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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

STATE OF MICHIGAN, STATE OF CALIFORNIA, DISTRICT OF COLUMBIA, STATE OF MAINE, STATE OF NEW MEXICO, and STATE OF WISCONSIN, Plaintiffs, **v.** **ELISABETH D. DEVOS, in her official capacity as the United States Secretary of Education, and UNITED STATES DEPARTMENT OF EDUCATION,** Defendants.	Civil Case No. **COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

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INTRODUCTION

1. The State of Michigan, the State of California, the District of Columbia, the State of Maine, the State of New Mexico, and the State of Wisconsin (collectively, the Plaintiffs, Plaintiff States, or the States) bring this action to challenge a rule promulgated by Defendants Secretary Elisabeth D. DeVos and the United States Department of Education (the Department) (collectively, Defendants), unlawfully and erroneously interpreting the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), Public Law 116–136, 134 Stat. 281. The Department's interpretation will deprive low-income and at-risk students, their teachers, and the public schools that serve them of critical resources to meet students' educational and social-emotional needs during and after pandemic-related school closures. The States will also be harmed by the loss of these critical resources at a time of severe crisis.

2. The CARES Act was enacted on March 27, 2020, to address some of the financial challenges faced by Americans as businesses closed, employees lost their jobs, and schools shut down in an unprecedented effort to slow the spread of the virus. The statute authorizes the allocation of $30.75 billion for elementary and secondary schools and higher education in response to the COVID-19 pandemic, including assisting students to transition to distance learning. The statute directs states to distribute CARES Act funds to local educational agencies (LEAs) in proportion to their allocation under part A of Title I of the Elementary and Secondary Education Act of 1965 (ESEA) in the previous fiscal year. Title I-A funds are allocated to LEAs and schools based on the number of children who are economically disadvantaged. These funds benefit many of the vulnerable students whom the States serve, including children with disabilities, migrant children, English language learners, children in residential or day programs for students in the foster care or juvenile justice systems, and homeless children.

3. Congress directed LEAs to use a portion of the funds they receive from the CARES Act to provide equitable services to eligible private-school students and teachers in the same manner as provided under Section 1117 of the ESEA. Under Section 1117, LEAs calculate the amount of Title I-A funds reserved for equitable services based on the number of low-income students who attend private schools as a percentage of the total number of low-income students in

public and private schools combined. Once the money is apportioned, the LEA then provides equitable services to private-school students who are academically at-risk.

4. Section 1117 is clear that LEAs are to use Title I-A funds to provide services to *at-risk* private-school students, and neither Section 1117 nor the CARES Act requires the funds at issue to be used to provide equitable services to *all* students enrolled in private schools. Yet, despite these clear mandates and contrary to the will of Congress, the Department grafted its own allocation and eligibility rules on Congress's directive.

5. The Department first issued its interpretation of how LEAs should apportion the CARES Act moneys and which private-school students were eligible for equitable services on April 30, 2020, through a guidance document (Guidance Document).[1] The Guidance Document—which was inconsistent with prior guidance issued by the Department—provided that LEAs must apportion funds for equitable services using the total numbers of private and public-school students rather than only low-income students. If every LEA receiving CARES Act funds in the Plaintiff States were required to apportion CARES Act funds in this manner, millions of dollars in CARES Act funding would be diverted from their public schools to the private schools. In addition, the Guidance Document directed LEAs to provide equitable services to all private-school students, regardless of whether the private-school students were low income, were academically at-risk of failing, or resided in Title I school attendance areas. Neither of these mandates is consistent with Section 1117.

6. After widespread pushback regarding the Department's incorrect and unlawful guidance, the Department doubled-down on its erroneous interpretation of the CARES Act with the publication of an interim final rule entitled *Providing Equitable Services to Students and Teachers in Non-public Schools*, 85 Fed. Reg. 39,479 (July 1, 2020) (the Equitable Services Rule or Rule).[2] The Rule was published as an interim final rule, which is effective upon publication.

[1] The Guidance Document is attached hereto as Exhibit A. The Department took down its original Guidance Document from its website and now displays an updated version of the Guidance Document, which is available at https://oese.ed.gov/files/2020/06/Providing-Equitable-Services-under-the-CARES-Act-Programs-Update-6-25-2020.pdf.

[2] The Rule is attached hereto as Exhibit B.

7. Contrary to the Act, the Department's Rule requires LEAs to make an untenable choice about how to apportion the CARES Act funds for private-school students, a choice unsupported by the relevant statutes: (1) follow the same interpretation contained in the Guidance Document by apportioning funds for equitable services based on the number of *all* private school children enrolled, rather than *low-income* private school children as required by Section 1117; or (2) apportion funds for equitable services based on the number of *low-income* non-public school children, as required under Section 1117, but then incur strict, poison-pill requirements found nowhere in the CARES Act on how the public-school share of the funds can be used. Under either option, all private-school students would still be eligible to receive equitable services, which negates the eligibility requirements for services in Section 1117.

8. The first poison-pill "option" for LEAs prohibits them from using the public-school share of the funds for any non-Title I schools. As a result, depending on the district, numerous schools—which, despite not being designated as Title I schools, serve many low-income and at-risk students—are excluded from receiving any funds. This restriction cannot square with the flexibility Congress provided to LEAs to use the funds for all schools in their districts, not only Title I schools. The second requirement cautions the LEAs from using the funds in a way that would result in other federal funds "supplant[ing]," rather than "supplement[ing]," traditional school funding from state and local sources. In effect, this second requirement prohibits many LEAs from using CARES Act funds for existing expenditures, which is nonsensical since filling the gap created by reduced state and local funding is a key purpose of the CARES Act funding. These two poison pill restrictions on the use of the CARES Act funds penalize LEAs for following the proportional share calculation in Section 1117 (and required by the CARES Act), and push LEAs to apportion funds in accordance with the Department's Guidance Document—forcing LEAs to grant a higher proportion of funds to private schools, contrary to the CARES Act's clear mandate. They also undermine the flexibility that Congress intended to grant LEAs when it enacted a broad set of permitted uses for CARES Act funds, which expressly include maintaining continuity of services and continuing to employ existing staff of the local educational agency. *See* CARES Act §§ 18002(c)(1), 18003(d)(12).

