in accordance with section 1117 of ESEA Title I.

The guidance just released regarding providing equitable services under CARES Act programs is inconsistent with this well-established precedent. To be consistent with both the historical application of equitable services, and to treat public and private schools equitably under the CARES Act, this guidance must be revised to ensure that the equitable services share for private schools is determined by poverty rates rather than overall enrollment.

Absent these edits, the CARES Act equitable services guidance is inequitable and creates an environment where wealthy children in private schools are counted and used to generate the equitable services share of ESSER for their private schools at the direct expense of low-income children remaining in public schools.

To restore equity within the equitable services guidance you can revise it to allocate resources to private schools relying on a proportional calculation, much like how state and local education agencies receive their CARES share. Each LEA would calculate what proportion of their FY19 Title I allocation was used for equitable services and would make that same share of CARES funding available for private school equitable services.

As our nation and school districts work diligently towards COVID-19 recovery, our goal is to ensure that CARES Act resources are utilized to meet the needs of our public school students and educators, whose districts provide

¹ Title I, Part A of the Elementary and Secondary Education Act of 1965, as Amended by the Every Student Succeeds Act: Providing Equitable Services to Eligible Private School Children, Teachers, and Families Updated Non-Regulatory Guidance, October 2019

equitable services to eligible students enrolled in private schools. COVID-19 has disrupted education services among our students, educators, and school district communities and has taken thousands of lives. We are highlighting this misapplication within the Department's education stabilization fund guidance, and request clarification in the guidance that proportionate share determinations of ESSER funds must follow section 1117 of ESEA Title I. We look forward to your revision to ensure that the equitable share of CARES Act funding is calculated in a manner consistent with the CARES Act law.

Sincerely,

AASA, The School Superintendents Association American Federation of Teachers Council of Great City Schools National Education Association National Association of Elementary School Principals National Association of Secondary School Principals National School Boards Association

- CC: U.S. Senate HELP Committee
 - U.S. House Education & Labor Committee
 - U.S. Senate LHHS Appropriations Subcommittee
 - U.S. House LHHS Appropriations Subcommittee

United States Congress Washington, D.C. 20515

Dear Representatives and Senators:

The undersigned groups of national organizations involved in providing elementary and secondary education to the nation's public school students are gravely concerned with the complete lack of fiscal support for public schools in the Coronavirus Aid, Relief, and Economic Security (CARES) Act. As the third legislative package to deal with the COVID-19 pandemic is being developed, it is imperative that the final bill include emergency funding available to states for public schools. We identify five immediate opportunities for fiscal support for schools and strongly support the inclusion of all five:

- Provision of Emergency Funding Directly to States to Support Local Education Agencies: Much like the State Fiscal Stabilization Fund (or SFSF, a one-time appropriation of more than \$50 billion to states) that was part of the American Recovery and Reinvestment Act, we urge Congress to invest a significant amount—at least \$75 billion of funding—at the state level to help bolster state budgets, to stimulate the economy in the short term and invest in education and other essential public services to ensure the long-term economic health of our nation. Mechanisms exist to support quick and efficient allocation of the dollars through states to the local level. Any such funding must include strict protections related to 'supplement, not supplant' and ensure that a high percentage (all dollars except those related to administrative costs) end up at the local level. Particularly, we urge that a certain percentage [at least 50 percent] of funds provided through any SFSF program be designated for direct, supplemental subgrants to school districts for K-12 educational services and be distributed to LEAs within 15 days of receipt, again with a limitation on the percentage of subgrant funds withheld for administrative purposes.
- <u>Emergency Funding for Technology for Remote Learning</u>: As schools and families find themselves in the never-before-found situation of wide-spread home-based learning as schools are closed, it has highlighted a long-documented and persistent inequity as it relates to access to broadband. In the context of our students, this is called the 'homework gap'. This package must include \$2 billion in funding to the E-rate program and flexibility for the FCC in its administration.
- <u>Federal Medical Assistance Percentage (FMAP) for Medicaid</u>: Since its enactment in 1965, the Medicaid program has used the FMAP to determine the federal share of the cost of covered services in state Medicaid programs. The federal share has averaged 57 percent. In recent years, Congress has twice increased FMAPs across the board to provide temporary fiscal relief to states during recessions¹. With states all facing an all but certain economic downturn, it would be prudent and proactive for the federal government to increase its FMAP funding in order to cover 100 percent of Medicaid costs for at least one year..
- Include Public Employers in Payroll Tax Credit: Congress must ensure equitable treatment of state and local government agencies by including them in the benefits of payroll tax credit for "emergency paid leave" for our public employees affected by the coronavirus. Just like businesses and nonprofit agencies, state and local government employers will be providing emergency family and medical paid leave and emergency paid sick leave. Under the Family First Coronavirus Response Act, unlike businesses and nonprofit agencies, state and local government employers, including school districts, are expressly prohibited from offsetting these additional personnel costs against our employer share of Social Security payroll withholding payments [see section 7001(e)(4) and 7003(e)(4) of H.R. 6201]. Ironically, private and

¹ Kaiser Family Foundation. "Medicaid Financing: An Overview of the Federal Medicaid Matching Rate (FMAP)". September 2012. <u>https://www.kff.org/wp-content/uploads/2013/01/8352.pdf</u>

parochial schools, as nonprofit agencies, would financially benefit from the proposed tax credits, along with private sector businesses, while public school districts, along with other state and local government employers, would be excluded from the payroll tax credits. As school districts are the largest employer in the United States collectively, we urge Congress to remove this prohibition and allow eligibility for school districts and other units of state and local governments to receive the payroll credits.

• <u>Paid Sick Leave</u>: Given the expansive nature of this pandemic, even modest estimations for population infection are staggering. The likelihood of infection makes the availability of paid sick leave an absolute necessity. Absent paid sick leave, employees have to choose between keeping themselves home to keep their coworkers safe, or going to work because they can't afford to forgo wages. This is a false choice in light of this pandemic, and any final bill must cover all workers, reinstate the personal illness and quarantine and family care provisions in extended paid FMLA portion that were eliminated by HRes 904 and cover workers who need to care for a family member who is disabled or ill or aged and would normally be cared for by an institution or person who is now unavailable because of the public health emergency.

Thank you for your quick work on this important legislative package. We strongly urge you to include these critical provisions.

Sincerely,

AASA, The School Superintendents Association American Federation of Teachers Council of Great City Schools National Association of Elementary School Principals National Association of Secondary School Principals National Education Association National School Boards Association

CC: U.S. Senate U.S. House of Representatives IDEA

Summary of National IDEA Class Action Lawsuit:

J.T. et al v. de Blasio, et al.

