



May 19, 2020

The Honorable Andrew Cuomo
Governor of New York
New York State Capitol Building
Albany, New York 12224

Re: CARES Act Equitable Services

Dear Governor Cuomo:

As you know, Congress approved \$1.1 billion in the Elementary and Secondary School Emergency Relief (ESSER) Fund to be allocated to New York public school districts and \$164.6 million for K-12 and higher education in the Governor's Emergency Education Relief (GEER) Fund in the Coronavirus Aid, Relief, and Economic Security Act (CARES Act). Congress intended the federal relief to provide New York districts with additional funds for resources such as internet connectivity, devices and online learning platforms to address the "digital divide" disproportionately impacting students in the state's higher poverty districts.

We write to bring to your immediate attention an issue that has arisen that will, if not addressed by your Administration, reduce the emergency relief CARES Act funds received by New York school districts. In guidance issued on April 30, United States Secretary of Education Betsy DeVos has advised states that a proportional share of both ESSER and GEER federal emergency funds must be set aside not just for low income students in private schools, as is required under Title I of the Elementary and Secondary Education Act (ESEA) as amended by the Every Student Succeeds Act (ESSA), but for all private school students without regard to household income.

Secretary DeVos' directive on serving private school students is based on a patent misreading of the federal CARES Act and Title I statute. It would also significantly diminish the resources available to public school districts, or local education agencies (LEAs), to provide effective and equitable remote learning opportunities for their students. We, therefore, request that your Administration reject Secretary DeVos' legally flawed directive and decline to adopt her erroneous interpretation of the laws governing distribution of CARES Act relief funds.

The Secretary's directive is contained in an April 30 guidance document titled "Providing Equitable Services to Students and Teachers in Non-Public Schools Under CARES Act Programs" (April 30 Guidance).¹ As we explain, the non-binding April 30 Guidance violates the express language of the CARES Act and Title I statute, is inconsistent with longstanding United States Education Department (USED) interpretations of Title I and the ESEA, and would, if followed, promote inequity in the distribution of funds at the expense of our most vulnerable students.

Notably, Congress included an explicit provision in the CARES Act requiring any school district or LEA that receives emergency federal funds to provide "equitable services" to students and teachers in non-public schools "in the same manner as provided under section 1117 of the [ESEA]." Section 18005(a) of the CARES Act. In turn, section 1117(a)(4)(A) and (c) of the ESEA explicitly provide that the proportion of the federal funds to be allocated to serving private school children shall be equal to the proportion of low-income children who attend private schools. Moreover, the calculation of equitable services under Section 1117 of the ESEA has consistently been interpreted by USED to depend on the numbers of low income students attending both public and non-public schools.² Indeed, there has never been any doubt that the Title I program of the ESEA is intended to direct federal funds to at-risk low income students who are in need of supplemental programs and services to succeed in school.

In direct contradiction to the express language of the CARES Act and USED's prior interpretation of the ESEA, Secretary DeVos, in her April 30 Guidance, states that "[u]nlike Title I, Part A, equitable services under the CARES Act programs are not based on residence in a participating Title I public school attendance area and are also not limited only to low-achieving students and their teachers." See April 30 Guidance at p. 5, Q&A 9, and p. 5, Q&A 7 (stating that for "CARES Act programs, the LEA need not collect poverty data from non-public schools"). Rather than calculate the

¹ The Secretary's guidance is available at <https://oese.ed.gov/files/2020/04/FAQs-Equitable-Services.pdf>.

² See, for example, Title I, Part A of the ESEA as amended by ESSA: Providing Equitable Services to Eligible Private School Children, Teachers, and Families, Updated Non-Regulatory Guidance, October 2019, available at <https://www2.ed.gov/about/inits/ed/non-public-education/files/equitable-services-guidance-100419.pdf>.

proportional share of equitable services based on student poverty rates, as is required under Title I, the Secretary improperly instructs LEAs to use overall private school enrollment, without regard to income levels. April 30 Guidance at p. 6, Q&A 10B & 10C.

In her April 30 Guidance, Secretary DeVos is clearly advancing her personal preferences of reducing federal emergency CARES Act funds to public schools and redirecting as much of that funding as possible to private schools. The Secretary seeks to accomplish her objective by instructing public schools to not only set aside funds for low income private school students, but also students in every income bracket, including the most wealthy. By allowing even the wealthiest students in the most expensive private schools to receive services paid for with CARES Act funds, New York would divert millions that could be used by LEAs to meet the critical needs of low income students.

For example, using enrollment numbers from the New York State Education Department (NYSED) reports, we estimate that in the New York City public schools, calculating equitable services based on total private school enrollment rather than the poverty rate will result in a loss to the district of approximately \$38 million more in federal CARES Act funds, with \$126 million, instead of \$88 million, directed to private schools. Similarly, Syracuse will lose \$575,000, Buffalo \$705,000, and Yonkers over \$1 million. Compounding these impacts, the districts will have to provide the additional funds for equitable services to private schools directly from their already reduced budgets given that the state aid cut in the FY21 State Budget effectively nullified any increase in funding from the CARES Act.³

Secretary DeVos' directive also ignores the recent lessons from President Donald Trump's distribution of emergency loans to private college preparatory programs serving large numbers of more affluent students.⁴ The COVID-19 pandemic has laid bare existing

³ Education Law Center, "New York's Pandemic Adjustment: Depriving Resources to Students Impacted by COVID-19," available at: https://edlawcenter.org/assets/files/pdfs/publications/NY_Pandemic_Adjustment_final.pdf

⁴ LA Times, "Trump and Mnuchin pressure well-heeled private schools to return federal loans," May 1, 2020, available at <https://www.latimes.com/california/story/2020-05-01/la-me-coronavirus-private-schools-ppp-mnuchin>.

inequities in New York public schools, including the digital divide. As Governor, you must do everything possible to target federal emergency funds to ameliorate those inequities for public school students most in need.

Finally, disregarding Secretary DeVos' directive is compelled by New York's constitutional obligation to provide "sound basic education," defined by the New York Court of Appeals as "a meaningful high school education," in the landmark *Campaign for Fiscal Equity* rulings. N.Y. Const., Art. IX, Sec. 1. The fundamental right of New York students to a public education that prepares them for citizenship and the economy is one that must remain prominent, paramount and fully protected.

For these reasons, we urge your Administration to reject Secretary DeVos' invitation to funnel significant sums of federal emergency CARES Act funds to private schools, in contravention of law. Instead, we urge NYSED to direct all New York districts to set aside funds for private schools in a manner consistent with well-established legal precedent by basing set-aside calculations on private school student poverty rates, not overall enrollments.⁵

Thank you for your attention to this critical issue. ELC stands ready to work with your Administration to take prompt action to ensure New York provides sufficient resources to end the digital divide for all public school students.

Sincerely,



David G. Sciarra, Esq.
Executive Director

Cc: Honorable Letitia James, New York Attorney General
Betty Rosa, Chair, New York Board of Regents
Shannon Tahoe, New York Interim Commissioner of Education
Richard Carranza, Chancellor, NYC Public Schools

⁵ The Indiana State Superintendent has directed Indiana districts not to follow the Secretary's flawed guidance. See Indiana Department of Education, "Final Language for Equitable Share of CARES Act Funds," (May 12, 2020), available at <https://www.doe.in.gov/sites/default/files/grants/finallanguage-equitable-share-cares-51220.pdf>.