9. The Rule is thus inconsistent with and not in accordance with the law. The discrepancy between the plain language of the CARES Act and the Department's inaccurate interpretations has led to widespread confusion for State Education Agencies (SEAs), LEAs, and private schools across the Nation. The Rule strips funds Congress specifically directed to public schools to support their response to the COVID-19 pandemic and requires that those funds be reallocated, including to affluent private schools, with consideration neither of the private schools' needs or available resources nor the harms these reallocations cause to public schools. While Congress intended to provide some assistance to private-school students and teachers through the inclusion of equitable services, it intended that assistance go to vulnerable students and used the Title I-A formula and equitable services requirement applicable to those funds to that end.

10. The CARES Act does not expressly delegate to the Department the authority to promulgate administrative rules that interpret, let alone completely re-write, the Act's allocation requirements for moneys provided to private-school students. Nor does the Department's general rulemaking authority, *see* 20 U.S.C. § 1221e-3, allow it to impose these restrictions.

11. Because Congress unambiguously directed the allocation of money in accordance with Title I-A, Congress neither explicitly nor implicitly left any gaps in the statute that might justify rulemaking by the Department. The Department's guidance and the Rule are accordingly entitled to no deference.

12. The Rule is arbitrary and capricious in several respects.

13. First, as discussed above, the Department failed to articulate how its position comports with the plain text of section 18005 of the CARES Act. Thus, it must be set aside as based on an incorrect legal premise. *See Safe Air for Everyone v. U.S. EPA*, 488 F.3d 1088, 1101 (9th Cir. 2007).

14. Second, the Department failed to adequately explain—consistent with the evidence before it—why it was reversing its own guidance regarding how equitable services under Section 1117 should be provided. *See, e.g.*, *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983) (requiring agencies to "explain the evidence which is

available, and . . . offer a rational connection between the facts found and the choice made . . . [including] justification for rescinding the regulation"); *see also Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, No. 18-587, 2020 WL 3271746, at *14 (U.S. June 18, 2020) (requiring "reasoned analysis to support" rescission of prior policy) (quoting *State Farm*, 463 U.S. at 42).

15. Third, the Department ignored important aspects of the problem, *see State Farm*, 463 U.S. at 43, including, among others, the harms to students, States, and LEAs discussed herein. For example, the Department failed to consider that communities with Title I-eligible schools are likely to experience a greater concentration of difficulties relating to COVID-19, and that therefore Congress intended the flexible uses of the CARES Act funds to be concentrated in these communities' schools.

16. Fourth, the Department took into account factors Congress did not intend it to consider. *See id.* For example, the Department's prioritization of support for all private-school students, even those not Title I-A eligible, appears to be based on the erroneous premise that Congress intended to direct these funds to affluent, economically secure private-school students on an equal basis as public schools that educate large populations of at-risk and low-income students. Congress unambiguously expressed clear intent to the contrary by using the Title I-A allocation method, which tracks low-income students.

17. Fifth, the Department failed to take into account the reliance interests that its former position generated. The States and LEAs have relied on the Department's prior interpretations, and there is no indication that the Department took this into account when making its decision. "When an agency changes course . . . it must be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account. It would be arbitrary and capricious to ignore such matters." *Regents*, 2020 WL 3271746, at *14 (citations and punctuation omitted).

18. Sixth, the Department's ever-changing position has generated an "[u]nexplained inconsistency," and the Department has not shown any awareness of its changed position. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005).

19. In addition, the Department flouted the procedural steps required under the Administrative Procedure Act (APA) for the promulgation of the Rule, as the Department did not have good cause for issuing the Rule as an interim final rule. 5 U.S.C. § 553(b)(B); *see, e.g.*, *California v. Azar*, 911 F.3d 558, 576 (9th Cir. 2018) ("[A]n agency's desire to eliminate more quickly legal and regulatory uncertainty is not by itself good cause.").

20. The Rule also violates core separation of powers principles in the Constitution. "[W]here previously appropriated money is available for an agency to perform a statutorily mandated activity," separation of powers principles and the Spending Clause prevent agencies from "ignor[ing] statutory mandates or prohibitions." *In re Aiken County*, 725 F.3d 255, 260 (D.C. Cir. 2013); *see also City & Cty. of San Francisco v. Trump*, 897 F.3d 1225, 1232 (9th Cir. 2018) (agencies are without "[the] unilateral authority" to "thwart congressional will by canceling appropriations passed by Congress") (internal quotation marks and citations omitted). Congress intended to deliver LEAs "need[ed] funding flexibility due to the disruption in the academic year from COVID-19." 166 Cong. Rec. H1856 (Mar. 27, 2020) (statement of Rep. Underwood). Congress intended that LEAs have this funding to "help alleviate the challenges educators, students and families are struggling with in light of school closures" particularly those "students with disabilities, English language learners, and students experiencing homeless." 166 Cong. Rec. E340 (Mar. 31, 2020) (statement of Rep. Jayapal).

21. Relatedly, the Rule violates the Spending Clause: (1) it is contrary to Congress's plainly expressed intent in the CARES Act; (2) Congress has not "unambiguously" imposed the requirements of the Rule, *South Dakota v. Dole*, 483 U.S. 203, 207 (1987) (internal citations omitted, brackets in original); and (3) it is an improper "post acceptance" restriction on the States' and LEAs' use of the funds, *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 25 (1981).

22. Further, the additional funding requirements on schools that the Department would impose under one of the so-called "choices" provided in the Rule violates the plain language of the CARES Act requiring that funds be allocated in the same manner as required in Section 1117 of the ESEA and specifying that funds could be used to maintain existing operations and retain existing personnel. The Department's allocation scheme will dilute the per-pupil amount

available to all public schools by directing Title I-A funds to support private-school students not eligible for equitable services.