(Updated October 1, 2020)

On July 28, 2020, a group of special education students filed a class action lawsuit in the United States District Court for the Southern District of New York against defendants NYC Mayor Bill de Blasio, NYCDOE Chancellor Richard Carranza and the New York City Department of Education (collectively the "NYC Defendants"), as well all school districts in the United States and all fifty State Education Departments. The lawsuit alleges that because of the shuttering of physical brick and mortar school sites due to Covid-19, the school closings across the country prevented special education students from receiving a Free Appropriate Public Education (FAPE) as defined by the student's individualized education plan (IEP) in violation of the Individuals with Disabilities Education Act (IDEA), the Americans with Disabilities Act (ADA), Section 504 of the Rehabilitation Act , the Equal Protection and Due Process clauses of the Fourteenth Amendment of the United States Constitution, and even unspecified provisions of every State Constitution. The plaintiff's attorneys have also raised an "organized crime claim" under the federal Racketeer Influenced and Corrupt Organizations (RICO) Act.

The students' complaint requests various compensatory and punitive damages and includes numerous allegations that students with disabilities were denied procedural and substantive protections under IDEA due to changes in services without notice to and input from parents. The complaint alleges that the substitution of remote learning for in-person instruction denied students an appropriate education and that students with disabilities did not have the same access to appropriate educational services compared to their general education peers. The complaint also alleges a violation of the IDEA's "stay put" provision, which they argue should afford students with a stable learning environment during an event such as a pandemic. The students claim that if their current placement becomes unavailable, the school district must provide in person services pursuant to the "stay put" provision.

On September 2, 2020, the Chief Judge of the New York court issued an "Order to Show Cause" (a demand for information to the plaintiffs related to the case), which began with the Chief Judge stating that she entertains "serious doubts about numerous procedural aspects of the case." The Order to Show Cause requires the students' attorneys to persuade the court that: (1) the court has jurisdiction over the non-New York school districts; (2) the court's district is a proper venue for the lawsuit; and (3) that all defendants other than the New York City Department of Education are proper defendants.

The take-away is that if the students' attorneys cannot persuade the court accordingly, the lawsuit will either be:

- dismissed;
- assigned to a different federal New York court to hear the case;
- certain defendants, likely those out of state, will be dismissed from the lawsuit; or
- a combination of the above.



Council of the Great City Schools **MEMBER DISTRICTS** Albuquerque Anchorage Arlington, TX Atlanta Aurora, CO Austin **Baltimore** Birmingham Boston Bridgeport **Broward County** Buffalo Charleston Charlotte-Mecklenburg Chicago Cincinnati **Clark County** Cleveland Columbus Dallas Dayton Denver **Des Moines** Detroit **Duval County** El Paso Fort Worth Fresno **Guilford County** Hawaii Hillsborough County Houston Indianapolis Jackson Jefferson County, KY Kansas City Long Beach Los Angeles Manchester, NH **Miami-Dade County** Milwaukee Minneapolis Nashville **New Orleans New York City** Newark Norfolk Oakland Oklahoma City Omaha Orange County, FL Palm Beach County Philadelphia **Pinellas** County Pittsburgh Portland Providence **Puerto Rico** Richmond Rochester Sacramento San Antonio San Diego San Francisco Santa Ana Seattle Shelby County St. Louis St. Paul Stockton Toledo Toronto Tulsa Washington, D.C. Washoe County Wichita

Council of the Great City Schools[®] 1331 Pennsylvania Avenue, NW, Suite 1100N, Washington, DC 20004 (202) 393-2427 (202) 393-2400 (fax) www.cgcs.org

April 15, 2020

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

Dear Secretary DeVos:

The Council of the Great City Schools, the coalition of the nation's largest central city school districts, offers recommendations for your consideration in the development of the Report to Congress regarding additional flexibility in federal education law to meet student needs during the pandemic. Since the impact of this national crisis and its duration cannot be accurately projected, the Council encourages the Education Department in its Report to take into account not only the school closures for nearly a third of the current school year, but also the possible extension of closures into the summer, and the ongoing effects for school year 2020-2021.

The Council has been working with your staff on administrative flexibilities that do not require changes in federal law. The following sets of federal requirements, in our opinion, may require temporary revisions or exceptions to the statute and/or regulations.

The Council supports the recommendations on IDEA timelines, meetings, procedures, documentation, reporting, and fiscal management submitted to the Department in late March jointly by the Council of Administrators of Special Education and the National Association of State Directors of Special Education, and by the Council for Exceptional Children. The progress of every student will be affected by school closures and alternative means of providing services. Assuming reopening for the 2020-21 school year, school districts will be reestablishing and intensifying services, although it will likely take multiple months to overcome the backlog of IDEA evaluations, meetings, reporting, etc. -- beyond the 45 school days proposed by CASE/NASDSE.

Further, the Council requests that specific attention be given in the Department's Report to extending the implementation period of current IEP goals and services for at least a third of the school year once schools reopen. A properly designed IEP provides a plan for annual student progress under the circumstance at the time. The current necessity to deliver instructional and support services through alternative means and levels during school closures and public safety directives may delay, but not negate the student progress expected in the IEP.

The Council recommends extending the implementation period of IEPs, as noted above, and allowing for the alternative delivery of services during closure to be considered compliant, provided that documentation of those services is maintained and that the services are generally comparable to those offered to students without disabilities. Similarly, the flexibility to communicate, provide information, and receive responses through alternative means with students and parents should be clarified.

In particular, the Council reads the IDEA as allowing for a one-year State maintenance of effort exception for uncontrollable circumstances, but not allowing a similar exception for local maintenance of effort. The Council specifically requests that the Department include a recommendation for similar local MOE flexibility in the Report to Congress.

With in-person instructional and related services, for example, unable to be provided due to state and local public safety directives, claims of IDEA violations have already begun and are likely to be filed in sizable numbers nationwide. The widespread closure of school district offices, state offices, and judicial offices makes the appropriate processing and adjudication of complaints severely limited at best. The Council, therefore, requests that the Department consider whether limited exceptions might be necessary and which of these requirements should be deferred.

Finally, the Council also requests that the Department review child find and other initial eligibility requirements, transitions from Part C and to Head Start, alternative means of services and communication for private school students, monitoring requirements, corrective action and CCEIS requirements, performance and other reports for temporary flexibility.

The Council urges the Education Department to undertake a practical review of current requirements in federal law in the context of the pandemic and advise Congress of the range of flexibilities necessary for the duration of the crisis and for reestablishing traditional public school services thereafter.

