UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE (NAACP), et al.,

Plaintiffs,

vs.

Civil Case No. 1:20-cv-01996 (DLF)

ELISABETH "BETSY" D. DEVOS, in her official capacity as the United States Secretary of Education, and the UNITED STATES DEPARTMENT OF EDUCATION,

Defendants.

Brief of National Education Association, AASA, The School Superintendents Association, American Federation of Teachers, Americans United for Separation of Church and State, In the Public Interest, National School Boards Association,

CORPORATE DISCLOSURE STATEMENT

Pursuant to Local Rules 7(o)(5) and Federal Rules of Appellate Procedure 29(a)(4)(A) and 26.1, organizational *Amici* certify that they are all non-profit associations or advocacy groups that represent or advocate on behalf of public school educators, school boards, administrators, parents, students, or taxpayers, or work to

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AMICI'S STATEMENT OF INTEREST[1]

The over three million members of the National Education Association ("NEA") serve as educators in our nation's public school districts, colleges, and universities. Since its founding over a century and a half ago, NEA and its affiliates have worked to create, expand and strengthen the quality of public education available to all children. In the current crisis, NEA believes that restoring public education services and funding, and doing so equitably, is central to our nation's recovery.

The American Federation of Teachers, AFL-CIO ("AFT") is a national labor union that represents 1.7 million members nationwide. The largest segment of AFT's members are public school educators and educational support personnel, many of whom work in school districts where a significant portion of the student population receive Title I and now CARES Act resources.

Americans United for Separation of Church and State is a national, nonsectarian public interest organization that is committed to preserving the constitutional principles of religious freedom and the separation of religion and government. Americans United has long fought to ensure that public tax dollars are

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[1] Pursuant to Local Rule 7(o)(5) and Fed. R. App. P. 29(a)(4)(E), amici state that no party's counsel authored this brief in whole or in party, no party or party's counsel contributed money to fund the preparation or submission of this brief, and no person other than amici and their counsel contributed money to fund the preparation or submission of this brief.

used only for educational services that are appropriate for all students, regardless of what their religious beliefs may be.

In the Public Interest ("ITPI") is a national nonprofit research and policy organization that studies how the privatization of public goods impacts service quality, democracy, equity, and government budgets. ITPI advocates for strong public institutions that work for everyone, and has done extensive research and

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Amici believe that public education is the cornerstone of our nation's social, economic, and political structure, that education is a civil right necessary to the dignity and freedom of the American people, and that every child deserves equitable access to a free public education that maximizes their individual potential. *Amici* also respect the decision of individuals to educate their children at their own expense in privately supported, non-segregated, private schools. But they oppose using limited public funds to subsidize private schools—which are, by their nature, exclusive. Public schools serve all students, including a disproportionate number of our neediest students, and amici oppose redirecting CARES Act funds from the schools and communities that need them most in order to benefit private schools.

ARGUMENT

In the worst public health and economic crisis in most of our lifetimes, one that has hit Black, Latinx and Native communities the hardest in terms of illness, death and economic deprivation, the U.S. Department of Education under the direction of Secretary Betsy DeVos has undertaken to divert to private schools over $1 billion in critical funds that Congress appropriated under the CARES Act for our neediest students.

The provision of the CARES Act at issue in this case is "plain as day." *Michigan v. DeVos*, _ F. Supp. 3d _, No. 20-cv-04478-JD, 2020 WL 5074397, at *5 JD DeVoi94 oTw ((( )Tj(di)8.5 (r)12.2 (4 (t of)3.6 gr04 Tc -0.006 Tn436 0 Tipr)12.

I. The Secretary's Diversion of Critical Funding from Public Schools is Based on a Misreading of the CARES Act that Ignores Key Historical and Statutory Context

The Department's guidance and interim final rule interpret "equitable services" in CARES Act § 18005 to mean equal funding for private schools.[2] But that is not how "equitable services" has ever been understood, or how Congress used it in the CARES Act. From its original enactment in 1965 to the present day, the overriding purpose of Title I of ESEA has been to distribute additional funds to our nation's neediest students.[3] The Department's interpretation is at odds with the history and purpose of Title I and the clear intent of Congress in invoking Title I to distribute CARES funds, and the Department's actions represent an about-face from its own understanding of how Title I-funded equitable services operate.

