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July 31, 2020

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

**RE: COMMENTS FROM THE NATIONAL SCHOOL BOARDS ASSOCIATION  
(NSBA) OPPOSING THE U.S. DEPARTMENT OF EDUCATION’S INTERIM FINAL  
RULE REGARDING EQUITABLE FUNDING DISTRIBUTION OF THE CARES  
ACT, DOCKET ID ED–2020–OESE–0091**

Dear Ms. Huber:

The National School Boards Association (NSBA) is submitting comments in strong opposition to Docket ID ED–2020–OESE–0091, the Department of Education’s Interim Final Rule regarding equitable funding distribution by Local Education Agencies (LEAs) under the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), which was passed to help public schools impacted by COVID-19. If this rule is enacted, it will prevent many deserving public schools from receiving adequate funding that they desperately need to support their most hard-pressed students during this national emergency. NSBA and local school board members support providing equitable services to nonpublic school students as is prescribed in the Elementary and Secondary Schools Act (ESEA). However, both approaches offered by this rule will harm many low-income students whom Congress intended to help through the CARES Act.

NSBA is a not-for-profit organization and federation of 49 state associations and the U.S. territory of the Virgin Islands, representing more than 90,000 school board officials, that advocate for public education. Local school board members govern approximately 14,000 local school districts serving more than 50 million public school students accounting for 90% of the nation’s students in K-12 education. Advocating for equity and excellence in public education through school board governance and the belief that public education is America’s most vital institution is at the core of NSBA’s goals and mission. Education is a civil right necessary to the dignity and freedom of the American people, and all children deserve access to an education which encourages them to reach their potential.

  
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## **I. Clear Statutory Language and Congressional Intent of the CARES Act**

When Congress passed the CARES Act, it provided approximately \$13.23 billion for an Elementary and Secondary School Emergency Relief (ESSER) Fund to be allocated to state and local education agencies (SEAs and LEAs) based on their share of Title I, Part A funding in the 2019 fiscal year. Section 18005(a) of the CARES Act provides 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. Equitable services must be provided “in the same manner as provided under section 1117 of the ESEA of 1965.”<sup>1</sup> This clear and unambiguous language sets out the firm direction of Congress and the legislative intent to use the same allocation method for CARES Act funding as is used for Title I. Section 1117(a)(4)(A) of ESEA lays out how that allocation is to take place. “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.”<sup>2</sup>

Numerous members of Congress have clarified that their intent was to help the most vulnerable students, which is why the Title I model was used in the legislation.<sup>3</sup> Allocating funds under the existing procedures for Title I provides the most expeditious path to disperse funds quickly and efficiently so resources can be provided to help the neediest students and schools during this national emergency, as Congress clearly intended. It is imperative that CARES Act funding be distributed following the Title I allocation method.

## **II. The Proposed Rule Has Unnecessarily Delayed the Distribution of Funds**

Despite the clear and unambiguous language of the CARES Act and the intent of Congress, the U.S. Department of Education (ED) released nonbinding guidance that is contrary to the allocation method outlined in the law. Rather than follow the normal distribution of funds under Title I, ED chose to change the process and offer guidance that would base distribution on total private school enrollment instead of using poverty levels as is used for Title I allocations. Upon announcement of the guidance, there was an immediate outcry opposing ED’s decision, as it would fundamentally alter how equitable services are normally allocated. The decision caused confusion and unnecessary delay of the distribution of funds. Although there was a widespread concern from numerous education advocates, including NSBA, that the guidance was misguided

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<sup>1</sup> Public Law No: 116-136, Coronavirus Aid, Relief, and Economic Security (CARES) Act, Section 18005 (a)(b), Assistance to Non-Public Schools.

<sup>2</sup> Public Law No: 114-95, The Every Student Succeeds Act (ESSA), Section 1117 [20 U.S.C. 6320], Participation of Children Enrolled in Private Schools.

