



May 11, 2020

The Honorable Phil Murphy, Governor
Office of the Governor
P.O. Box 001
Trenton, New Jersey 08625

Re: CARES Act Equitable Services

Dear Governor Murphy:

In a letter dated May 1, 2020, we urged your Administration to quickly allocate the \$310 million for New Jersey school districts in the Elementary and Secondary School Emergency Relief (ESSER) Fund and the \$69 million for K-12 and higher education in the Governor's Emergency Education Relief (GEER) Fund, which were appropriated by Congress in the Coronavirus Aid, Relief, and Economic Security Act (CARES Act). We also urged the New Jersey Department of Education (NJDOE) to promptly issue guidance directing districts to prioritize use of CARES Act funds to end the digital divide disproportionately impacting students in higher poverty districts. This request is even more urgent given recent public estimates that approximately 90,000 New Jersey students are without access to internet connectivity.

We write to bring to your attention an issue that has arisen regarding New Jersey's and other states' use of CARES Act funds. In guidance issued on April 30, United States Secretary of Education Betsy DeVos 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 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 the federal CARES Act and Title I statutes. It would also significantly diminish the resources available to public school districts 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 erroneous directive is contained in the 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 statute, is inconsistent with longstanding United States Department of Education (USED) interpretations of the Elementary and Secondary Education Act of 1965 (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 local educational agency (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. The calculation of equitable services under Section 1117 of the ESEA, also referred to as Title I, has consistently been interpreted by the 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 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 the 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

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

² For the most recent example of this interpretation, see 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>. For example, in response to question B-3, asking what information is needed by an LEA to calculate proportional share under ESEA section 1117(a)(4)(A), the USED replied: "An LEA needs the amount of its total Title I allocation and poverty data on children residing in participating Title I public school attendance areas who attend public and private schools."

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 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 data, without regard to income levels. April 30 Guidance at p. 6, Q&A 10B & 10C.

In her April 30 Guidance, Secretary DeVos is clearly seeking to advance her personal preference for 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 Jersey would divert millions of dollars that LEAs should use to address the critical needs of their low income students, including access to continuing instruction while their schools are closed.

For example, we estimate that in the Newark Public Schools (NPS), the state's largest district, calculating equitable services based on total private school enrollment rather than the poverty rate will result in a loss of an additional \$800,000 of federal CARES Act funds for NPS and its students, with \$2.7 million, instead of \$1.9 million, directed for equitable services.

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.³ The COVID-19 pandemic has laid bare existing inequities in New Jersey's public school system, 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 Jersey's constitutional obligation to "provide for the maintenance and support of a thorough and efficient system of free

³ See 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>.

public schools" for all public school students. N.J. Const. art. VIII, § 4, par. 1. The fundamental right of our students to be afforded a public education that prepares them to be informed citizens and productive members of society "must remain prominent, paramount and fully protected." Abbott v. Burke, 153 N.J. 480, 528 (1998).

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 and with no regard for student need. Instead, we urge the NJDOE to direct all New Jersey districts to set aside funds for equitable services to private schools in a manner consistent with well-established legal precedent and to advance equity by basing set-aside calculations on private school student poverty rates, not overall enrollments.

Thank you for your prompt attention to this critical issue. ELC stands ready to work with your Administration to take prompt and aggressive action to make New Jersey the first state to end the digital divide for all public school students.

Sincerely,



David G. Sciarra, Esq.
Executive Director

Via Electronic Mail

Cc: Commissioner Lamont Repollet, Ed.D
Honorable Gurbir S. Grewal, New Jersey Attorney General
Assistant Commissioner Peggy McDonald, Student Services
Matt Platkin, Governor's Chief Counsel
George Helmy, Governor's Chief of Staff
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