23. To avert irreparable injury to the Plaintiff States and the students, teachers, and schools within their states, the Plaintiff States bring this suit to declare unlawful and enjoin the Department's Guidance Document and the Rule.

JURISDICTION AND VENUE

24. This action arises under the APA, 5 U.S.C. §§ 553, 701-06, and the U.S. Constitution. This Court has subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1346.

25. This Court has the authority to issue declaratory relief, injunctive relief, and other relief pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02, and the APA, 5 U.S.C. §§ 702, 705-06.

26. This is a civil action in which Defendants are agencies of the United States or officers of such an agency. Venue is proper in this Court because a substantial part of the events giving rise to this action occurred in this district. *See* 28 U.S.C. § 1391(e)(1).

PLAINTIFFS

27. Plaintiff State of Michigan is a sovereign state of the United States of America. This action is being brought on behalf of the State by Attorney General Dana Nessel pursuant to her statutory authority. Mich. Comp. Laws § 14.28.

28. Plaintiff State of California is a sovereign state of the United States of America. This action is being brought on behalf of the State by California Attorney General Xavier Becerra, the State's chief law officer, Cal. Const., art. V, § 13, who has the duty to see that the laws of the State are uniformly and adequately enforced, and Governor Gavin Newsom, the State's chief executive officer, who is responsible for overseeing the operations of the State and ensuring that its laws are faithfully executed, Cal. Const., art. V, § 1.

29. Plaintiff District of Columbia is a sovereign municipal corporation organized under the Constitution of the United States. It is empowered to sue and be sued, and it is the local government for the territory constituting the permanent seat of the federal government. The District is represented by and through its chief legal officer, the Attorney General for the District

of Columbia, Karl A. Racine. The Attorney General has general charge and conduct of all legal business of the District and all suits initiated by and against the District and is responsible for upholding the public interest. D.C. Code § 1-301.81.

30. Plaintiff State of Maine is a sovereign state of the United States of America. The Attorney General of Maine, Aaron M. Frey, is a constitutional officer with the authority to represent the State of Maine in all matters and serves as its chief legal officer with general charge, supervision, and direction of the State's legal business. Me. Const. art. IX, § 11; Me. Rev. Stat., tit. 5, §§ 191 et seq. The Attorney General's powers and duties include acting on behalf of the State and the people of Maine in the federal courts on matters of public interest. The Attorney General has the authority to file suit to challenge action by the federal government that threatens the public interest and welfare of Maine residents as a matter of constitutional, statutory, and common-law authority.

31. Plaintiff State of New Mexico is a sovereign state of the United States of America. New Mexico is represented by its Attorney General, Hector Balderas, who is authorized to assert the state's interests in state and federal courts.

32. Plaintiff State of Wisconsin is a sovereign state of the United States of America and brings this action by and through its Attorney General, Joshua L. Kaul, who is the chief legal officer of the State of Wisconsin and has the authority to file civil actions to protect Wisconsin's rights and interests. *See* Wis. Stat. § 165.25(1m). The Attorney General's powers and duties include appearing for and representing the State, on the governor's request, "in any court or before any officer, any cause or matter, civil or criminal, in which the state or the people of this state may be interested." *Id.*

33. In filing this action, Plaintiff States seek to redress harms to their interests as recipients of CARES Act emergency relief funding. Plaintiff States are affected by the Department's interpretation of the CARES Act through the Rule and Guidance Document, are directly injured by them, and the relief requested will redress their injuries.

DEFENDANTS

34. Defendant Elisabeth D. DeVos is Secretary of the United States Department of Education and is sued in her official capacity pursuant to 5 U.S.C. § 702. Her principal address is 400 Maryland Avenue, S.W., Washington, D.C. 20202.

35. Defendant the United States Department of Education is an executive agency of the United States of America pursuant to 5 U.S.C. § 101, and a federal agency within the meaning of 28 U.S.C. § 2671. As such, it engages in agency action and is named as a defendant in this action pursuant to 5 U.S.C. § 702. Its principal address is 400 Maryland Avenue, S.W., Washington, D.C. 20202.

36. Secretary DeVos is responsible for carrying out the duties of the Department of Education under the Constitution of the United States of America and relevant statutes, including the CARES Act and the ESEA.

FACTUAL ALLEGATIONS

I. COVID-19 PANDEMIC

37. COVID-19 is a public health emergency that has caused and continues to have devastating impacts on countless individuals, families, communities, businesses, and governments. Our Nation's educational agencies and school systems have had to respond urgently to the crisis and take drastic measures to protect the health and safety of their students and staff.

38. The Plaintiff States' educational agencies and school districts have been forced to transition to remote delivery of instruction, implement new health and safety guidelines, and meet the novel and challenging needs of their students arising from the pandemic, including supports for their vulnerable populations beyond the provision of core educational services. These efforts include, but are not limited to, serving meals to qualifying students and families; providing special education and related services to students with disabilities remotely; enabling English learners and migrant students to access remote learning by providing accessible technology, online instruction and translations; and offering computing devices and connectivity to low-income students at no cost.

39. Compounding the programmatic challenges in serving students during the pandemic is the uncertainty and economic stress caused by COVID-19 on the Plaintiff States, their SEAs, and their LEAs. Public education largely depends on state funding. State budgets have been hit hard by dramatic reductions in revenues from state sales and income taxes caused by the COVID-19 pandemic, as well as increased expenditures necessary for the public health response. This revenue decline inevitably impacts the amount of state aid available to school districts. And yet, school districts have incurred and continue to incur significant costs related to the pandemic, including paying for deep-cleaning campuses, obtaining personal protective equipment for employees, purchasing distance learning materials as well as new software and hardware, and preparing and delivering meals to students and families.

II. THE CARES ACT

40. In late March 2020, the United States Congress acted to address the fiscal impact of the COVID-19 outbreak. It passed legislation, signed by the President, including appropriations to federal agencies with explicit direction for distributing the funding.