<sup>3</sup> Bipartisan Letter to U.S. Secretary of Education Betsy DeVos from Seventy-Four U.S. Representatives, June 25, 2020.

and burdensome, ED ignored the strong public opposition and has now moved to codify the guidance through this interim final rule.

This equitable services guidance and proposed rule to direct LEAs to distribute CARES Act money based on total private school student enrollments instead of poverty levels under Title I will create numerous problems for local schools and their students. The rule fails to acknowledge 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. Congress intended the allocation of ESSER funding to be directed to both the state and local levels based on 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. Basing distribution on any other method defeats the main point of the legislation and is in opposition to the clear language and intent of Congress.

Several states have filed a lawsuit to prevent this diversion of funds due to its negative impact on their public schools. In media reports concerning the litigation, officials in Wisconsin report that nearly \$4.2 million would be diverted away from public schools to private institutions; in Michigan officials claim that the rule could cost public schools in the state as much as \$16 million in lost funds; and officials in California state that \$1.6 billion in aid could be impacted.<sup>4</sup> These stark examples demonstrate the severe consequences to public school students if this rule is enacted

The Department's directive on equitable services under the CARES Act is hurting the very students Congress sought to help through the legislation. The proposed rule creates an inequitable situation where wealthier children in private schools are counted and used to generate the equitable services share of CARES Act funding for their private schools at the direct expense of low-income children in public schools. This final interim rule should be rejected to ensure that the equitable services share for private schools is determined by poverty rates rather than overall enrollment, creating a fair and equitable situation for all students.

### **III. Public Schools are Facing an Unprecedented Moment in Time**

COVID-19 has created an unprecedented moment for public schools. School buildings across the nation have closed, and students have shifted to online learning. The challenges facing public schools are enormous as they provide instruction virtually while planning for the eventual return of students to school buildings. Creating delays in allocation so more funds can be taken away from local community schools and shifted to private education is the wrong priority to help K-12 education adjust during this extraordinary time. Public school districts are facing the reality that more than sixteen million students lack adequate access to the Internet. They are trying to help

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<sup>4</sup> Scott Neuman, "States Sue Education Department Over Allocation Of Pandemic Funds To Schools," National Public Radio, July 7, 2020, <https://www.npr.org/sections/coronavirus-live-updates/2020/07/07/888793021/states-sue-education-department-over-allocation-of-pandemic-funds-to-schools>.

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students with disabilities in a myriad of ways. They are working to continue to offer nutrition for their neediest students. They are planning how to best offer instruction in the fall. Yet, while undertaking these activities they are operating under limited funding and resources. Public schools are not receiving any funds under the Paycheck Protection Program, but private schools are receiving billions. Enactment of this rule would further exacerbate the inequities millions of students who attend public schools are facing already due to lack of resources.

Further, the rule's provision permitting LEAs to use the traditional funding mechanism for equitable services as long as those LEAs spend funds only on students and teachers in Title I schools confuses the difference between the distribution and the allowed uses of funds. This is not a workable alternative. The clearest path forward is for each LEA to calculate what proportion of its FY19 Title I allocation was used for equitable services and provide that same share of CARES Act funding available for equitable services to eligible students attending local private schools, consistent with Title I and the Cares Act.

The limited funding provided under the CARES Act is already woefully short of the more than \$200 billion that NSBA has determined is necessary to support public schools during this momentous moment in history. Creating a delay in allocation and shifting valuable taxpayer funds to private schools and away from our most deserving students attending public schools is harming the very students Congress sought to protect. This is the time to put away political agendas and focus on the best way to help as many students as possible. That can only be accomplished by rejecting this interim final rule and proceeding with funding allocations based on the method used for Title I.

The National School Boards Association (NSBA) urges you to reject this rule and to support public schools and the millions of students who attend them as educators across the nation strive to serve all their students during this extraordinary time.

Sincerely,



Anna Maria Chávez  
Executive Director & CEO  
National School Boards Association



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