In determining whether a statute is ambiguous, courts first look to the "traditional tools" of statutory construction, including the law's text, context, structure and history. *Eagle Pharm., Inc. v. Azar*, 952 F.3d 323, 330 (D.C. Cir. 2020). *Amici* agree with Plaintiffs—and with the two other district courts that have

[2] *See, e.g.*, U.S. Dep't. of Educ., Providing Equitable Services to Students and Teachers in Non-Public Schools Under the Cares Act Programs 3 (Apr. 30, 2020) (claiming that "[n]othing in the CARES Act suggests Congress intended to differentiate between students based upon the public or non-public nature of their school with respect to eligibility for relief"); U.S. Dep't. of Educ., CARES Act Programs; Equitable Services to Students and Teachers in Non-Public Schools, 85 Fed. Reg. 39,479, 39,480 (Jul. 1, 2020) (to be codified at 34 C.F.R. pt. 76) (asserting that "[t]he CARES Act programs do not favor students based on public or non-public school attendance").

[3] U.S. Dep't. of Educ., Improving Basic Programs Operated by Local Educational Agencies (Title I, Part A): Purpose, https://bit.ly/2EwulUI (last visited Aug. 27, 2020).

now ruled on the issue—that this Court need not look beyond the plain text of the CARES Act to decide in their favor, because Section 18005's directive that equitable services must be provided "in the same manner" as provided under Section 1117 of Title I of the Elementary and Secondary Education Act ("ESEA"), 20 U.S.C. § 6320, is unambiguous. As two district courts have already held, this directive can only be reasonably understood to mean that the CARES Act funding is to be distributed using the same method or procedures used under Section 1117. *Michigan v. DeVos*, 2020 WL 5074397; *Washington v. DeVos*, 2020 WL 5079038. Indeed, the Supreme Court already has construed the exact same statutory phrase, albeit it in a different statute, and reached the same conclusion. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 545 (2012) (finding that "in the same manner" was best understood to mean "to use the same methodology and procedures").

While nothing more is needed to rule in plaintiffs' favor, *Amici* add that the structure and context of the CARES Act, as well as the history of the Title I provisions it cites, also weigh solidly in favor of Plaintiffs' arguments.

The CARES Act provides funds for public education primarily through a $31 billion dollar "Education Stabilization Fund" established in Sections 18001-18005 of the Act. The Fund has three components. The key component for present purposes is the $13 billion Elementary and Secondary School Emergency Relief

(“ESSER”) Fund established by Section 18003, which is dedicated solely to elementary and secondary schools. Local education agencies (“LEAs”) may also receive funds from the smaller $3 billion Governor’s Emergency Education Relief (“GEER”) Fund established by Section 18002(c) if their state directs some portion of the GEER fund to LEA needs, and if they are one of the districts in their state “most significantly impacted by coronavirus,” or if they are “essential for carrying out emergency educational services” specified in Section 18003.

In creating the Education Stabilization Fund and its component programs, Congress did not direct the Department to distribute CARES funds equally to private school to LEAs and charter schools in proportion to the amount of funds they received under part A of Title I. CARES Act § 18003(c). Only after the funds are so distributed are LEAs instructed to provide services to private school students "in the same manner as provided under section 1117." CARES Act § 18005(a).

When Congress distributed ESSER funds using the Title I formula, it understood and intended that those resources would flow mainly to LEAs and schools with high concentrations of disadvantaged children—because that is what Title I does. Title I was the centerpiece of the Elementary and Secondary Education Act of 1965, and it remains the centerpiece of the ESEA under its most recent reauthorization, the Every Student Succeeds Act of 2015, Pub. L. No. 114-95; 114 Stat. 1177 (2015) (codified at 20 U.S.C. § 28

The CARES Act direction in Section 18005 that funding be provided "in the same manner" as under Section 1117 makes Congress's intent "plain as day." *Michigan*, 2020 WL 5074397, at *5. Congress meant for CARES Act funding to flow according to student needs, not overall student enrollment. It is an elementary principle of statutory construction that courts will "assume that Congress is aware of existing law when it passes legislation," *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990), and "legislates against the backdrop" of that statutory framework, *Orton Motor, Inc. v. U.S. Dep't of Health & Human Servs.*, 884 F.3d 1205, 1214 (D.C. Cir. 2018). This is particularly the case where Congress references a specific statutory provision. *Jam v. Int'l Fin. Corp.*, 139 S. Ct. 759, 769 (2019) ("a statute that refers to another statute by specific title or section number in effect cuts and pastes the referenced statute as it existed when the referring statute was enacted"). It is safe to say that when Congress referred directly, clearly, and unambiguously to Title I's equitable services provisions it understood that they require expenditures to be "based on the number of children from low-income families who attend private schools," 20 U.S.C. § 6320(a)(4)(A)(i), not based on total private school enrollment.