41. The Coronavirus Aid, Relief, and Economic Security Act (CARES Act), Pub. L. No. 116–136, 134 Stat. 281, enacted on March 27, 2020, appropriated funds for K-12 and higher education in response to the economic impact of the COVID-19 pandemic.

42. Specifically, Congress created the Education Stabilization Fund to help educational entities across the country "prevent, prepare for, and respond to coronavirus," and appropriated $30.75 billion for the Fund. CARES Act § 18001.

43. Congress tasked the Department with allocating the moneys appropriated to the Education Stabilization Fund through the CARES Act. The vast majority of the moneys in the Education Stabilization Fund are divided into three separate funds, each with its own rules for distribution and use: the Governor's Emergency Education Relief Fund (GEER), the Elementary and Secondary School Emergency Relief Fund (ESSER), and the Higher Education Emergency Relief Fund. *Id.* §§ 18002-18004. The funds are allocated as follows: 9.8% for GEER; 43.9% for ESSER; and 46.3% for the Higher Education Emergency Relief Fund. *Id.* §§ 18001(b)(1)-(3).

44. According to the Department's website, $2,953,230,000 was allocated for the GEER Fund and $13,229,265,000 for the ESSER Fund.[3]

A. The Governor's Emergency Education Relief (GEER) Fund

45. The CARES Act directs the Department to provide emergency grants from the GEER Fund to state governors. CARES Act § 18002(a).

46. The Department must allocate the GEER Fund moneys to governors as follows: (1) 60% based on the "relative population of individuals aged 5 through 24" in each state, and (2) 40% based on the state's "relative number of children counted under section 1124(c) of the [ESEA]." *Id.* § 18002(b). Section 1124(c) of the ESEA describes the children to be counted for purposes of distributing funds under Part A, Title I of the ESEA, commonly referred to as Title I-A funds. Children to be counted in this section include children 5 to 17 who are "from families below the poverty level," "in institutions for neglected and delinquent children . . . or being supported in foster homes with public funds," and "from families above the poverty level" but who receive payments under the Social Security Act, Title IV, Part A (Temporary Assistance for Needy Families). 20 U.S.C. §§ 6333(c)(1)(A)-(C), (c)(4)(A).

47. Governors, along with SEAs, may use GEER funds for three purposes:

> (1) To provide emergency support through grants to local educational agencies that the State educational agency deems have been most significantly impacted by coronavirus to support the ability of such local educational agencies to continue to provide educational services to their students and to support the on-going functionality of the local educational agency;
>
> (2) To provide emergency support through grants to institutions of higher education serving students within the State that the Governor determines have been most significantly impacted by coronavirus to support the ability of such institutions to continue to provide educational services and support the ongoing functionality of the institution; and
>
> (3) To provide support to any other institution of higher education, local educational agency, or education-related entity within the State that the Governor deems essential for carrying out emergency educational services to students for authorized activities . . . the provision of child care and early childhood education, social and emotional support, and the protection of education-related jobs.

[3] U.S. Dep't of Educ., Governor's Emergency Education Relief Fund, State Allocation Table, *available at* https://oese.ed.gov/files/2020/04/GEER-Fund-State-Allocations-Table.pdf; U.S. Dep't of Educ., Elementary and Secondary School Emergency Relief Fund, State Allocation Table, *available at* https://oese.ed.gov/files/2020/04/ESSER-Fund-State-Allocations-Table.pdf.

CARES Act §§ 18002(c)(1)-(3).

48. While they are directed per the above criteria to focus the GEER funds on the most significantly impacted districts, governors may allocate moneys from the GEER Fund to any LEA, regardless of whether the LEA or its public schools receive Title I-A funds. Moreover, there are no federal restrictions on the use of funds by the LEAs and any other restrictions on the use of funds is left to the discretion of each state. The CARES Act provides broad flexibility to the LEAs to use the moneys "to provide educational services to their students and to support the on-going functionality of the local educational agency." *Id.* §§ 18002(c)(1), (3).

49. The Plaintiff States expect to receive the following amounts from the GEER Fund:[4]

a. Michigan: $89,432,673;

b. California: $355,227,235;

c. District of Columbia: $5,807,678;

d. Maine: $9,273,552;

e. New Mexico: $22,262,663; and

f. Wisconsin: $46,550,411.

B. Elementary and Secondary School Emergency Relief (ESSER) Fund

50. Through the CARES Act, Congress also directed the Department to provide emergency grants from the ESSER Fund to SEAs. CARES Act § 18003(a).

51. The Department is required to allocate the ESSER Fund moneys to SEAs "in the same proportion as each State received under [Title I-A] in the most recent fiscal year." *Id.* § 18003(b). Allocation of Title I-A funds to States is governed by the formulas included in 20 U.S.C. §§ 6332-39, and is based primarily on the numbers of children from low-income families and foster children in each state's LEAs.

52. The CARES Act requires at least 90 percent of the moneys received by the SEAs from the ESSER Fund to be sub-granted to LEAs within the state. *Id.* § 18003(c). Like the Department's allocation to the states, the SEAs are to sub-grant the funds to LEAs "in proportion

[4] U.S. Dep't of Educ., Governor's Emergency Education Relief Fund, State Allocation Table, *available at* https://oese.ed.gov/files/2020/04/GEER-Fund-State-Allocations-Table.pdf.

to the amount of funds such local educational agencies and charter schools that are local educational agencies received under [Title I-A] in the most recent fiscal year." *Id.*

53. The Department's May 8, 2020 guidance discussing the ESSER allocations and LEAs' eligibility acknowledged that LEAs are only eligible for the ESSER funding to the extent they participate in the Title I-A program.[5] In other words, moneys from the ESSER Fund are designated, through the SEAs, for LEAs that receive Title I-A funds, which in turn support those public schools with populations of economically-disadvantaged children in each state. LEAs that do not receive Title I-A funds (generally, LEAs without significant numbers of low-income students) are not eligible for the ESSER Funds.

