



September 11, 2020

Honorable Kevin Dehmer, Interim Commissioner
New Jersey Department of Education
P.O. Box 500
Trenton, New Jersey 08625

Honorable Gurbir S. Grewal, Attorney General
Office of the Attorney General
P.O. Box 080
Trenton, New Jersey 08625

Re: CARES Act Equitable Services: *NAACP v. DeVos*

Dear Commissioner Dehmer and General Grewal:

I write to bring to your immediate attention the ruling issued on September 4, 2020, by the U.S. District Court for the District of Columbia, invalidating the U.S. Department of Education's (USED) Interim Final Rule, 85 Fed. Reg. 39,479 (July 1, 2020), regarding equitable services to private school students under the Coronavirus Aid, Relief, and Economic Security (CARES) Act. This ruling is applicable nationwide.

I attach Judge Dabney L. Friedrich's Memorandum Opinion and Order in *NAACP v. DeVos*, granting the plaintiffs' motion for summary judgment and vacating the USED Interim Final Rule.

As you know, in the CARES Act, Congress authorized funds for local educational agencies (LEAs) to address the impacts of COVID-19 on public education through the Elementary and Secondary School Emergency Relief (ESSER) Fund and the Governor's Emergency Education Relief (GEER) Fund. The CARES Act directs that LEAs receiving GEER and ESSER funds "shall provide equitable services in the same manner as provided under § 1117 of the ESEA of 1965 [Title I] to students and teachers in non-public schools..." Pub. L. No. 116-136, 134 Stat. 281 (2020) (to be codified as 20 U.S.C. § 3401) § 18005. The referenced provision of Title I states: "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.*" 20 U.S.C. § 6320(a)(4)(A)(i) (emphasis added).

In its Interim Final Rule promulgated in July 2020, the USED construed the CARES Act to require LEAs to treat all private schools as entitled to equal funding as public schools, regardless of their low-income student populations. The New Jersey Department of Education (NJDOE or State) has instructed LEAs to follow the USED's Interim Rule and provide a proportionate share of its ESSER funds for equitable services to private schools based on the schools' total enrollment,

and not the enrollment of low income students attending private schools. Specifically, the NJDOE has issued the following directive:

Per USDE's above guidance the NJDOE based proportionate share for equitable services under ESSER on total enrollment data for the LEA as submitted by the LEAs in NJSMART and the non-public schools in the LEA as submitted by nonpublic schools in the annual Nonpublic School Enrollment Report. Using the proportion of students who are enrolled in non-public schools, the State determined the amount of funds available for equitable services based on that proportionate share of the LEA's total allocation under ESSER.

See: <https://www.nj.gov/education/covid19/boardops/caresact.shtml>.

Further, the Attorney General has advised that the State has "set aside" GEER funds to cover any "difference between the portion of each district's ESSER allocation that the district must dedicate to equitable services for nonpublic schools (based on the federal guidance) and the portion of the ESSER allocation that the district would have to dedicate to equitable services if equitable shares were based on nonpublic schools' share of Title I-eligible students residing in the district." Letter of Attorney General to David Sciarra, July 24, 2020. Thus, the State, in its allocation of both ESSER funds and GEER funds is requiring LEAs to provide equitable services to all private school students, not just those who are low income.

In her decision in *NAACP v. DeVos*, Judge Friedrich held that the Interim Final Rule is "contrary to the unambiguous mandate of the [CARES] Act." As a result of this ruling, LEAs are obligated only to set aside ESSER and GEER funds for equitable services based on the the number of *low-income students* attending private schools -- as required by the CARES Act and Title I -- not based on the total number of private school students.

Finally, on September 9, the USED posted an update acknowledging that "[o]n September 4, 2020, in *NAACP v. DeVos*, the U.S. District Court for the District of Columbia issued an opinion and an order vacating the IFR. Accordingly, the IFR is no longer in effect." See: <https://oese.ed.gov/offices/education-stabilization-fund/elementary-secondary-school-emergency-relief-fund/?source=email>.

Accordingly, Education Law Center (ELC) requests the State take immediate action to comply with Judge Friedrich's ruling. Specifically, we ask the NJDOE to issue notice to LEAs rescinding its prior guidance on equitable services to private schools and direct LEAs to: 1) halt any further expenditures for equitable services based on total private school enrollments; 2) restrict those expenditures to only low income enrollments in those schools; and 3) take action to recover any funds inappropriately used to provide equitable services under the invalid Interim Rule.

We also ask the State to assist LEAs in taking these steps, including measures as may be necessary to recoup funds that may have been spent on equitable services on private school students not eligible for those services under the CARES Act.

Thank you for your attention. ELC is available to assist your efforts in resolving this important matter.

Sincerely,

A handwritten signature in black ink, appearing to read "David Sciarra". The signature is fluid and cursive, with the first name "David" being more prominent than the last name "Sciarra".

David G. Sciarra, Esq.
Executive Director

cc: Matthew Platkin, Governor's Counsel
George Helmy, Governor's Chief of Staff