The statutory context makes that presumption even stronger in this instance because Congress had a clear alternative. Section 1117 is not the only portion of ESEA to address equitable services. Section 8501 also requires LEAs that receive federal funds in connection with certain specified programs to provide equitable services to private school students. Id. § 7881. But unlike Section 1117, which allocates expenditures based on the number of low-income private school students, Section 8501 requires LEAs to provide equitable services based on whether students are eligible for those services. Id. § 7881(b)(2). Given that the CARES Act does not restrict eligibility for ESSER or GEER funded services to disadvantaged students, if Congress had intended CARES funds to flow to private schools based on total private school enrollment rather than the concentration of disadvantaged students, it could have simply referenced Section 8501. But instead it chose to reference Section 1117 of Title I.

The history of ESEA's equitable services provisions further confirms that the Secretary's interpretation is inconsistent not just with the text of Section 1117 and the intent of Title I, but with how equitable services under Title I have always been understood. The concept of equitable services has been present in ESEA in some form since its original enactment—though in the beginning it was referred to as "comparable services." Barrera v. Wheeler, 475 F.2d 1338, 1348 (8th Cir. 1973), aff'd, 417 U.S. 402 (1974). The core principle of "comparable services" was the same as "equitable services" today: to require local educational agencies (LEAs) "to plan and administer programs that would meet the particularized needs of all educationally disadvantaged children," including disadvantaged children attending private schools. Id. at 1342, 1355 (citing 20 U.S.C. § 241e(a)(2) (1974); 45 C.F.R. § 116.19 (1972)).

But as the Eighth Circuit explained in the most prominent early dispute over LEAs' obligation to provide services to private school students under Title I of the original ESEA, interpreting Title I's "comparable services" provision to mean equal sharing of funds with private schools "fails to properly interpret Title I in conformity with the Act's intended purpose." Id. at 1344. In so holding, the Eighth Circuit relied on both the language of the statute itself and a report from the National Advisory Council on the Education of Disadvantaged Children, which ESEA had charged with reporting annually to Congress and the President on the progress of Title I. See Pub. L. No. 89-10, 79 Stat. 27-58 § 212 (1965). In the report, the Council noted that some private schools had complained about "not receiving their 'fair share'" of Title I funds, with the groups' definition of "fair share" referring to a "percentage coinciding with the percentage of nonpublic school children in the city." Barrera, 475 F.2d at 1347 n.11 (quoting Nat'l Advisory Council on the Educ. of Disadvantaged Children, Annual Report to the President and the Congress 38 (1969)). The Council dismissed private schools' concerns, noting that not only did Title I "intend[] no such 'sharing' or division of funds," but that such a claim was "inconsistent with the intent" of Title I given that "the number of disadvantaged nonpubg wituchubd the number of disadvantaged public school children in any city in the present study." Id.

Congress has since added more specifics to Title I concerning how LEAs are to provide "equitable services" to private school students, but the program still rests on the basic principle that disadvantaged children should be the primary beneficiaries of Title I-funded services. The current text of Section 1117 itself reflects this. Not only are LEAs directed to base expenditures for equitable services on the number of children from low-income families in the district, 20 U.S.C. § 6320(a)(4)(A)(i), but Section 1117 clearly expresses that services are meant to be provided "consistent with the number of eligible children identified under Section 6315(c)." Id. § 6320(a)(1) (emphasis added). "Eligible children" includes private school students who are economically disadvantaged, English language learners, disabled, neglected, eligible for Head Start, or homeless. Id. § 6315(c). The Department's most recent regulations echo these two requirements, 34 C.F.R. §§ 200.62, 200.64, just as they have for decades.[4]

Instead of accounting for this statutory framework, context and history in interpreting Section 18005 of the CARES Act, the Department's guidance and

[4] See, e.g., U.S. Dep't. of Educ., Proposed Rule: Title I—Helping Disadvantaged Children Meet High Standards, 60 Fed. Reg. 21400 (May 1, 1995) ("Although funds are allocated on the basis of poor children . . . private school children eligible to be served are children who reside in a participating public school attendance area and who have educational needs under section 1115(b) of Title I.").

