ALLOCATION OF CARES ACT GRANTS

July 27, 2020

Amy Huber
U.S. Department of Education
400 Maryland Ave., SW
LBJ Room 3W219
Washington, DC 20202

RE: DOCKET ID NUMBER: ED-2020-OESE-0091, CARES ACT PROGRAMS; EQUITABLE SERVICES TO STUDENTS AND TEACHERS IN NON-PUBLIC SCHOOLS.

On behalf of the 65,000 members of the Texas State Teachers Association (TSTA), I am submitting the following comment in response to the U.S. Department of Education's (ED's) interim final rule (IFR) regarding the allocation of equitable services to students and teachers in non-public schools under grants appropriated in the Coronavirus Aid, Relief, and Economic Security (CARES) Act (Public Law 116-136), published in the Federal Register on July 1, 2020.

On April 9, 2019 and August 1, 2019, our national affiliate, the National Education Association (NEA), submitted comments related to guidance that exceeded statutory authority related to consultation and the delivery of equitable services under the Title I, Part A of the Elementary and Secondary Education Act of 1965, as amended by the Every Student Succeeds Act (ESSA). ***Because the IFR reflects these same deviations from statute, TSTA is echoing the objections here. In addition, the formula under which local education agencies (LEAs) would be required to calculate the extent to which non-public schools would receive equitable services is inconsistent with the statute.***

EDUCATION FUNDS APPROPRIATED UNDER CARES ACT

The CARES Act appropriated two sets of funds for PreK-12 education stabilization due to the burdens schools have faced as a result of the coronavirus disease of 2019 (COVID-19): Section 18002 provides the Governor's Emergency Education Relief Fund (GEERF) and Section 18003 provides the Elementary and Secondary School Emergency Relief Fund (ESSERF). Under the provisions of these laws, grants are provided by ED to the state education agencies (SEAs), who are then responsible for distributing subgrants to their respective LEAs. Section 18005 was included to provide assistance to non-public schools, and paragraph (a) of this section states the following:

> ***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.***

Equitable services under ESSA are to be allocated based on the number of students living in poverty attending the public and non-public schools in each LEA. While ED is allocating GEERF and ESSERF grants according to the formula described in section 1117 of the ESEA (20 U.S.C. §6320), and the SEA will allocate subgrants to LEAs using the same formula, LEAs are subject to a different formula under this guidance. Specifically, ED is stating that LEAs must provide the proportionate share of grants based on the total number of students in public and non-public schools in a given LEA.

Specifically, section 1117 paragraph (b)(1)(J) states that LEAs should consult with non-public school officials to determine the following:

> ***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.***

ED makes two claims in the IFR that are incorrect. First, ED inaccurately claims that the statute is ambiguous, and therefore they have the authority to interpret the statute as provided under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 844 (1984). Second, ED claims that calculating equitable services as defined in section 1117 would "disadvantage some students based simply on where they live," while inferring that their calculation would not. They make this claim based on the idea that, as ED states, "the pandemic has harmed *all* our Nation's students by disrupting their education." This statement infers the erroneous conclusion that the harm has been experienced equally.

Question of Ambiguity

ED opens the rule with the legal framework to argue that because of the ambiguity of the statute they have the authority to issue a clarifying interpretation. Specifically, they state that because the CARES Act, as a whole, was written to provide needed support for the entire American public suffering from the effects of COVID-19, this section of the law requires clarification that makes it harmonious with the entirety of the law. They state that the phrase "in the same manner" as written in section 18005(a) makes Congressional intent unclear. The addition of the phrase provides additional clarification for the use of the ESEA formula. In fact, what causes ambiguity is the IFR itself.

Furthermore, ED makes the statement that because a definition is not given in the law, and therefore, the calculation of CARES Act equitable services is ambiguous, they must interpret it within the context of the whole law.[1] The purpose of the law is to provide relief to those institutions that have experienced particular hardships due to the health and economic effects of COVID-19. Public schools were quickly forced to decide how to continue providing quality education and other social services in a remote format, including school meals, special education, and social-emotional services. Private schools have been able to take advantage of relief programs above and beyond ESSERF and GEERF, such as the paycheck protection program under section 1102 of the CARES Act,[2] programs to which public schools were not entitled.

PANDEMIC IS NOT EXPERIENCED EQUALLY

In the background section of the IFR, ED makes the assertion that the pandemic was experienced equally. They continue to state, "Nothing in the CARES Act suggests Congress intended to differentiate between students based upon the public or non-public nature of their school with respect to eligibility for relief." The CARES Act statute was not one to intend that there is a difference between public and private schools. Indeed, the CARES Act funding does provide for equitable services to non-public schools. The purpose of ESSERF was specifically to assist those students who have been disproportionately affected by the negative effects of COVID-19, regardless of the school they attend.

Public schools serve all students, regardless of any personal characteristics including but not limited to race, ethnicity, sexual orientation, gender identity, ability/disability, or family income. Certain communities, especially communities of color, have been disproportionately affected by the negative effects of the disease.[3] Because of this, it is vital that students with the highest need are the ones receiving the appropriate financial support that has been appropriated under the CARES Act. Robbing our nation's most underserved students of these resources only exacerbates the inequality of educational opportunity, and it violates these students' constitutionally protected civil rights.

ED has provided two potential formulas to calculate equitable services: by total population or by low-income population. However, the entire rule is written in a way that advocates the total population formula be used. This calculation is not one that is provided in section 1117 of the ESEA, and therefore is in violation of the CARES Act statute.

TSTA respectfully submits the above comments for consideration and urges the U.S. Department of Education to amend the IFR of equitable services under section 18005 of the CARES Act to require LEAs to follow the statutorily required calculation as provided under section 1117 of the ESEA. Please do not hesitate to contact me or Portia Bosse at portiab@tsta.org should you have any questions.

Sincerely,

Ovidia Molina, President

1) ED cites *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 132–33 (2000) as the rationale for doing so.
2) See, e.g., https://www.washingtonpost.com/local/education/despite-pushback-sidwell-and-other-dc-area-prep-schools-are-keeping-their-small-business-loans/2020/05/05/8590893e-8df8-11ea-9e23-6914ee410a5f_story.html
3) See, e.g., https://www.brookings.edu/blog/fixgov/2020/04/09/why-are-blacks-dying-at-higher-rates-from-covid-19/