Sincerely,

Michael Casserly Executive Director

COMMISSION ON THE SOCIAL STATUS OF BLACK MEN AND BOYS



Council of the Great City Schools **MEMBER DISTRICTS** Albuquerque Anchorage Arlington, TX Atlanta Aurora, CO Austin **Baltimore** Birmingham Boston Bridgeport **Broward County Buffalo** Charleston Charlotte-Mecklenburg Chicago Cincinnati **Clark County** Cleveland Columbus Dallas Dayton Denver **Des Moines** Detroit **Duval County** El Paso Fort Worth Fresno **Guilford County** Hawaii Hillsborough County Houston Indianapolis Jackson Jefferson County, KY Kansas City Long Beach Los Angeles Manchester, NH **Miami-Dade County** Milwaukee Minneapolis Nashville **New Orleans** New York City Newark Norfolk Oakland **Oklahoma** City Omaha Orange County, FL Palm Beach County Philadelphia Pinellas County Pittsburgh Portland Providence Puerto Rico Richmond Rochester Sacramento San Antonio San Diego San Francisco Santa Ana Seattle Shelby County St. Louis St. Paul Stockton Toledo Toronto Tulsa Washington, D.C. Washoe County Wichita

Council of the Great City Schools®

1331 Pennsylvania Avenue, NW, Suite 1100N, Washington, DC 20004 (202) 393-2427 (202) 393-2400 (fax) www.cgcs.org

June 2, 2020

The Honorable Frederica Wilson U.S. House of Representatives 2445 Rayburn Office Building Washington D.C. 20515

Dear Congresswoman Wilson:

The Council of the Great City Schools, the coalition of the nation's largest central city public school districts, is pleased to endorse your legislation, H.R. 1636, establishing a Commission on the Social Status of Black Men and Boys to study and make recommendations on the disparities experienced by African American males nationwide.

Your long-term leadership in this area both in South Florida and here in Washington is greatly appreciated by our organization of urban school leaders. We particularly value your personal assistance in launching the *My Brothers' Keeper* initiative and the 5000 *Role Models of Excellence* program across our Great City Schools.

The recent killings in Minnesota, Kentucky, and Georgia underscore the continuing racism that sadly permeates our public institutions and private lives. Establishing the Commission on the Social Status of Black Men and Boys in the U.S. Commission on Civil Rights will provide an appropriate and powerful venue to explore the disparities faced by Black males and offer recommendations to remedy these intolerable conditions across the spectrum of American society.

The Council is hopeful that the Commission can provide a practical path forward for improving opportunities for our Great City School students so that they will fully share in the promise of America. We wholeheartedly endorse H.R. 1636, support its expeditious passage, and will work for its approval.

Sincerely

Michal Dlanky

Michael Casserly Executive Director

EQUITY AND DIVERSITY LEGISLATION

Summary of "Inclusion and Equity Enforcement Act" (H.R. 2574)

(Sponsored by Chairman Scott and cosponsored by 16 other representatives)

<u>PURPOSE</u>: To create a private cause of action for enforcement of federal regulations for a discriminatory "disparate impact" of policies by recipients of federal funds to the same extent as intentional discrimination.

<u>NEW SECTION 607</u>: Adds new section to Title VI of the Civil Rights Act giving rise to a private right of action to enforce a violation of federal "disparate impact" regulations despite intentional discrimination not being determined.

<u>REQUIRMENT FOR EMPLOYEE TO SERVE AS LOCAL TITLE VI MONITOR</u>: A new section 608 requires each recipient of federal funds to designate a Title VI Monitor to coordinate and investigate violations, and to disseminate contact information to students and other employees.

<u>ANTISEMITISM UNDER TITLE VI</u>: A new provision is added to consider antisemitism to be discrimination on the basis of race, color or national origin under Title VI.

<u>SPECIAL ASSISTANT ADVISING THE SECRETARY</u>: A new provision is added to the Department of Education Organization Act creating a special assistant for Equity and Inclusion to advise the Secretary and Deputy Secretary.

BACKGROUND NOTE: In 2001, the Supreme Court in <u>Alexander v. Sandoval</u> decided (5-4) that Title VI of the Civil Rights Act did not allow for lawsuits filed by private parties for unintentional "disparate impact" discrimination under the federal regulations. Enforcement of the disparate impact regulations has been left solely to the federal government to enforce therefore subject to the discretion of each Secretary of Education. If enacted, this bill would allow for new lawsuits from private parties to be filed against any recipient of federal funds based on a disparate impact of their policies.

Summary of "Strength in Diversity Act" (H.R. 2639)

(Sponsored by Rep. Fudge; Co-sponsored by Chairman Scott and 100+ Others)

<u>PURPOSE</u>: To support the development, implementation, and evaluation of comprehensive strategies to address the effects of racial isolation or concentrated poverty by increasing diversity, including racial diversity and socioeconomic diversity, in covered schools.

<u>RESERVATIONS</u>: The Secretary may reserve 5 percent for national activities and 10 percent for SEA planning and implementation grants.

ELIGIBLE ENTITIES: For planning and implementation grants, an eligible entity'' is a State educational agency, a local educational agency, a consortium of such agencies, an educational service agency, or regional educational agency that at the time of the application has significant achievement gaps and socioeconomic or racial segregation within or between the school districts served by such entity.

<u>COVERED SCHOOL</u>: A "covered school" means a publicly funded early childhood education program; a public elementary school; or a public secondary school.

<u>TYPES OF GRANTS</u>: Planning grants (not more than one year), implementation grants (not more than three years with a possible two-year extension), or both planning and implementation grants.

<u>AWARD CRITERIA</u>: Competitive grants will be awarded based on: the quality of the application; likelihood of the use of funds to improve student outcomes or outcomes of other performance measures; and the likelihood that the funds will provide for meaningful reduction of racial or economic isolation of children in covered schools.

<u>PRIORITY</u>: Priority will be extended as follows: first for applicants the applied for the Open Doors grant competitive announced in December 2016; second for applicants proposing a program that addresses racial isolation; third for applicants that support a program beyond a single school district, such as an inter-district or regional program; and fourth for applicants that demonstrate meaningful coordination with local housing agencies to increase access to schools that have a disproportionately low number of low-income students.

<u>PROGRAM REQUIREMENTS</u>: Among other requirements, applicants must to describe: implement, replicate, or expansion of strategies based on a strong or moderate level of evidence (as described in section 8101(21)(A)(i) of ESEA; or test a promising strategy to increase diversity in covered schools.

<u>PERFORMANCE MEASURES</u>: The Secretary is directed to develop performance measures and at minimum track progress on: 1. improving academic and other developmental or noncognitive outcomes for each subgroup under ESEA on measures, including, as applicable, by: (A) increasing school readiness; (B) increasing student achievement and decreasing achievement gaps; (C) increasing high school graduation rates; (D) increasing readiness for postsecondary education and careers; (E) improving access to mental health and social-emotional learning; (F) reducing school discipline rates; and (G) any other indicator the Secretary or eligible entity may identify; and (2) increasing diversity and decreasing racial or socioeconomic isolation in covered schools.

<u>APPROPRIATIONS</u>: Such sums as may be appropriated for FY20 and the subsequent 5 years.