interim final rule reach the untenable conclusion that the phrase “in the same manner as under section 1117” means that every provision in Section 1117 was incorporated into the CARES Act by reference except for those targeting aid to students most in need. This is “interpretive jiggery-pokery in the extreme.” *Michigan*, 2020 WL 5074397, at *5 (cleaned up). In its guidance, in particular, the Department painstakingly directs CARES funding recipients to observe the other Section 1117 requirements: they must ensure funds remain under public control and that services be secular, neutral and nonideological; designate an equitable services ombudsman; and follow the procedural requirements of notice and consultation with private schools about allocation of funds.[5]

The proffered rationale for this odd parsing is that the CARES Act uses specific catirnale2 enaleile(he)1.5 .6 (a)12.1 (n)8.(he)3.6 (C)12.3 (d)8.3 5s determining expenditures. The Department's actions, which interpret all sections related to the poverty-based formula out of existence, violate the "endlessly reiterated principle of statutory construction . . . that all words in a statute are to be assigned meaning, and that nothing therein is to be construed as surplusage." Qi-Zhuo v. Meissner, 70 F.3d 136, 139 (D.C. Cir. 1995).

The text and structure of the CARES Act, including its -

same thing as "equal.'" 2020 WL 5079038, at *9 (comparing *Equitable*, Dictionary.com ("characterized by equity or fairness; just and right; fair; reasonable"), with *Equal*, Dictionary.com ("as great as; the same as")).[8] The groups of students targeted by Title I and the equitable services requirement—including those who are economically disadvantaged, English language learners, disabled, neglected, eligible for Head Start, or homeless—are suffering disproportionately from the pandemic. Far from being just, fair or reasonable, the Department's interpretation would inflict yet another layer of harm on these vulnerable communities.

As discussed *supra* in Section I at pages 9-14, increasing equity has always been Congress's central concern in allocating federal education funds under Title I; the concept of "equitable services" under Title I has never been intended to direct equal funds to private school students. That is so, as Tw [(Tt)J 0.0 Tw 6.863 0 Td ( )Tj -

Communities of color are also disproportionately represented in public schools. This fall, NCES estimates that 23.4 million of the nation's 50.7 million public school students will be white—about 46 percent.[13] By contrast, 69 percent of private school students are white, nine percent Black, and 10 percent Hispanic or Latinx.[14] Put another way, public schools today serve an estimated 94 percent of our nation's students of color and 96 percent of its low-income students.[15]

Finally, public schools also serve higher concentrations of children who face unique challenges in remote learning environments. According to NCES, public schools serve 95 percent of students with special needs.[16] Many of these students require services that are difficult or impossible to provide remotely. Public schools are also more likely to serve students—especially very low-income and homeless students—who do not have access to the technology necessary for remote instruction such as a computer and internet connection.[17] Approximately 17 percent

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13 U.S. Dep't. of Educ., Nat'l Ctr. for Educ. Statistics, Fast Facts: Back to School Statistics (2020), https://bit.ly/3b032OR.

14 Nat'l Ctr. for Educ. Statistics, *School Choice in the United States*, *supra* note 9 at 22.

15 *Compare id.* (discussing racial and ethnic makeup of private schools), *with* Nat'l Ctr. for Educ. Statistics, *Fast Facts*, *supra* note 13 (reflecting that as of fall 2020 there are 50.7 million students in public schools and 5.7 million in private schools).

16 U.S. Dep't. of Educ., Nat'l Ctr. for Educ. Statistics, NCES 2020-009, Digest of Education S-e44 :

of U.S. teens are unable to do homework online because they lack access to a reliable computer and internet connection.[18] Among Black students and very low-income students, who disproportionately attend public schools, these numbers are substantially higher at around one quarter for each group.[19]

close the gap in terms of dollars spent,[23] poorer districts' increased reliance on state funds means they tend to experience deeper revenue shortfalls in a recession.

