Congress of the United States
Washington, DC 20515

July 31, 2020

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

Re: Docket ID ED-2020-OESE-0091

Dear Secretary DeVos:

We write to express our concerns regarding the U.S. Department of Education's (Department) interim final rule (IFR) interpreting the equitable services provision of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act). Through this rule, the Department has distorted the plain language of the CARES Act to potentially divert federal emergency aid dollars intended for public school students to private schools—denying public school students in Illinois an estimated $75 million, according to analysis by the Learning Policy Institute.

In April, the Department first released its unlawful interpretation of the CARES Act requirement that local educational agencies (LEAs) provide equitable services to private school students "in the same manner" as section 1117 of the Elementary and Secondary Education Act (ESEA) of 1965 as non-binding guidance. Despite multiple states indicating that they would ignore this guidance and follow the letter of the law, the Department codified its unlawful interpretation and improperly imbued it with the immediate force of law.

Due to the uncertainty and confusion caused by the Department's erroneous interpretation, the Illinois State Board of Education has instructed LEAs to hold the disputed funds in escrow, meaning these funds are sitting unused instead of helping LEAs meet the incredible challenge of educating students during the coronavirus pandemic. Chicago Public Schools estimates that it could lose approximately $10 million due to the IFR and has joined a number of states and school districts in filing suit against the Department. Outside Chicago, West Aurora School District 129 is estimating a loss of over $300,000, and Woodstock Community Unit School District 200 stands to lose over $75,000—significant portions of each district's total allocation under the CARES Act. These are just a few examples of the communities in Illinois negatively impacted by the IFR.

The IFR violates both the letter and intent of the CARES Act and runs counter to decades of federal education law, denying critical relief to public schools at a time of unprecedented crisis in our education system. We urge you to rescind this rule and all associated guidance, allowing states to comply with the CARES Act as Congress wrote it and utilize all emergency resources to safely reopen public schools for the following reasons:

1.) The plain language of the CARES Act directs LEAs to reserve funds for equitable services in direct proportion to the number of low-income students in private schools. According to the Congressional Research Service's (CRS) recent legal analysis (CRS memo), "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."[1] Specifically, section 18005 of the CARES Act requires LEAs to provide equitable services "in the same manner as provided under section 1117 of [Title I-A of the ESEA] of 1965."[2] Because the allocation calculation is a statutory component of section 1117,[3] this mandates LEAs reserve the same proportion of CARES Act funds for equitable services under the CARES Act as LEAs reserve under Title I-A. Stated differently, LEAs must calculate their equitable services reservation as described above, by counting the number of low-income students enrolled in private schools.

2.) The Department's IFR claims ambiguity where none exists and develops two alternative interpretations of the CARES Act in conflict with the statute. The Department claims that the CARES Act text requiring LEAs to "provide equitable services in the same manner as provided under section 1117 of the ESEA of 1965" is ambiguous. The Department argues that "in the same manner" requires deviation from some of the mechanisms of section 1117 and "if [Congress] simply intended to incorporate "section 1117 of the ESEA of 1965 by reference in the CARES Act… [t]he unqualified phrase "as provided in" alone would have been sufficient."[4] It concludes that because Congress did not use the magic words "as provided in," the Department may cast off the calculation formula in section 1117 and develop its own. This argument is wrong. In the 2012 Supreme Court decision in *National Federation of Independent Businesses (NFIB) v. Sebelius* the Court held that "when the phrase "in the same manner" references a specific provision in the law, that specific reference supplies the methods or procedures for the agency to follow."[5] The Court's interpretation of this phrase is controlling, requiring LEAs to provide equitable services using the "methods or procedures" required under section 1117 to implement the equitable services provision, including the calculation for the funding allocated for the provision of equitable services.

When Congress directed equitable services to be provided "in the same manner as section 1117" it meant for LEAs to follow standard practices outlined in ESEA Section 1117 when reserving and using funds for equitable services. Instead, the Department has promulgated a rule that distributes funds in a different manner. The Department claims to be providing LEAs two options for compliance, but, is forcing LEAs to adhere to the mandate of the April 30 equitable

[1] Enclosure 1, Congressional Research Service Legal Memo. "*Analysis of the CARES Act's Equitable Services Provision."* July 1, 2020. P. 2.
[2] Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, § 18005 (2020).
[3] The Elementary and Secondary Education Act of 1965, as amended, § 1117(a)(4)(A)(i), 20 U.S.C. § 6320(a)(4)(A)(i)).
[4] CARES Act Programs; Equitable Services to Students and Teachers in Non-Public Schools, 85 Fed. Reg. 39,479, 39,481(July 1, 2020).
[5] Enclosure 1, Congressional Research Service Legal Memo. "*Analysis of the CARES Act's Equitable Services Provision."* July 1, 2020. P. 11

services guidance because the Department's proposed alternative incorporates onerous restrictions on the use of funds where no such restrictions exist in statute.