BACKGROUND NOTES: This legislation represents an evolution of a proposal during the Obama Administration by Secretary John King to encourage socio-economic integration, similar to a program developed in New York state. The Council had concerns over a new grant program competing for limited funding with the traditional Magnet Schools Program and the prospect of school districts receiving grants for integrating poor and affluent students with no racial integration component. The current legislation includes a priority on addressing racial isolation as well as other provisions addressing racial diversity. The Council has taken no position on this legislation which passed in the House in September 2020. If federal courts at some point in the future strike down the use of all racial criteria in student assignment plans, the Council would support socio-economic diversity initiatives as an alternative.

TITLE IX AMICUS BRIEF

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

COMMONWEALTH OF PENNSYLVANIA, et al.,
Plaintiffs,
v.
ELISABETH DEVOS, in her official capacity as SECRETARY, UNITED STATES DEPARTMENT OF EDUCATION, <i>et al.</i>
Defendants.

Civil Action No. 1:20-cv-1468-CJN

AASA, THE SCHOOL SUPERINTENDENT'S ASSOCIATION, THE COUNCIL OF THE GREAT CITY SCHOOLS, AND THE NATIONAL ASSOCIATION OF SECONDARY SCHOOL PRINCIPALS AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

HUSCH BLACKWELL LLP

John W. Borkowski (D.C. Bar No. 417065) *Petition for re-admission to this Court pending* 120 South Riverside Plaza, Suite 2200 Chicago, Illinois 60606 Phone: (312) 526-1538 Fax: (312) 655-1501 john.borkowski@huschblackwell.com

Scott Schneider (TX Bar No. 24054023) Paige Duggins-Clay (TX Bar No. 24105825) *Pro hac vice motions pending* 111 Congress Avenue, Suite 1400 Austin, Texas 78701 Phone: (512) 472-5456 Fax: (512) 479-1101 scott.schneider@huschblackwell.com paige.duggins-clay@huschblackwell.com

Steven A. Neeley (D.C. Bar No. 998792) 750 17th Street, NW, Suite 900 Washington, D.C. 20006 Phone: (202) 378-2300 Fax: (202) 378-2319 steve.neeley@huschblackwell.com

Aleksandra O. Rushing *Pro hac vice motion pending* 190 Carondelet Plaza, Suite 600 St. Louis, Missouri 63141 Phone: 314-345-6275 Fax: 314-480-1505 aleks.rushing@huschblackwell.com

Allen F. James (MO Bar No. 70675) *Pro hac vice motion pending* 4801 Main Street, Suite 1000 Kansas City, Missouri 64112 Telephone (816) 983-8000 Facsimile (816) 983-8080 aj.james@huschblackwell.com

Dated: June 30, 2020

Counsel for Amicus Curiae

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STATEMENT OF INTEREST

Amici are the three most prominent associations of public school district leaders and urban public school districts in the United States. *Amici* represent tens of thousands of administrators and teachers and tens of millions of students in American public school districts. They have a strong interest in ensuring that their members have an appropriate amount of time to understand and properly implement the extensive changes mandated by the first set of regulations issued under Title IX since the 1970s. The effective date of the Final Rule, however, does not give them adequate time, especially in light of the unprecedented demands that responding to the evolving COVID-19 crisis has imposed on public school districts.¹

Amicus curiae, AASA, The School Superintendent's Association ("AASA"), founded in 1865, is the professional organization for over 13,000 educational leaders in the United States and throughout the world. AASA members range from chief executive officers, superintendents and senior level school administrators to cabinet members, professors and aspiring school system leaders. Throughout its more than 150 years, AASA has advocated for the highest quality public education for all students and provided programing to develop and support school system leaders. AASA members advance the goals of public education and champion children's causes in their districts and nationwide.

Amicus curiae, the Council of the Great City Schools (the "Council"), is a coalition of 76 of the nation's largest urban public school systems, and is the only national organization exclusively representing the needs of urban public schools. Founded in 1956 and incorporated in 1961, the Council serves as the national voice for urban educators and provides a forum to share best practices. The Council is composed of school districts with enrollments greater than 35,000

¹ No person or entity other than *Amici* and their counsel assisted in or made a monetary contribution to the preparation or submission of this brief.

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students located in cities with a population exceeding 250,000. Districts located in the largest city of any state are also eligible for membership based on urban characteristics. The Council's member districts have a combined enrollment of over 8.2 million students. Headquartered in Washington, D.C., the Council promotes urban education through research, instruction, management, technology, legislation, communications, and other special projects.

Amicus curiae, the National Association of Secondary School Principals ("NASSP"), is the leading organization of and voice for principals and other school leaders across the United States. NASSP seeks to transform education through school leadership, recognizing that the fulfillment of each student's potential relies on great leaders in every school committed to the success of each student. Principals serve as the leaders of their schools and strive to put each child in the best situation to succeed. They build their schools to be centers for learning where students feel safe, comfortable, and cared for. With regard to sexual harassment and assault, principals require a clear federal policy to set in place procedures that ensure all reports are addressed in an efficient fashion that offers fair protections for both the accuser and the accused.

Amici and their members are deeply concerned that the U.S. Department of Education's ("Department") recently announced Title IX regulations, which require extensive changes to public school districts' policies, staffing, training and record-keeping, have set an unreasonable implementation deadline of August 14, 2020—less than three months following publication of the new regulations in the Federal Register. Public school districts, many of which have been closed for months and whose faculties are now off for the summer, will be unable to meet that deadline without diverting significant time and resources that are sorely needed to respond to the ongoing global pandemic and safely open schools in the summer. Moreover, *Amici* believe that the Plaintiffs' challenges to aspects of the regulations affecting public schools are likely to be

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successful, raising the substantial possibility that the rushed changes required of their members now may ultimately have to be undone. Therefore, *Amici* write to underscore the harms the August 14, 2020 compliance date imposes on them and the risk that it entails specifically for public school teachers and students, and urge this Court to enjoin that deadline in order to allow public school districts sufficient time to implement the new regulations.

SUMMARY OF ARGUMENT

The Department recently issued final regulations under Title IX for the first time in nearly half a century. *See* U.S. Dep't of Educ., *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 Fed. Reg. 30,026 (May 19, 2020) (to be codified at 34 C.F.R. pt. 106) (hereinafter, "Final Rule"). The Final Rule is the result of a year-and-a-half-long rulemaking that culminated in a 600,000-word Federal Register notice. The Final Rule, among other things, requires public school districts to rewrite thousands of district-specific policies and procedures in order to comply with scores of new administrative mandates. And yet the Department has set an abbreviated compliance deadline of August 14, 2020, less than three months after the publication of the Final Rule.