54. LEAs may use the moneys from the ESSER Fund for twelve broad purposes, as described in the CARES Act. *See* CARES Act § 18003(d). Like the GEER Fund, there are no restrictions in the statutory language on which schools within the eligible LEAs may receive the funds, regardless of whether the public school receives Title I-A funds. These funds can be used for expressly broad purposes, including "[o]ther activities that are necessary to maintain the operation of and continuity of services in [LEAs] and continuing to employ existing staff of the [LEA]," i.e., to support any operation, service, or staff existing prior to the pandemic. *Id.* § 18003(d)(12).

55. For the SEAs to receive the ESSER funds from the Department, the Plaintiff States' SEAs were required to complete and submit a Certification and Agreement form.[6]

56. Within the Certification and Agreement form, the Plaintiff SEAs are required to:

> [A]cknowledge and agree that the failure to comply with all Assurances and Certifications in this Agreement, all relevant provisions and requirements of the CARES Act, Pub. L. No. 116-136 (March 27, 2020), or any other applicable law or regulation may result in liability under the False Claims Act, 31 U.S.C. § 3729, et seq.; OMB Guidelines to Agencies on Governmentwide Debarment and Suspension

[5] U.S. Dep't of Educ., Frequently Asked Questions about the Elementary and Secondary School Emergency Relief Fund (ESSER), May 5, 2020, *available at* https://oese.ed.gov/files/2020/05/ESSER-Fund-Frequently-Asked-Questions.pdf.

[6] U.S. Dep't of Educ., Certification and Agreement for Funding under the Education Stabilization Fund Program Elementary and Secondary School Emergency Relief Fund (ESSER Fund), CFDA Number 84.425D, April 24, 2020, *available at* https://oese.ed.gov/files/2020/04/ESSERF-Certification-and-Agreement-2.pdf.

> (Nonprocurement) in 2 CFR part 180, as adopted and amended as regulations of the Department in 2 CFR part 3485; and 18 USC § 1001, as appropriate.

Certification and Agreement at 1.

57. Within the specific assurances and certifications, the SEAs are required to ensure that:

> [] LEAs receiving ESSER funds will provide equitable services to students and teachers in non-public schools as required under 18005 of Division B of the CARES Act.
>
> [] [A]n LEA receiving ESSER funds will provide equitable services to students and teachers in non-public schools located within the LEA in the same manner as provided under section 1117 of the ESEA, as determined through timely and meaningful consultation with representatives of non-public schools.

Id. at 2.

58. Each of the Plaintiff States' SEAs submitted a Certification and Agreement to the Department to secure the ESSER Funds for their states.

59. The Department also requires SEAs to submit quarterly reporting regarding how the SEA and the LEAs used the ESSER funds. *Id.* at 3; *see also* CARES Act § 15011(b)(2).

60. From the ESSER Fund, the Plaintiff States each received the following amounts:[7]

a. Michigan: $389,796,984;

b. California: $1,647,306,127;

c. District of Columbia: $42,006,354;

d. Maine: $43,793,319;

e. New Mexico: $108,574,786; and

f. Wisconsin: $174,777,774.

C. Equitable Services for Private-School Students and Teachers Required by the CARES Act.

61. The CARES Act requires that LEAs that receive moneys from the GEER Fund and/or ESSER Fund must allocate some of the moneys to provide "equitable services" to students and teachers at private schools. CARES Act § 18005(a). Crucial to this action, the CARES Act

[7] U.S. Dep't of Educ., Elementary and Secondary School Emergency Relief Fund, State Allocation Table, *available at* https://oese.ed.gov/files/2020/04/ESSER-Fund-State-Allocations-Table.pdf.

specifies that each LEA "shall provide equitable services *in the same manner as provided under Section 1117 of the ESEA of 1965 to students and teachers in non-public schools.*" *Id.* (emphasis added).

62. Section 1117 of the ESEA, 20 U.S.C. § 6320, requires LEAs to allocate a portion of their Title I-A funds to provide equitable services to eligible students and teachers at private schools. Section 1117 calculates the proportionate share of funds to be used for equitable services "based on the number of children from low-income families who attend private schools" and reside in the "participating school attendance areas" (i.e., the geographic area in which children are normally served by a Title I-A school). 20 U.S.C. § 6320(a)(4)(A); *see also* 20 U.S.C. § 6313(a)(2) (defining "school attendance area"). Services are then provided to those private-school students identified "as failing, or most at risk of failing, to meet State academic standards." 20 U.S.C. § 6320(a) (incorporating the definition of "eligible children" from 20 U.S.C. § 6315(c)). In other words, the LEAs must provide equitable services only to low-achieving children who attend private schools and reside in a Title I-A school attendance area. *Id.* §§ 6315(c), 6320(a).

63. The Department's Title I-A guidance for providing equitable services under Section 1117 to private-school students—issued under the current administration less than a year ago—confirms that equitable services should only be provided to at-risk students who reside in Title I public school attendance areas. As stated in that document: "to be eligible for Title I services, a private school child must reside in a participating Title I public school attendance area and must be identified by the LEA as low achieving on the basis of multiple, educationally related, objective criteria."[8]

64. While *services* are based on low-achievement and residence in a Title I-A school attendance area, the amount of *money* LEAs are required to set-aside under Section 1117 of the

[8] U.S. Dep't of Educ., Title I, Part A of the Elementary and Secondary Education Act of 1965, as amended by the Every Student Succeeds Act: Providing Equitable Services to Eligible Private School Children, Teachers, and Families Updated Non-Regulatory Guidance, October 7, 2019, p. 30, *available at* https://www2.ed.gov/about/inits/ed/non-public-education/files/equitable-services-guidance-100419.pdf.

ESEA is based on the number of economically disadvantaged students attending private schools who reside in the LEA's attendance area. 20 U.S.C. § 6320(c).

