



September 11, 2020

Dr. Betty Rosa
New York State Interim Commissioner of Education
New York State Education Building
89 Washington Avenue
Albany, NY 12234

Honorable Letitia James, Attorney General
Office of Attorney General
The Capitol
Albany, NY 12224-0341

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

Dear Commissioner Rosa and General James:

I write to bring to your immediate attention a ruling issued September 4, 2020, by the U.S. District Court for the District of Columbia, invalidating the U.S. Department of Education's (USED's) 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's Interim Final Rule.

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 the Interim Final Rule promulgated in July 2020, the USED incorrectly 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 rule gave LEAs two "options." Under the first option, an LEA could determine the proportional share of funding for equitable

services based on the number of children from low-income families who attend private schools. However, if an LEA chose this option, it would face two restrictions not found in the CARES Act: (1) the LEA would be prohibited from using any CARES Act funding in its non-title I schools, and (2) the LEA's CARES Act funding would be subject to the "supplement not supplant" rule. Under the second option, an LEA could use its CARES Act funding in all of its schools without the "supplement not supplant" restriction *only* if it determined the proportional share of equitable services funding based on *all* children who attend private schools.

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, the two options for LEAs set forth in the Interim Final Rule are invalid. Therefore, districts must calculate the equitable services set-aside under the CARES Act based only on 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.

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."¹

On July 20, 2020 NYSED issued a directive to LEAs to provide equitable services pursuant to the IFR.² Thus, the applications LEAs submitted to, and approved by, NYSED were based on calculations of the equitable services set-aside under an invalid rule.

Accordingly, Education Law Center (ELC) requests NYSED immediately notify LEAs of Judge Friedrich's ruling and its effect: i.e., LEAs can only allocate a proportional share of ESSER and GEER funds for equitable services based on the enrollment of low-income students in private schools. We further ask that NYSED instruct LEAs to immediately cease providing equitable services to private schools based on total enrollments and take action to recover any funds that may have been inappropriately expended to date under the invalid IFR.

Thank you in advance for your attention to this matter.

Sincerely,



David G. Sciarra, Esq.
Executive Director

cc: T. Andrew Brown, Vice Chancellor, NYS Board of Regents
Aaron Baldwin, Esq., NYSED Acting Counsel

¹ <https://oese.ed.gov/offices/education-stabilization-fund/elementary-secondary-school-emergency-relief-fund/?source=email>

² <http://www.nysed.gov/news/2020/state-education-department-announces-process-local-educational-agencies-apply-12-billion>