Given the scope of the changes required of public school districts by the Final Rule, that deadline is unreasonable. The regulations significantly increase the procedural, staffing, training and record keeping burdens on school districts. Moreover, nearly all of the school districts led by AASA, served by NASSP members, and who belong to the Council have been closed for months in response to state-wide orders responding to COVID-19. With the bulk of their staff off for the summer, *Amici* are now frantically preparing for a new school year in the face of this ongoing global pandemic. Their singular focus at this moment is on how to reopen schools, while keeping students and staff safe. In light of this extraordinary burden, which is falling to *Amici* (without the benefit of significant state or federal guidance or supplemental resources), the August 14,

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2020 implementation deadline is arbitrary and unworkable. This deadline effectively requires school districts to divert attention and resources from the critical mission of ensuring health and safety when they reopen schools in the fall.

The implementation deadline itself imposes imminent and irreparable harms on public school districts, if the compliance deadline is not stayed. These harms are particularly relevant to the balance of hardships and public interest factors associated with the standard for preliminary injunctive relief. *Amici* support the request for a preliminary injunction of the implementation deadline set forth in the Final Rule to permit public school districts sufficient time to assess how most effectively to incorporate the new requirements into their policies, procedures and practices.

Amici also believe it would be prudent to delay implementation of the Final Rule until there is a final resolution of the substantive issues in this lawsuit. Because aspects of the Final Rule have not been tailored to address the unique context of K-12 public education, *Amici* believe that Plaintiffs are likely ultimately to prevail on at least some aspects of their challenge on the merits. If this occurs and the implementation deadline is *not* enjoined or stayed, the harms described above would be exacerbated, as rushed changes adopted now would have to be undone at that time. Given the challenges of the global pandemic, *Amici* seek reasonable certainty that the entirely new framework established by the Final Rule actually is required by Title IX in the K-12 context. This request is particularly appropriate in that the current implementation deadline occurs during the summer when almost all of *Amici's* teachers and non-essential administrative staff are off, schools have been closed, and many administrators are away either due to COVID-19 work-from-home relocation or normal summer schedules. The personnel currently planning for the safe reopening of America's public schools should not be required to divert their attention from the critical mission of effectively and safely providing public education in order to rapidly implement extensive changes in Title IX related policies, procedures, staffing, training and record-keeping, particularly when this Court ultimately may conclude that not all of those changes are necessary.

ARGUMENT

I. The Department's Final Rule Significantly Increases the Procedural, Staffing, Training, and Record Keeping Requirements on Public School Districts under Title IX.

On September 7, 2017, the Department announced that, for the first time in over 40 years,

it would issue new federal regulations regarding Title IX.² The Department allowed itself almost three years to craft the extensive Final Rule which, when finalized, was described by the Department as a "game-changer."³ In a variety of ways detailed below, the Final Rule is especially a "game-changer" for public K-12 institutions. Most notably, it will require every public school district in the country to:

- Draft and implement new institutional investigatory and adjudicatory procedures for employee and student disciplinary matters and reconcile those procedures with
 - preexisting state-specific statutory obligations;Renegotiate collective bargaining agreements;
 - Create an infrastructure to comply with the Final Rule's internal notice obligations;
 - Implement a system to comply with the Final Rule's vast record-keeping requirements;
 - Train its Title IX personnel on compliance with the new Final Rule; and
 - Train every single school employee on the Final Rule's new and unprecedented mandatory reporting obligation.

² See U.S. Dep't of Educ., *Highlights from Secretary DeVos' Remarks on Title IX Enforcement* (Sept. 7, 2017), https://www.ed.gov/news/press-releases/highlights-secretary-devos-remarks-title-ix-enforcement.

³ See U.S. Dep't of Educ., Secretary DeVos Takes Historic Action to Strengthen Title IX Protections for All Students (May 6, 2020), https://www.ed.gov/news/press-releases/secretary-devos-takes-historic-action-strengthen-title-ix-protections-all-students.

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The Final Rule mandates that our nation's public school districts follow a prescribed template that requires the vast majority of schools to make broad-scale and fundamental changes to a wide variety of institution-specific policies and practices with regard to Title IX proceedings. Implementation of the Final Rule's centerpiece requirements for institutional investigatory and adjudicatory procedures and the provision of supportive measures require a substantial overhaul of schools' disciplinary systems, which will entail extensive and labor-intensive revisions to every public school district's policies, procedures, and practices and governing both students and employees.

For example, school districts must adopt or otherwise reconcile in their policies and procedures a new Title IX-specific definition of "sexual harassment" to mean conduct that is so "severe" *and* "pervasive" *and* "objectively offensive" that it effectively denies a person equal access to the recipient's education program or activity. All of these revisions must account for a new set of mandatory response obligations triggered by a "deliberate indifference" standard, which in turn, requires implementation of various newly-mandated supportive, grievance, investigative, notice, and record-keeping obligations. They must also include new practices for adjudicating Title IX reports under prescribed evidentiary and procedural standards. All measures taken in response to sexual harassment must be meticulously documented, including at least ten separate notice requirements, documentation of supportive measures offered and accepted, and all resolutions memorialized in detailed formal reports. And, because of the Department's new definition of "sexual harassment" and limitations to Title IX's "jurisdiction," which runs counter to the Department's prior guidance regarding discriminatory harassment,⁴

⁴ See, e.g., U.S. Dep't of Educ., *Q&A on Campus Sexual Misconduct* (Sept. 2017) ("[W]hen sexual misconduct is so severe, persistent, or pervasive as to deny or limit a student's ability to participate in or benefit from the school's programs or activities, a hostile environment exists and the school must respond."), *https://bit.ly/35Up8jt*; U.S. Dep't of Educ., *Dear Colleague Letter: Harassment and Bullying* (Oct. 26, 2010) ("Harassment creates a hostile

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upon which school districts had relied for year, districts must also reconcile and revise their existing codes of student conduct and personnel policies to address discriminatory conduct falling outside of the final Rule's jurisdiction. *See generally* U.S. Dep't of Educ., *Summary of Major Provisions of the Department of Education's Title IX Final Rule* (May 6, 2020).⁵

In addition, the final regulations require intensive training for all school employees tasked with Title IX responsibilities. These training requirements are not accompanied by any federal funding, and the Department's cost analysis does not account for large school districts that typically have <u>one</u> responsible official in each school—rather than a coordinator, an investigator, <u>and</u> a decision maker, as now required⁶—to handle Title IX and other misconduct allegations. With approximately 16 hours of training required by the regulations for each of the three (at least) responsible individuals in each school, the cost burden for large districts, like members of the Council and many districts managed by AASA and served by NASSP members, will be substantial, and it almost certainly has been underestimated by the Department.