65. Again, it has been the Department's own position that, under Section 1117 of the ESEA, funding for equitable services should be based on the number of children in private schools who are economically disadvantaged or in foster care—the LEAs should "determine an accurate count of children from low-income families who attend public and private schools and reside in participating Title I public school attendance areas in order to allocate the proportional share."[9]

66. Notably, the CARES Act does not require that LEAs provide equitable services in the same manner as Section 8501 of the ESEA, a general provision that measures equitable services based on proportional total enrollments. 20 U.S.C. § 7881(b). Rather, the CARES Act specifically references Section 1117. By referencing Section 1117, Congress explicitly and clearly directed LEAs to provide equitable services only based on the number of low-income private-school students, not all private-school students, as would have been required had the CARES Act instead referenced Section 8501.

III. THE DEPARTMENT'S APRIL 30, 2020 GUIDANCE DOCUMENT

67. On April 30, 2020, the Department issued the Guidance Document, titled *Providing Equitable Services to Students and Teachers in Non-Public Schools Under the CARES Act Programs*. *See* Guidance Document, Ex. A.

68. The Guidance Document advises LEAs to (i) determine the allocation of funds for equitable services based on all students enrolled in non-public schools, rather than only economically disadvantaged students, and (ii) ignore Section 1117's eligibility requirements for private-school students to receive services, including residence in a Title I-A school attendance area and low-achievement.

[9] *Id.* at 19.

A. Determining the Proportional Share of Funds to Be Reserved for Equitable Services

69. In section 10 of the Guidance Document, the Department incorrectly states that an LEA must calculate the proportional share available for equitable services from the comparative enrollments of *all students* in public and private schools in the district, rather than the comparative enrollments of *low-income students*, as required by Section 1117(a)(4)(A)(i). Guidance Document, Ex. A at 6-7; *see also* 20 U.S.C. § 6320(a)(4)(A)(i).

70. Essentially, the guidance rejects the calculation of the proportionate share under Section 1117 that Congress specified in the CARES Act and instead adopts the calculation in Section 8501, which drastically inflates the amount of CARES Act funds required to be allocated for services for private-school students.

71. Under the Department's Guidance Document, the share of funds diverted from public schools to private schools in many LEAs is substantial.

B. Eligibility Requirements for Private-School Students to Receive CARES Act Equitable Services

72. In section 9 of the Guidance Document, the Department erroneously determines that "[a]ll students and teachers in a non-public school are eligible for equitable services under the CARES Act programs." Guidance Document, Ex. A at 5.

73. The Department cites no section of the CARES Act that requires—or even suggests—that all students and teachers at non-public schools are eligible for equitable services.

74. The plain language of the CARES Act makes clear that LEAs that receive GEER or ESSER funds must provide equitable services "*in the same manner* as provided under section 1117 of the ESEA." CARES Act § 18005(a) (emphasis added). And Section 1117 of the ESEA requires LEAs to provide equitable services for eligible, at-risk children enrolled in non-public schools who reside in attendance areas where public schools qualify for Title I-A funding, rather than all students enrolled. 20 U.S.C. § 6320(a)(1).

75. Section 7 of the Guidance Document misinterprets the requirement under § 18005(a) of the CARES Act that equitable services be provided "in the same manner as provided under section 1117 of the ESEA." *See* Guidance Document, Ex. A at 3-5. Contrary to the Act, this

section of the Guidance Document states that this requirement in the CARES Act "necessitates that the Department interpret how the requirements of section 1117 apply to the CARES Act programs" because "an LEA under the CARES Act programs may serve all non-public-school students and teachers without regard to family income, residency, or eligibility based on low achievement." *Id.* at 3. But Section 18005(a) of the CARES Act does not necessitate any interpretation by the Department. Instead, the plain language of the Act makes clear that, while LEAs have discretion in spending money for public schools, Congress intended that the LEAs should provide equitable services to private schools under the CARES Act "in the same manner" as they do for at-risk students under Title I-A.

76. Also, in section 7 of the Guidance Document, the Department purports to "reconcile[]" various subsections of Section 1117 of the ESEA using an erroneous and incongruous interpretation of the Act. Guidance Document, Ex. A at 3. For example, after noting that Section 1117(a)(1) of the ESEA requires LEAs to "provide equitable services to low-achieving students," the Department nevertheless states that "an LEA may provide equitable services . . . to any students and teachers in non-public schools." *Id.* The Department provides no explanation or basis for this distinction.

77. The Guidance Document's conclusion that the non-public proportion must be calculated based on total enrollments, rather than enrollment of low-income students, and its interpretation of the requirements for equitable services under § 18005(a) of the CARES Act are arbitrary and capricious, misstate and misapply the law as written, and exceed the Department's authority.

C. Reaction to the Department's Guidance Document

78. The Guidance Document faced immediate backlash by Congressional leaders, SEAs, and national education groups due to its incorrect interpretation of the CARES Act.

79. On May 5, 2020, the Council of Chief State School Officers (CCSSO), a nationwide organization of public officials who head SEAs, wrote a letter to urge Secretary DeVos to clarify

the Guidance Document to align it with the CARES Act's requirements for equitable services.[10] The CCSSO's letter specifically requested that the Department issue new guidance to "advise LEAs to look at the percentage of FY2019 Title I-A funds they set aside for equitable services and apply that percentage to ESSER Funds."[11] Secretary DeVos responded to CCSSO's letter on May 22, 2020, rejecting its request to clarify the Guidance Document in accordance with the plain text of the CARES Act.[12] Secretary DeVos stated that if LEAs "insist on acting contrary to the Department's stated position, they should, at a minimum, put into an escrow account the difference between the amount generated by the proportional-student enrollment formula and the Title I, Part A formula."[13] The instruction to put funds in escrow is nonsensical given the crisis, and clearly inconsistent with the intent of the CARES Act, which is to provide funding expeditiously to LEAs to address their immediate needs in light of the COVID-19 pandemic.

