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## LEGAL UPDATE

September 24, 2020

**To:** Superintendents, Member School Districts (K-12)

**From:** Jennifer Henry, Associate General Counsel *J.H.*

**Subject:** **U.S. Department of Education Rolls Back Interim Final Rule Regarding the Allocation of CARES Act ESSER Funds**  
**Memo No. 56-2020**

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The U.S. Department of Education (DOE) announced on September 9, 2020, that a controversial Interim Final Rule that purported to mandate how local educational agencies (LEAs) calculated equitable services for private school students as to the Coronavirus Aid, Relief, and Economic Security (CARES) Act funds is no longer in effect.

In March, Congress passed the CARES Act, part of which allocated \$13.2 billion to the states as emergency relief funds to address the impact of COVID-19 (Elementary and Secondary School Emergency Relief Fund (ESSER Fund)).<sup>1</sup> The CARES Act required LEAs to use ESSER funds to “provide equitable services in the same manner as provided under section 1117 of the ESEA of 1965 (Title I) to students and teachers in [private] schools.”<sup>2</sup> Title I generally requires LEAs to provide equitable services to low-income students attending private schools based on the number of low-income children who attend those private schools. On July 1, 2020, the DOE issued an Interim Final Rule interpreting the CARES Act to require LEAs to allocate their ESSER funds to equitable services for private schools based on the total number of enrolled students, rather than the number of low-income students. Multiple states filed lawsuits challenging the Interim Final Rule.

On September 4, 2020, the U.S. District Court for the District of Columbia issued an opinion and an order vacating the Interim Final Rule.<sup>3</sup> Similar orders

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<sup>1</sup> Pub. L. No. 116-136, 134 Stat. 281, §§ 18001-18003 (2020) (“CARES Act”).

<sup>2</sup> CARES Act § 18003.

<sup>3</sup> *National Association for the Advancement of Colored People, et al., v. Elisabeth D. DeVos, et al.*, No. 20-cv-1996 (DLF), at \*7-10, 13 (D. D.C. Sept. 4, 2020). The Memorandum Opinion can be found here: [https://oese.ed.gov/files/2020/09/NAACP-v-DeVos-DDC\\_Opinion-Granting-Partial-Summary-Judgment.pdf](https://oese.ed.gov/files/2020/09/NAACP-v-DeVos-DDC_Opinion-Granting-Partial-Summary-Judgment.pdf); and the corresponding Order can be found here: [https://oese.ed.gov/files/2020/09/NAACP-v-DeVos-DDC\\_Order-granting-Partial-SJ-09-04-2020.pdf](https://oese.ed.gov/files/2020/09/NAACP-v-DeVos-DDC_Order-granting-Partial-SJ-09-04-2020.pdf).



enjoining enforcement of the Interim Final Rule had issued in other jurisdictions, including the Northern District of California.<sup>4</sup> Following the Opinion of the U.S. District Court for the District of Columbia, the DOE stated that the Interim final Rule was no longer in effect.<sup>5</sup>

In summary, the ESSER funds should be allocated to private schools as Title I funds are, based upon the number of Title I students. The California Department of Education (CDE) has directed LEAs to seek legal counsel before making any decisions related to allocation of funds for the provision of equitable services for CARES Act funds.<sup>6</sup> Please contact our office if any questions still remain regarding required uses of ESSER funds.

*The information in this Legal Update is provided as a summary of law and is not intended as legal advice. Application of the law may vary depending on the particular facts and circumstances at issue. We, therefore, recommend that you consult legal counsel to advise you on how the law applies to your specific situation.*

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<sup>4</sup> See *State of Michigan, et. al, v. Betsy Devos, et al.*, No. 3:20-cv-04478-JD, Order re Preliminary Injunction (N.D. Cal. Aug. 26, 2020).

<sup>5</sup> U.S. Department of Education, Office of Elementary and Secondary Education, *Elementary and Secondary School Emergency Relief Fund* <https://oese.ed.gov/offices/education-stabilization-fund/elementary-secondary-school-emergency-relief-fund/?source=email> (last modified Sept. 24, 2020).

<sup>6</sup> California Department of Education, *ESSER Fund Frequently Asked Questions*, FAQs 10-11 <https://www.cde.ca.gov/fg/cr/esserfaqs.asp> (last reviewed Sept. 3, 2020).