The Department's Final Rule now applies the "actual knowledge" standard to "any employee of an elementary or secondary school" with "notice" of sexual harassment. Final Rule))85 Fed. Reg. at 30,574 (to be codified at 34 C.F.R. § 106.30(a) (*Actual knowledge*)). This standard applies to an employee witnessing or otherwise receiving notice of potential sexual harassment involving both students and peer employees. This effectively creates a mandatory reporting requirement for all school employees. *See id.* Therefore, schools must now re-train all employees—from a superintendent to a teacher to a janitor—on this mandatory reporting

environment when the conduct is sufficiently severe, pervasive, or persistent so as to interfere with or limit a student's ability to participate in or benefit from the services, activities, or opportunities offered by a school. When such harassment is based on race, color, national origin, sex, or disability, it violates the civil rights laws that OCR enforces."), https://bit.ly/2yPkXct.

⁵ Available at https://bit.ly/2xL9Ws4.

⁶ See Final Rule, 85 Fed. Reg. at 30,577 (to be codified at 34 C.F.R. 106.45(b)(7)).

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obligation during a time when the vast majority of these employees are not even working. Doing such training effectively will also certainly require additional personnel and resources for the vast majority of public school districts.

Taken together, these changes significantly alter the Title IX compliance landscape to require extensive re-drafting of procedures, policies, protocols, and handbooks and renegotiation of employee contracts. In addition, because many of these changes involve the application of highly technical legal standards by school district employees, districts also now face significant re-training burdens in advance of beginning the implementation of the new policies and procedures. The process to come into compliance with these unfunded mandates necessarily requires diversion of limited time and resources from other efforts—including, as discussed below, school districts' ongoing efforts to reopen schools safely in the midst of a global pandemic.

II. The Effective Date of the Final Rule is Unreasonable and Unworkable for Public School Districts during the Current Pandemic.

The U.S. Department of Education's conclusory explanation for how it arrived at its August 14, 2020 effective date for compliance with the new Final Rule fails to address the unique factors in the K-12 setting that would make such a short compliance window unworkable under the best of circumstances. These are obviously not the best of circumstances as the unprecedented challenges created for public K-12 schools by the COVID-19 pandemic (which shows no signs of abating) require schools to focus all of their efforts on their paramount obligation: safely returning children to their schools. That the Department would instead compel schools to divert their attention to complying with its newly promulgated Title IX regulations is remarkable and unreasonable.

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While giving itself almost three years to draft the Rule, the Department has inexplicably provided public K-12 institutions—the overwhelming majority of which have been shuttered since mid-March⁷—less than three months to get into compliance. Virtually no explanation is provided for how the Department arrived at this compliance deadline which, under the best of circumstances, would fall within a period when K-12 employees (all of whom require training under the Rule) are not on campus because of summer breaks. No explanation whatsoever, though, is provided for how such a compliance deadline is rational in light of the complications raised by COVID-19.

⁷ See Nicole Chavez and Artemis Moshtaghian, 48 States have Ordered or Recommended that Schools Don't Reopen this Academic Year, CNN (updated May 7, 2020), https://www.CNN.com/2020/04/18/us/schools-closed-coronavirus/index.html.

⁸ See 85 Fed. Reg. at 30,534.

⁹ Id.

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the Rule was being finalized, the Administration believed "that, by June 1st, we will be well on our way to recovery."¹⁰

As of the filing of this brief, there are almost 2.5 million confirmed cases of COVID-19.¹¹ The number of new virus infections continues to hit record daily numbers of confirmed cases, with nearly 45,000 Americans testing positive for the virus.¹² This daily total of positive cases is almost 30 times the collective total of infections which prompted the national emergency declaration. In addition, as of the time of this brief's filing, the virus has killed nearly 125,000 Americans.¹³ Again, the Department does not specify what "currently available information" it relied on in setting its August 14th, 2020 deadline, but the scope of COVID-19 has become considerably worse since it issued the Final Rule in May 2020 and the new infection and death totals are considerably worse now than what the Administration was predicting for the summer.

In addition, two weeks after issuing the Rule, the Centers for Disease Control and Prevention issued new guidance that children, who initially were not viewed as being at risk for COVID-19 symptoms, might experience "multisystem inflammatory syndrome" if exposed to the virus.¹⁴ Such discoveries are to be expected when dealing with a novel virus and there is no telling if more are to come before the beginning of the upcoming school year.

Significant changes have also been made in the recommendations made by the Administration and others regarding effective mitigation efforts. Most notably, the CDC and the

¹⁰ See Remarks by President Donald J. Trump, Vice President Mike Pence, and Members of the Coronavirus Task Force in Press Briefing (March 30, 2020), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-vice-president-pence-members-coronavirus-task-force-press-briefing-14/.

¹¹ See Centers for Disease Control and Prevention, Cases in the U.S. (last visited June 29, 2020), https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html.

¹² See Antonia Noori Farzan et al., *Live updates: Global Death Toll from Coronavirus Surpasses Half a Million*, THE WASHINGTON POST (updated June 29, 2020), https://www.washingtonpost.com/nation/2020/06/29/coronavirus-live-updates-us/.

¹³See Centers for Disease Control and Prevention, *Daily Updates of Totals by Week and State* (last visited June 29, 2020), https://www.cdc.gov/nchs/nvss/vsrr/COVID19/index.htm.

¹⁴ Centers for Disease Control and Prevention, *Information for Healthcare Providers about Multisystem Inflammatory Syndrome in Children (MIS-C)* (May 20, 2020), https://www.cdc.gov/mis-c/hcp/.

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Surgeon General both initially indicated mask wearing would not mitigate virus spread.¹⁵ Their guidance on this issue—as well as local and state guidance—has now changed¹⁶ and schools must now consider whether to require masks at school, how to effectively and fairly enforce mask-wearing rules, and potentially arrange the logistics for securing and providing masks to students and employees. Similarly, the extent to which the virus survives on surfaces remains a largely unresolved issue.¹⁷ As the research develops on this, schools may need to adjust their plans for cleaning facilities and ensure that they have sufficient disinfectants. A couple of months ago, there was also an emerging consensus that there would be seasonal fluctuations in the virus and that the summer and warm-weather months would prove inhospitable for virus spread. If true, this would reduce some of the complications with an August reopening. The exploding case count during the month of June in warm areas suggests this is not the case; consequently, schools may need to consider robust testing protocols for the reopening of schools and then coordinate that testing with community providers.

In sum, schools are faced with an expanding pandemic, an evolving understanding of the impact COVID-19 might have on students and employees, and changing (and ambitious) directives around effective risk mitigation efforts. Again, it is unclear what "information" the Department was relying on at the time in setting its effective date, but these are the harsh realities public school districts are dealing with now in trying to accomplish what has widely been acknowledged as a national imperative—the safe reopening of K-12 public schools.