80. Additionally, multiple SEAs published memoranda and guidance to their LEAs instructing the LEAs to follow the plain text of the CARES Act and not the Department's Guidance Document.[14] For example, on May 12, 2020, the Indiana Department of Education published a memorandum for its LEAs, instructing the LEAs to disregard the Department's

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[10] Letter from Carissa Moffat Miller, CCSSO, to Betsy DeVos, U.S. Sec'y of Educ., (May 5, 2020), *available at* https://ccsso.org/sites/default/files/2020-05/DeVosESLetter050520.pdf.

[11] *Id.*

[12] Letter from Betsy DeVos, U.S. Sec'y of Educ., to Carissa Moffat Miller, CCSSO (May 22, 2020), *available at* https://ccsso.org/sites/default/files/2020-06/Secretary%20DeVos%20Response%20to%20Carrisa%20Moffat%20Miller%205%2022%2020.pdf.

[13] *Id.*

[14] *See, e.g.*, Pennsylvania Department of Education, Letter from Pedro Rivera, Sec'y of Educ., to Frank Brogan, Asst. Sec'y. for Elementary and Secondary Educ., (May 7, 2020), *available at* https://www.education.pa.gov/Documents/K-12/Safe%20Schools/COVID/CARESAct/Letter%20to%20Secretary%20Brogan.pdf; Memorandum from New Mexico Public Education Department, Funds available under Coronavirus Aid, Relief and Economic Security (CARES) Act through the Elementary and Secondary School Education Relief Fund (ESSER), Index 24301 (May 14, 2020), *available at* https://webnew.ped.state.nm.us/wp-content/uploads/2020/05/CARES-Act-memo-ESSER-Funds-2020-05-14-Final.pdf; Mississippi Department of Education, CARES Act Equitable Service, EdUpdate (May 21, 2020), *available at* https://msachieves.mdek12.org/cares-act-equitable-services/; Maine Department of Education, Priority Notice, CARES Act: Frequently Asked Questions (May 27, 2020), *available at* https://mailchi.mp/maine/cu5lemq6y0-1321452; Memorandum from Illinois State Board of Education (March 31, 2020), *available at* https://www.isbe.net/Documents/CARES-Act-District-Info-3-31-20.pdf; Memorandum from Connecticut State Board of Education, (June 8, 2020), *available at* https://portal.ct.gov/-/media/SDE/Digest/2019-20/Equitable-services-under-ESSERF-CARES-Act-06082020.pdf.

Guidance Document and "enact[] the CARES Act as written in the law . . . including the provision to administer equitable services according to Sec. 1117 of the [ESEA]."[15] The memorandum described its decision as "ensur[ing] the funds are distributed according to Congressional intent and a plain reading of the law, which prioritizes communities and schools with high-poverty who are at most risk and in need of additional funds."[16]

81. On May 20, 2020, Chairman Bobby Scott of the House Committee on Education and Labor; Chairwoman Rosa DeLauro of the House Subcommittee on Labor, Health, Human Services, and Related Agencies; and Ranking Member Patty Murray of the Senate Committee on Health, Education, Labor, and Pensions wrote to Secretary DeVos, to urge the Department to "immediately revise your April 30 guidance, including Question 10 of the guidance document to come into compliance with the CARES Act and section 1117 of ESEA."[17] The bicameral letter also requested the Department's internal records related to the development of "its interpretation of the equitable services provision and its inconsistency with long-standing requirements related to equitable services."[18]

82. On May 21, 2020, Senator Lamar Alexander, Chair of the Senate Committee on Health, Education, Labor, and Pensions, was quoted as disagreeing with the Department's Guidance Document: "My sense was that the money should have been distributed in the same way we distributed Title I money. . . . I think that's what most of Congress was expecting."[19]

83. On June 4, 2020, fifty national education organizations, including the CCSSO, wrote to United States Senate and House leaders, asking for Congress to "pass[] legislation rescinding

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[15] Memorandum from Indiana Department of Education, Final Language for Equitable Share of CARES Act Funds (May 12, 2020), *available at* https://www.doe.in.gov/sites/default/files/news/final-language-equitable-share-cares-act-funds.pdf.

[16] *Id.*

[17] Letter from Robert C. "Bobby" Scott, Chair, Committee on Education and Labor, U.S. House of Representatives, et al., to Betsy DeVos, U.S. Sec'y of Educ. (May 20, 2020), *available at* https://edlabor.house.gov/imo/media/doc/2020-5-20%20Ltr%20to%20DeVos%20re%20Equitable%20Services.pdf.

[18] *Id.*

[19] Nicole Gaudiano, Alexander, *DeVos split on stimulus support for private school kids*, Politico, May 22, 2020, *available at* https://www.politico.com/newsletters/morning-education/2020/05/22/alexander-devos-split-on-stimulus-support-for-private-school-kids-787837.

the equitable services [G]uidance [Document], preempting any future notice from [the Department] that is contrary to the legislation, and further clarifying the allocation requirements for equitable services for nonpublic schools consistent with Title I."[20]

IV. THE RULE

84. On June 25, 2020, the Department published an unofficial version of the Rule on its website. The Rule was officially published in the Federal Register on July 1, 2020. 85 Fed. Reg. 39,479.

85. The Rule was published as an interim final rule and became effective when published.

A. The Rule Conflicts with the Plain Language of the CARES Act.

86. Like the Department's Guidance Document, the Rule effectively rewrites both (1) the proportional share calculation that Congress established for LEAs to determine the amount of funds to be used for equitable services for private-school students, and (2) the eligibility criteria that Congress mandated to determine which private-school students are entitled to equitable services under the CARES Act.

87. Neither the proportional share nor eligibility mandates in the Rule comport with the plain text of the CARES Act.

88. The Rule will divert millions of dollars to private schools and away from public schools in direct contradiction of Congress's intent.

