



Office of the General Counsel

3211 FOURTH STREET NE • WASHINGTON DC 20017-1194 • 202-541-3300 • FAX 202-541-3337

Filed Electronically

July 27, 2020

U.S. Department of Education
Office of Elementary and Secondary Education
400 Maryland Avenue, SW
Washington, DC 20202

Subject: CARES Act Programs; Equitable Services to Students and Teachers
in Non-Public Schools, RIN 1810-AB59

Dear Sir or Madam:

Thank you for the opportunity to submit comments on the U.S. Department of Education's ("Department") Interim Final Rule, "CARES Act Programs; Equitable Services to Students and Teachers in Non-Public Schools" (the "IFR").

The United States Conference of Catholic Bishops ("USCCB") is a nonprofit corporation, the members of which are the active Catholic Bishops in the United States. Catholic schools comprise the nation's largest private educator, with 6,300 schools educating 1.8 million children in the United States today, many of whom come from low-income families, keeping with Catholic schools' long-standing tradition of providing disadvantaged children with a top-quality education. The USCCB is the voice of those schools and our Catholic community before the federal government.

The IFR's purpose is to address ambiguity in the CARES Act section 18005(a): "A local educational agency receiving funds under sections 18002 or 18003 of this title shall provide equitable services in the same manner as provided under section 1117 of the Elementary and Secondary Education Act of 1965 ("ESEA") to students and teachers in non-public schools, as determined in consultation with representatives of non-public schools."

The Department provided guidance on this issue on April 30, 2020. In that guidance, the Department states:

The services that an LEA may provide under the CARES Act programs are clearly available to *all* public school students and teachers, not only low-achieving students and their teachers as under Title I, Part A.... For CARES Act services to be equitable in comparison to public school students and teachers, it follows that the same principles must apply in providing equitable services to non-public school students and teachers.

The IFR cites the Department’s interpretive authority under *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), and *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000). *Brown & Williamson* emphasizes that, under *Chevron*, a core function of agency interpretation is “assessing the wisdom of ... *policy choices* and resolving the struggle between competing views of the public interest,” 538 U.S. at 132 (emphasis added), a function that may be exercised when a statute’s ambiguity implicitly delegates interpretive authority to the agency. *Id.* at 159. The USCCB supports the Department’s election of policy choices in favor of equity for children in nonpublic schools. It is firmly in the public interest to ensure that emergency relief is distributed without arbitrary limits or distinctions drawn on factors other than need.

The IFR properly recognizes the Education Stabilization Fund (“ESF”) to be a “new” emergency education fund, separate from funds for the Title I program established via the ESEA. Accordingly, the IFR correctly determines that Congress’s reference to section 1117 of the ESEA is not meant to incorporate the entirety of section 1117, but rather only those parts consonant with the context of the CARES Act and the ESF, whose broad purpose is to “prevent, prepare for, and respond to” the effects of COVID–19.” 85 Fed. Reg. at 39482.

The IFR attempts to resolve ambiguity in section 18005(a) by allowing the Local Education Agencies to select from two options when it comes to the proportionate share of funds providing equitable services to non-public schools: 1) distribute funds only to Title I participating public schools and calculate a share to local nonpublic schools based upon their low-income enrollment, or 2) distribute funds based on total student enrollment in public and private schools, regardless of poverty counts. *See* 34 C.F.R. § 76.665(c)(1). The IFR argues that its interpretation gives meaning to section 1117(a)(3), which states that “[e]ducational services and other benefits for such private school children shall be equitable in comparison to services and other benefits for public school children participating in this part, and shall be provided in a timely manner.” The USCCB agrees that section 1117(a)(3) articulates the right policy choice to make in the implementation of the CARES Act.

By tying distribution of funds to previous participation in Title I, however, the first option necessarily excludes many nonpublic school students in poverty from CARES Act benefits. While USCCB thus does not believe the first option reflects a fully equitable solution, we appreciate that it requires LEAs that wish to use Title I poverty counts for nonpublic schools to treat ESF funds as bound by Title I standards for funding public schools too, and is in that sense equitable. The USCCB supports and commends the Department for providing the second option of distributing based on total enrollment, which reflects the broad nature of emergency legislation like the CARES Act and allows States committed to equity in education to act on that commitment.

There are two grants within the Education Stabilization Fund: the Governor’s Emergency Education Relief Fund (GEER) and the Elementary and Secondary School Emergency Relief Fund (ESSER). Assistance under the ESSER fund may be used for 12 specified purposes. *See* Sec. 18003(d).

A number of those purposes are for expenses that do not relate to the proportion of children in a school who are in poverty. For example, the funds may be used for purchasing supplies to sanitize and clean school facilities. *See* section 18003(d)(7). Consider a nonpublic school with 25% students in poverty. Even if Congress intended CARES Act funds to benefit only those students, compared to their peers in Title I public schools, those students could not be said to benefit equitably from a school that is 75% less clean.

In light of this concern, the USCCB requests that the Department clarify whether LEAs using the funds for any section 18003(d) purpose where the cost of the service is not relative to a school's proportion of students in poverty may nonetheless elect to distribute funds based on a poverty count as described in 34 C.F.R. § 76.665(c)(1)(i).

Beyond provisions regarding how LEAs must distribute funds to nonpublic schools, section 1117 sets out numerous requirements for transparency and accountability by the LEA. For instance, section 1117(b)(1) sets out detailed parameters for LEAs' consultation with nonpublic school officials, section 1117(b)(2) requires LEAs to provide written explanations of any disagreements with nonpublic school officials over the issues subject to that consultation, and section 1117(b)(6) permits nonpublic school officials to file complaints with the State educational agency.

The Department's April 30 guidance expressed the position that the CARES Act incorporates aspects of section 1117 aimed at transparency and accountability in LEAs' administration of funds, but the IFR does not address these questions. The USCCB requests that the Department clarify that the IFR is not intended to supersede those aspects of the April 30 guidance, and that they remain in effect. Further, the Department should exercise its regulatory authority to establish specific measures, beyond those set out in section 1117, to assure transparency in the methods that LEAs use to calculate the distribution of CARES Act funds.

Lastly, the USCCB notes that a number of States have sued to block the implementation of the IFR. One potential consequence of this litigation, regardless of its ultimate resolution, is to delay nonpublic schools' receipt of CARES Act funds. And in the context of an emergency, to delay aid is effectively to deny it. In light of this tactic, and of the opposition expressed to the IFR by some States and public school districts to the statutory policy of equitable distribution of relief funds among *all* students and schools affected by COVID-19, the USCCB urges the Department to take further, enforceable steps to ensure that LEAs satisfy the requirement in section 1117(a)(3)(a), as incorporated by the CARES Act, that LEAs provide equitable services in a timely manner.

A state of affairs where all public school students are counted, while many private school students are not, cannot be characterized as equitable. Moreover, without equitable services in this time of emergency, many private schools will not have the resources to keep their children safe and healthy, or to maintain continuity in their students' education. All schools should have the resources to keep their children safe and healthy, and to maintain continuity in their students' education, during the pandemic.

Thank you for the opportunity to comment.

Respectfully submitted,

Anthony R. Picarello, Jr.
Associate General Secretary and General Counsel

Daniel Balserek
Assistant General Counsel and
Director of Religious Liberty