¹⁵Colin Dwyer and Allison Aubrey, CDC Now Recommends Americans Consider Wearing Cloth Face Coverings In Public, NPR (Apr. 3, 2020), https://www.npr.org/sections/coronavirus-liveupdates/2020/04/03/826219824/president-trump-says-cdc-now-recommends-americans-wear-cloth-masks-in-public ¹⁶ See Centers for Disease Control and Prevention, Considerations for Wearing Cloth Face Coverings (last updated June 28, 2020), https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-coverguidance.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fpreventgetting-sick%2Fcloth-face-cover.html.

¹⁷ See Centers for Disease Control and Prevention, Cleaning and Disinfection for Households (updated May 27, 2020), https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cleaning-disinfection.html.

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Reopening will require herculean and laser-focused efforts by school administrators. By way of example, the CDC has created broad "guidelines" for reopening.¹⁸ From now until when schools reopen in August of 2020, those guidelines recommend that schools adopt a variety of plans for various situations depending on the degree of community spread of the virus. This required work includes:

- Developing short-term closure procedures if an infected person has been in a school building;
- Coordinating with local health officials to create protocols to notify local health officials about outbreaks in the community and at school;
- Creating plans to clean and disinfect school buildings thoroughly;
- Developing plans to safely run child-care programs even when a school is temporarily closed;
- Implementing strategies to continue education and related support for students to ensure continuity of education;
- Reviewing continuity plans, including plans for the continuity of teaching and learning;
- Implementing e-learning plans, including digital and distance learning options;
- Training teachers on how to deliver on-line instruction;
- Addressing the potential lack of students' access to computers and the Internet;
- Ensuring continuity of meal programs;
- Considering alternatives for providing essential medical and social services for students;
- Providing necessary services for children with special healthcare needs;
- Ensuring that emergency planning includes strategies to reduce the spread of a wide variety of infectious diseases;
- Teaching and reinforcing healthy hygiene practices;
- Training staff on healthy hygiene practices;
- Ensuring adequate supplies (e.g., soap, paper towels, hand sanitizer, tissue) to support healthy hygiene practices;
- Reviewing attendance and sick leave policies;
- Identifying critical job functions and positions, and plan for alternative coverage by cross-training staff;
- Determining how absenteeism will disrupt continuity of teaching and learning;
- Assessing the safety of scheduled group gatherings and events;
- Establishing procedures for students and staff who are sick at school;
- Creating and testing communications plans for use with the school community; and
- Reviewing and applying CDC's guidance for businesses and employers.

¹⁸See Centers for Disease Control and Prevention, *Reopening Guidance for Cleaning and Disinfecting Public Spaces, Workplaces, Businesses, Schools, and Homes* (updated May 27, 2020), https://www.cdc.gov/coronavirus/2019-ncov/community/reopen-guidance.html.

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Over the next several weeks, moreover, these guidelines will likely be supplemented by additional state and local rules that public schools will have to digest and implement in very short time frames.¹⁹

The extent of the work being done by schools over the summer to reopen is reflected in the extraordinary projected costs of this effort. A recent report from *Amicus* AASA put the costs of reopening schools with proper safety protocols at nearly \$1.8 million per district on average, or roughly \$25 billion total.²⁰ The American Federation of Teachers estimated at least \$116 billion.²¹ The Council of Chief State School Officers released an estimate that it would cost between \$158 billion and \$245 billion to reopen safely.²²

Put bluntly, the full attention and resources of public school districts should be focused exclusively on the complicated task of safely reopening America's schools. Only when that mission is accomplished, should school districts turn their attention to other complicated and important, but less urgent, new compliance obligations. Time and resources spent getting schools in compliance with the Department's new Title IX regulations is time and resources not being spent on the ensuring that schools can safely reopen in August.

¹⁹ See, e.g., Staff Reports, *Massachusetts Releases Guidelines for Reopening Schools: Here's What to Know*, NBC 10 BOSTON (updated June 25, 2020), https://www.nbcboston.com/news/coronavirus/school-reopening-guidelines-expected-to-be-released/2148817/.

²⁰ AASA and Assoc. of Sch. Bus. Officials Int'l, *Reopening means an additional \$1.8 million in costs for average-sized school district, administrators estimate* (June 10, 2020), *https://www.asumag.com/covid-19/article/21133640/reopening-means-an-additional-18-million-in-costs-for-averagesized-school-district-administrators-estimate.*

 ²¹ American Federation of Teachers, *Reopening Schools during a Time of Triple Crisis: Financial Implications* (last visited June 29, 2020), https://www.aft.org/sites/default/files/wysiwyg/reopen-schools-financial-implications.pdf.
 ²² Council of Chief State School Officers, *Letter to Honorable Lamar Alexander* (June 24, 2020), https://ccsso.org/sites/default/files/2020-06/HELPLetterFinal.pdf.

III. Aspects of the Final Rule Specifically Related to K-12 Schools May Ultimately be Struck Down

There are many other ways, besides its unrealistic effective date, in which the Final Rule appears not adequately to account for the uniqueness of the K-12 education context, and these problems, among others raised in Plaintiff's brief, suggest that the Final Rule may result in the Plaintiffs ultimately prevailing on the merits of some of their claims. That result would simply exacerbate the harm caused by the premature effective date, because at least some of the changes the public school district are rushing to make now may well have to be undone.

It is not surprising to *Amici* that the Final Rule has these problems, because the Proposed Rule²³ was developed without even consulting them or other prominent K-12 organizations. *See, e.g.*, Michael Casserly, *CGCS Comments on Proposed Title IX Regulations at* 2 (Jan. 30, 2019) (hereinafter "CGCS Comments") ("[W]e do not know that any of the Great City Schools were consulted or invited to any of the meetings on Title IX, despite operating the nation's largest and arguably most complex school systems"). Instead, the proposed regulations were developed against the backdrop of numerous well-publicized higher education incidents involving alleged sexual assault. Several meetings were held between Department officials and representatives of victims, those accused, and college and university administrators as the new regulations were being drafted. Similarly, many of the comments on the Proposed Rule from the public-school constituencies were dismissed in the Final Rule. Thus, despite soliciting comments regarding the Proposed Rule's impact on elementary and secondary institutions and the applicability of the proposed provisions based on the age of the parties, *see* 83 Fed. Reg. at 61,482–61,483, the Department failed to address several irreconcilable differences between the K-12 and

²³ Proposed Rule, *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance* 83 Fed. Reg. at 61,462 (Nov. 29, 2018) (to be codified at 34 C.F.R. pt. 106) (hereinafter "Proposed Rule").

²²⁸

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postsecondary setting, resulting in a Final Rule which reflects a lack of understanding or appreciation for the K-12 context.

Critically, a school-age child's physical, emotional, and mental development during his or her elementary and secondary school tenure is not complete. Instructional and support services in public schools are designed in recognition of the various developmental stages of each child, and courts have routinely recognized the developmental differences between K-12 students and students in higher education. School children often have neither the judgment nor experience to interact or make decisions like adults, yet the Final Rule requires young children to be able to make "formal complaints" which are "in writing" and "signed" before a school district can institute a Title IX investigation. *See* Final Rule,)85 Fed. Reg. at 30,574 (to be codified at 34 C.F.R. § 106.30(a) (*Formal complaints*)).