3.) The Department's April 30 directive, contained in the IFR as option one, conflates which students LEAs must count for allocation purpose with which students may be the beneficiaries of equitable services. The Department's foundational argument in support of the rule's first option is that "if 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." This imagines a distinction between the CARES Act and Title I where none exists and draws a conclusion from that imagined distinction, which does not follow.[6] The Department's April 30 guidance attempts to distinguish between the CARES Act and Title I equitable services claiming that "the services that an LEA may provide under the CARES Act programs are clearly available to *all* public school students and teachers, not only low-achieving students and their teachers as under Title I, Part A."[7] The Department claimed that this distinction necessitated the Department's reinterpretation of section 1117 as applied to CARES Act funds[8] and its rule repeats a version of this claim.[9] But these assertions misrepresent the facts.[10] In reality, in most cases Title I-A allows LEAs to provide schoolwide services, not services targeted only at low-achieving students. Schoolwide services, by definition, serve all public-school students in attendance at Title I schools. In fact, according to the Department's own National Center for Education Statistics, 95 percent of all students served in Title I-A participating public schools, receive services in schoolwide programs.[11]

The Department's rule claims that the most consequential sub-sections of section 1117, those governing the equitable services allocation, "are inapposite in a CARES Act frame" because of this perceived tension between allocation and use.[12] But the CRS memo confirms that "there is no inherent tension in Congress directing the equitable share of a fund that is, at least in part,

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[6] *See also* Enclosure 1, Congressional Research Service Legal Memo. "*Analysis of the CARES Act's Equitable Services Provision."* July 1, 2020. P. 12, 16. (The CRS memo indicates that the Department's argument "may elevate a general conception of equity …over the specific procedures set out in section 1117." And also states that using the "in the same manner" phrase in statute, "Congress, likely meant to indicate *how* LEAs should provide equitable services with relief funds rather than *for what or to whom*.")

[7] *See* U.S. Department of Education, Providing Equitable Services to Students and Teachers in Non-Public Schools Under the CARES Act Programs, page 6 (Apr. 30, 2020).

[8] *See Id at 6* ("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.")

[9] CARES Act Programs; Equitable Services to Students and Teachers in Non-Public Schools, 85 Fed. Reg. 39,479, 39,481 (July 1, 2020). ("Eligible public school students must live in a school attendance area selected to participate under Title I and be low achieving.")

[10] *See also,* Enclosure 1, Congressional Research Service Legal Memo. "*Analysis of the CARES Act's Equitable Services Provision."* July 1, 2020. P. 17 ("[T]he 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 students as the way (i.e. manner) to determine equitable share.")

[11] National Center for Education Statistics, *Study of the Title I, Part A Grant Program Mathematical Formulas* (2019), Executive Summary.

[12] CARES Act Programs; Equitable Services to Students and Teachers in Non-Public Schools, 85 Fed. Reg. 39,479, 39,481 (July 1, 2020).

income-based to be distributed based on income."[13] When Congress directed LEAs to provide CARES Act equitable services in the same manner as provided under 1117 it did not parse the applicable subsections of section 1117. The Department may not do so in absence of Congressional direction.

4.) The IFR's option two is not a possible option, especially for high-poverty LEAs, and has no basis in law. Under option two, LEAs may allocate funds for equitable services in accordance with the requirements of section 1117, but LEAs must abide by two restrictions rendering this option both untenable and functionally impossible. First, LEAs may only distribute CARES Act funds to Title I-participating schools. Second, the Department requires LEAs employing this option to comply with the supplement, not supplant requirement in section 1118(b) of ESEA. These requirements are not rooted in the CARES Act, would deprive tens-of-thousands of public schools from receiving CARES Act aid, and have rendered this option an impossibility for many LEAs.

