September 16, 2020

Dear Chief State Education Officer:

We represent the plaintiffs in *NAACP v. DeVos*, a lawsuit challenging the U.S. Department of Education's (USED's) Interim Final Rule, 85 Fed. Reg. 39,479 (July 1, 2020), regarding the provision of equitable services to private school students under the Coronavirus Aid, Relief, and Economic Security (CARES) Act. We are writing to inform you of the final order in the case issued on September 4, 2020, by the U.S. District Court for the District of Columbia.[1] **According to the September 4 Order, the Interim Final Rule has been invalidated.** This ruling is applicable nationwide and is effective immediately.

We are attaching Judge Dabney L. Friedrich's Memorandum Opinion and Order granting the plaintiffs' motion for summary judgement and vacating the 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 requires 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 that went into effect on July 1, 2020, the USED incorrectly construed the CARES Act to require LEAs to treat all private schools as entitled to funding based on private schools' *total enrollment* rather than their *enrollment of children from low-income families*. 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 funding 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 *total* private school enrollment.

[1] This letter is intended for general information purposes only. The information provided in this letter does not, and is not intended to, constitute legal advice. Recipients should contact their legal counsel to obtain advice pertaining to this letter.

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 *students from low-income families* 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."[2]

We are writing to ask that you immediately notify all LEAs in your state of Judge Friedrich's ruling and its effect – *i.e.*, LEAs must determine the proportional share of ESSER and GEER funds for equitable services based solely on the number of *students from low-income families* attending private schools – and that you immediately correct any conflicting state guidance that has been issued. We also ask that you instruct LEAs to immediately cease providing equitable services based on total enrollment in private schools.

Further, we ask that you work with LEAs and appropriate legal counsel to help districts determine how they should proceed in order to comply with Judge Friedrich's order. This includes halting and recouping any inappropriate allocations, where districts have already made financial commitments based on the USED's illegal rule.

The CARES Act funds affected by the invalidated Interim Final Rule are desperately needed as Congress intended them: to be used by public schools to support student learning and provide critical supports throughout this pandemic. Thank you in advance for your attention to this matter.

Sincerely,

Bacardi Jackson, Esq.
Southern Poverty Law Center

Jessica Levin, Esq.
Education Law Center

Via electronic mail only
Enclosures

[2] https://oese.ed.gov/offices/education-stabilization-fund/elementary-secondary-school-emergency-relief-fund/?source=email