The Final Rule's grievance procedures neglect to adequately account for the unique challenges that public school districts face on a daily basis and thus may fail to implement Title IX's fundamental requirement that no person shall be discriminated against on the basis of sex with respect to an educational program or activity. 20 U.S.C. § 1681(a). For example, public K-12 schools, whose student bodies consist almost entirely of persons who are legally considered to be minors, must follow each and every step in the Final Rule's detailed grievance procedures and delay implementing discipline until these requisite steps are completed. Final Rule, 85 Fed. Reg. at 30,575–30,578 (to be codified at 34 C.F.R. § 106.45). However, the Final Rule's procedures require multiple levels of notice and the opportunity for various parties, such as parents and attorneys, to participate in meetings or proceedings to address incidents of misconduct involving minor school-age children. *See id.* As the Council noted in its comments on the Proposed Rule, this requirement "add[s] to the adversarial and litigation-like atmosphere" the Final Rule will

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create. CGCS Comments at 6. For example, the regulations could have kindergarteners (or their representatives/attorneys) facing off against other kindergarteners as to the veracity of the allegations and evidence with responses and counter-responses being exchanged.²⁴ This approach does not take into consideration best practices in interviewing and obtaining statements in a developmentally appropriate manner from children; potentially creates a climate of intimidation and possibly additional trauma; and allows confidential student information to be shared across countless numbers of individuals. The increased risk of retaliation, the possibility for additional trauma and the privacy concerns created by the Final Rule in the public school context are problematic.

These same rigid requirements also may prevent public school districts from being able to act swiftly to limit the harm potentially caused by misconduct by requiring formal notice, grievance and investigation requirements without exception. This is particularly problematic in the elementary school context, where timely action is not only critical to maintain order, but also necessary in order for young children to learn that their actions have consequences.

Similarly, the Department's decision to limit the circumstances under which a school district may initiate a Title IX complaint does not account for the realities faced by most public K-12 schools. For example, unlike college and university students, who come from all corners of the nation and the world and are free to determine for themselves their level of community engagement, children in public elementary and secondary schools often live year-round in the same neighborhoods as their potential harassers and, in many cases, spend their entire childhoods

²⁴ See Final Rule, 85 Fed. Reg. at 30,577 (to be codified at 34 C.F.R. § 106.45(b)(6)(ii)) ("For recipients that are elementary and secondary schools, . . . the recipient's grievance process may, but need not, provide for a hearing. With or without a hearing, after the recipient has sent the investigative report to the parties pursuant to paragraph (b)(5)(vii) of this section and before reaching a determination regarding responsibility, the decision-maker(s) must afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions from each party.").

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interacting with the same classmates and peers as they progress through school. While the regulations at least cover sexual harassment occurring in college and university residential facilities, elementary and secondary children are left with no protection against sexual harassment by their classmates (or others) in their homes-which in many cases are just steps from their neighborhood public school, even when such harassment affects their access to public education. As AASA observed in its comments the Proposed Rule, while K-12 schools are charged with standing in *loco parentis* with respect to their students, the Final Rule nevertheless "take[s] away the ability of districts to initiate an investigation because the sexual misconduct occurred online or off-campus." See Sasha Pudelski, Letter to Secretary Betsey DeVos at 5, (Jan. 22, 2018).²⁵ In today's world in which cyberbullying and other problematic on-line behavior has become increasingly common among elementary and secondary students, this restriction seems at best highly questionable. At worst, and as NASSP stated in its comments to the Proposed Rule, "[s]chools would be required to ignore harassment that occurs outside of a school activity, including most off-campus and online harassment." See JoAnn Bartoletti Letter to Assistant Secretary Kenneth L. Marcus (Jan. 18, 2019).²⁶ Moreover, it creates tension between public school districts Title IX responsibilities and their duties regarding any state law and local policies, many of which *require* them to act to address sexual harassment in the on-line context.

For each of these reasons and for those stated in Plaintiff's Memorandum in Support of their Motion for Preliminary Injunction, some aspects of the Final Rule that relate to K-12 public schools are likely not to survive judicial review. Therefore, a preliminary injunction with respect to the implementation of the Final Rule until its viability can be fully determined is particularly prudent here. Otherwise, public school districts will be racing against the clock to implement the

²⁵ Available at https://aasa.org/uploadedFiles/AASA_Blog(1)/AASA%20Title%20IX%20Comments%20Final.pdf_

²⁶ Available at https://www.nassp.org/wordpress/wp-content/uploads/2019/01/NASSP_Title_IX_Comments_-_1.17.19_V2.pdf.

Final Rule, instead of maintaining the necessary and essential focus on the safe reopening of schools, and then they likely will have to go back and re-redo policies and procedures they have hastily pulled together and undo costly structures that they already cannot afford.

CONCLUSION

For these reasons, the Court should enjoin the August 14, 2020 effective date of the Final Rule in order to permit public school districts adequate time to come into compliance with the new requirements that survive judicial scrutiny without distracting them now from their critical efforts to reopen public elementary and secondary schools safely in the midst of the COVID-19 pandemic.

Dated: June 30, 2020

Respectfully submitted,

HUSCH BLACKWELL LLP

/s/

John W. Borkowski (D.C. Bar No. 417065) *Petition for re-admission to this Court pending* 120 South Riverside Plaza, Suite 2200 Chicago, Illinois 60606 Phone: (312) 526-1538 Fax: (312) 655-1501 john.borkowski@huschblackwell.com

Scott Schneider (TX Bar No. 24054023) Paige Duggins-Clay (TX Bar No. 24105825) *Pro hac vice motions pending* 111 Congress Avenue, Suite 1400 Austin, Texas 78701 Phone: (512) 472-5456 Fax: (512) 479-1101 scott.schneider@huschblackwell.com paige.duggins-clay@huschblackwell.com

Steven A. Neeley (D.C. Bar No. 998792) 750 17th Street, NW, Suite 900 Washington, D.C. 20006 Phone: (202) 378-2300 Fax: (202) 378-2319 steve.neeley@huschblackwell.com

Aleksandra O. Rushing *Pro hac vice motion pending* 190 Carondelet Plaza, Suite 600 St. Louis, Missouri 63141 Phone: 314-345-6275 Fax: 314-480-1505 aleks.rushing@huschblackwell.com

Allen F. James (MO Bar No. 70675) *Pro hac vice motion pending* 4801 Main Street, Suite 1000 Kansas City, Missouri 64112 Telephone (816) 983-8000 Facsimile (816) 983-8080 aj.james@huschblackwell.com

Counsel for Amici Curiae