While the Department claims this requirement ensures CARES Act funds are spent only on low-income students, it actually deprives countless low-income students the benefit of emergency aid by prohibiting funds from flowing to Title I *eligible* schools (low-income public schools) that do not participate in Title I due to lacking annual appropriations. The Department's restriction ignores this reality and will prevent LEAs from distributing funds to more than 10,000 schools serving sufficient numbers of low-income students to be eligible for Title I-A but not receiving Title I-A dollars.[14] Option two also subjects states and LEAs to supplement, not supplant requirements for Title I-A funds, a requirement that has no textual basis in the CARES Act, as noted by the Department. [15] In the Title I-A context, supplement, not supplant restricts states and LEAs from reallocating state and local funds from Title I-A recipients and replacing them with Title I-A aid, preventing the dilution of Title I-A aid. The supplement, not supplant requirement serves an important purpose in the Title I-A context, by ensuring that the federal investment in Title I-A increases the funds available to serve those schools instead of simply changing their source. But as applied to the CARES Act, a supplement, not supplant requirement would prevent LEAs from exclusively directing CARES Aid to Title I schools while allocating extremely limited state and local resources to pay all remaining costs.

5.) The process by which the Department issued this rule is deeply flawed. The Department's claim that it has good cause to bypass both standard Administrative Procedures Act-mandated 30-day waiting period lacks merit. Courts have repeatedly held that events outside an agency's control may justify good cause if those events necessitate a rulemaking with immediate effect of

[13] Enclosure 1, Congressional Research Service Legal Memo. "*Analysis of the CARES Act's Equitable Services Provision."* July 1, 2020. P. 17

[14]Based on data available from the Elementary/Secondary Information System maintained by NCES, for the 2017-18 school year 11,434 schools were eligible for either Title I targeted assistance or Title I schoolwide programs but did not participate in those programs. *See,* Dep't of Educ. National Center for Education Statistics, *Elementary/Secondary Information System*

[15] Department of Education, *Providing Equitable Services to Students in Teacher in Non-Public Schools Under the CARE Act Programs FAQ*, p. 12 (2020).

law.[16] However, those cases are limited to "exceptional circumstances" to prevent an agency from "simply wait[ing] until the eve of a statutory, judicial, or administrative deadline, then rais[ing] up the 'good cause' banner and promulgat[ing] rules without following APA procedures."[17] In other words, courts have held that "good cause may not arise as a result of the agency's own delay."[18] If it was necessary for the rule to take effect on July 1, the Department could have published this rule a full month after Congress passed the CARES Act, while providing both 30-day periods and meeting its deadline. Instead, the Department waited more than three months to publish the rule and insisted that in the interim LEAs either comply with the Department's equitable services guidance or hold the CARES Act funds in escrow.[19]

In the interest of public schools, teachers, and students in Illinois and the rule of law, we call on the Department to immediately rescind this rule and all related guidance.

Sincerely,

Lauren Underwood
Member of Congress

Richard J. Durbin
United States Senator

Tammy Duckworth
United States Senator

Danny K. Davis
Member of Congress

Bobby L. Rush
Member of Congress

Jesús G. "Chuy" García
Member of Congress

Bill Foster
Member of Congress

Jan Schakowsky
Member of Congress

Mike Quigley
Member of Congress

Bradley S. Schneider
Member of Congress

Sean Casten
Member of Congress

Cheri Bustos
Member of Congress

Robin Kelly
Member of Congress

Raja Krishnamoorthi
Member of Congress

[16] *See, e.g., American Federation of Government Emp., AFL-CIO v. Block*, 655 F.2d 1153, 1157 (D.C. Cir. 1981); *see also Nat. Res. Def. Council v. Nat'l Highway Traffic Safety Admin.*, 894 F.3d 95, 114 (2d Cir. 2018), and *United States v. Valverde*, 628 F.3d 1159, 1166 (9th Cir. 2010)

[17] *Council of Southern Mountains, Inc. v. Donovan*, 653 F.2d 573, 581 (D.C. Cir. 1981).

[18] *NRDC v. Nat'l Highway Traffic Safety Admin.*, 894 F.3d 95, 114-15 (2d Cir. 2018). *Nat'l Educ. Ass'n v. DeVos*, 379 F. Supp. 3d 1001, 1027 (N.D. Cal. 2019) (ruling against the Department because "the time pressures faced by the Department were of its own making").

[19] *See* Letter from The Honorable Elizabeth "Betsy" DeVos to Carissa Moffat Miller (May 22, 2020).