During the Great Recession of 2008, for example, federal stimulus programs played a critical role in stabilizing state and local education budgets.[24] But as stimulus funds ran out, state and local funding remained at recession levels, which led to significant budget cuts.[25] In fact, at the time the COVID crisis hit, many state education budgets—and the funds they provide to lower-wealth school districts—either had not yet fully recovered from the Great Recession, or had recovered only very recently.[26] Both the initial cuts and delayed recoveries tended to be worse in

[23] Bruce D. Baker,

high-poverty school districts.[27] And all indicators suggest that the current recession will be more severe than the Great Recession in terms of its impact on state education budgets.[28]

The families and communities served by public and private schools are not similarly situated in terms of their exposure to coronavirus and the resources needed to mount a response. Due to “[l]ong-standing systemic health and social inequities,” the same families most likely to rely on public schools have also been those most heavily impacted by the pandemic.[29] Members of low-income

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social distancing are difficult or impossible.[31] They are more likely to suffer from health conditions that put them at higher risk for the most serious cases of COVID-19,[32] and less likely to have adequate access to health care.[33] When people of color seek care, they are more likely to encounter discrimination.[34]

All of these factors add up to higher infection and death rates in low-income communities and communities of color. According to data recently obtained by the *New York Times* from the Centers for Disease Control, coronavirus infection rates for Black Americans are well over double the rates for whites.[35] Infection rates for Latinx Americans were more than triple that of whites.[36] According to the COVID Tracking Project, which assembles data reporting by every state, Black Americans

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[31] U.S. Bureau of Labor Statistics, Report 1082, *Labor Force Characteristics by Race and Ethnicity, 2018* (Oct. 2019), https://bit.ly/3aSsdD1.

[32] Serkez, *supra* note 29.

[33] CDC Equity Report, *supra* note 29; Serkez, *supra* note 29.

[34] CDC Equity Report, *supra* note 29 (citing Yin Paradies, *A Systematic Review of Empirical Research on Self-Reported Racism and Health*, 35 Int. J. Epidemiol. 888 (Aug. 2006), https://bit.ly/3aPmYDW).

[35] Richard A. Oppel, Jr., et al., *The Fullest Look Yet at the Racial Inequity of Coronavirus*, N.Y. TIMES (July 5, 2020), https://nyti.ms/3aYsDrC (showing an infection rate of 62 per 10,000 residents for Black AmerTw -23.93278 1 .6 ly

are dying at 2.4 times the rate of white Americans, and death rates among Latinx Americans and American Indians are nearly 1.5 times that of whites.[37]

Because public schools reflect the communities they serve, the same schools most in need of additional assistance before the coronavirus pandemic now face disproportionate challenges in respon public primary and secondary schools in the CARES Act, and in mapping out allowable uses of funds to focus on schools and students with the greatest need.[38]

Requiring public schools to redirect that support to provide additional services to private school students will damage their response efforts in ways that cannot be undone. They may be unable to maintain current staffing levels, let alone hire additional staff to carry out physical distancing and other safety recommendations. *Cf. Michigan*, 2020 WL 5074397, at *8 (noting that the Department's actions could deprive Michigan public schools of over $16 million in funding, "the equivalent of health consequences of the Department's actions are real, and the learning losses that result from funding shortfalls would be significant and long-lasting.[39]

Finally, contrary to what the Department's rhetoric suggests, private schools are not the victims of "discrimination" in federal funding; in fact they have more options for obtaining stimulus funds than public schools, and have fully availed themselves of those avenues. Most significantly, the CARES Act created the $349 billion Paycheck Protection Program ("PPP"), which provides forgivable loans to businesses and non-profit organizations, including private schools. CARES Act § 1102, 1106, 1107(a)(1). Private schools, including elite institutions with large endowments,[40] have to date received an estimated $4.5 billion dollars in forgivable loans under the PPP—approximately six times more per facility than public schools.[41] Private schools are also eligible for the Employee Retention Credit under CARES Act § 2301, and payroll tax credits under the Families First Coronavirus

[39] Letter from Council of the Great City Schools, *supra* note 17; Dorn, *supra* note 17 (discussing the impact of learning losses on future earnings, racial and socioeconomic inequality, and the broader economy).

[40] Michelle Conlin & M.B. Pell, *Dozens of Expens*

Response Act, Pub. Law No. 116-127, 134 Stat 178 §§ 7001–7005 (Mar. 18, 2020). Public schools are not eligible for assistance from any of these programs.

The Department's reading of Section 18005 to require equal funding for private school students—regardless of whether their household income is $20,000 or $2 million—cannot be squared with the equitable purposes underlying the CARES Act and the Title I provisions upon which it relies, or with the Act's plain text. If this flawed interpretation is allowed to stand, the very students Congress sought to help through the CARES Act will be deprived of over a billion dollars of dollars in critical aid at a time when they are facing unprecedented challenges.

CONCLUSION

For the foregoing reasons, we urge this Court to grant the Plaintiffs' Motion for Partial Summary Judgment.

Respectfully Submitted,

Dated: August 28, 2020

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