89. For the proportional share calculation, the Rule provides two options to LEAs:

> **Option #1 (Title I-Only Schools Option):**
> An LEA using all its funds under a CARES Act program to serve only students and teachers in public schools participating under Title I, Part A of the ESEA may calculate the proportional share in accordance with paragraph (c)(1)(ii) of this section or by using—
>
> (A) The proportional share of Title I, Part A funds it calculated under section 1117(a)(4)(A) of the ESEA for the 2019-2020 school year; or
>
> (B) The number of children, ages 5 through 17, who attend each non-public school in the LEA that will participate under a CARES Act program and are from low-income families compared to the total number of children, ages 5 through 17, who are from

[20] Letter from national education organizations to congressional leadership (June 4, 2020), *available at* https://ccsso.org/sites/default/files/2020-06/Equitable%20Services%20Funding%20Letter%20-%20FINAL.pdf.

> low-income families in both Title I schools and participating non-public elementary and secondary schools in the LEA.

34 C.F.R. § 76.665(c)(1)(i).

90. Functionally, this option is most similar to the ESEA, Section 1117 proportional share calculation. *See* 20 U.S.C. § 6320(a)(4)(A); *see also id.* § 6320(c)(1). The two sub-options allow the LEA to use the proportional share figures used for the 2019-2020 Title I-A distribution (34 C.F.R. § 76.665(c)(1)(i)(A)) or updated figures based on the current proportion of low-income students who attend private schools in the LEA (34 C.F.R. § 76.665(c)(1)(i)(B)). By adopting the ESEA, Section 1117 proportional share calculation, Option #1 similarly adopts the proportional share calculation required by the CARES Act, as the funds would then be apportioned "in the same manner" as Section 1117. *See* CARES Act § 18005(a). However, this option includes two unsupported "poison pill" limitations on LEAs who choose this option, as discussed below.

> **Option #2 (Private School Enrollment Option):**
> Any other LEA must calculate the proportional share based on enrollment in participating non-public elementary and secondary schools in the LEA compared to the total enrollment in both public and participating non-public elementary and secondary schools in the LEA.

34 C.F.R. § 76.665(c)(1)(ii).

91. This option incorporates the Department's erroneous proportional share calculation set forth in the Guidance Document, requiring LEAs to consider all private-school students when they apportion funds, similar to the calculation used to determine funds for equitable services under Section 8501 of the ESEA, which Congress did not adopt for CARES Act funds. *See* 34 C.F.R. § 76.665(c)(1)(ii). This option has no basis in the CARES Act and would allow the Department to divert hundreds of millions of dollars of CARES Act funds intended for public schools to private schools.

92. As mentioned above, the Department included two poison pill requirements for using Option #1 (Title I-Only Schools Option) to calculate the proportional share, with the obvious effect of pushing LEAs to use Option #2.

93. The poison pill restrictions would force the LEAs using Option #1 to calculate the proportional share to (1) use the CARES Act funds reserved for public schools for Title I schools

only, and (2) use the CARES Act only for limited, supplemental costs to avoid a Title I supplanting violation. 34 C.F.R. §§ 76.665(c)(1), (c)(3); 20 U.S.C. § 6321(b)(1) (Section 1118 of ESEA). This would effectively prohibit many LEAs from using CARES Act funds, for example, to retain existing staff in Title I schools while using state and local dollars for the same purpose in non-Title I schools. This requires LEAs to treat CARES Act funds not as stimulus monies but as additional funds, forcing them to choose between a less beneficial methodology or a requirement that limits their ability to spend CARES Act dollars to most effectively meet their needs.

94. Neither of these restrictions is found anywhere in the CARES Act. Rather, they are both contrivances of the Department, seemingly intended to force LEAs to use Option #2 for apportioning the CARES Act funds. The restrictions effectively punish LEAs that attempt to apportion the CARES Act funds as Congress intended.

95. The Department has acknowledged "Congress . . . intended that grantees have substantial flexibility in the use of these [CARES Act] dollars."[21] Yet, the Department arbitrarily imposes these restrictions on LEAs, significantly limiting their flexibility to use the funds.

96. These poison pill requirements are contradicted by the plain language of the CARES Act, which specifies how the public schools' share of the funds should be used.

97. The CARES Act grants LEAs that receive CARES Act funds flexibility to use the funds for all schools in the district, not only Title I schools. *See* CARES Act §§ 18002(c)(1), (3), 18003(d)(1)-(12).

98. For the ESSER funds, the CARES Act specifies the twelve "[u]ses of [f]unds" for the LEAs, including such broad uses as "[p]roviding principals and other school leaders with the resources necessary to address the needs of their individual schools" and "[o]ther activities that are necessary to maintain the operation of and continuity of services in [LEAs] and continuing to employ existing staff of the [LEA]." CARES Act §§ 18003(d)(3), (12); *see also id.* §§ 18003(d)(1)-(12). Likewise, LEAs can broadly use the GEER funds granted to LEAs at the

[21] Letter from Mitchell M. Zais, Ph.D., Deputy Sec'y, U.S. Dep't of Educ. to Gene Dodaro, Comptroller Gen., U.S. Gov't Accountability Office (June 12, 2020), at p. 3 (available as pp. 375-389 of the U.S. Gov't Accountability Office, COVID-19 Opportunities to Improve Federal Response and Recovery Efforts, GAO-20-625, June 2020, available at https://www.gao.gov/products/GAO-20-659T).

Governor's discretion "to continue to provide educational services to their students and support on-going functionality of the [LEA]." *Id.* § 18002(c)(1); *see also id.* § 18002(c)(3). These broad uses of the ESSER and GEER funds as specified by Congress explicitly allow the LEAs and public schools to use the funds to "supplant" state and local funding that may have been lost due to the pandemic. The Rule impermissibly exceeds the scope of the CARES Act by requiring LEAs to choose between two options that are contrary to the CARES Act's requirements and prohibiting LEAs from using funds consistent with those purposes if they use Option #1.

99. Whether calculated under Option #1 (Title I-only schools Option) or Option #2 (Private school enrollment Option), CARES Act funds will be diverted from their intended recipients.

100. Under Option #1, due to the poison pill restrictions, public-school students at non-Title I schools (many of whom are low-income or otherwise at-risk) will receive no funding whatsoever. The ESSER funds and part of the GEER funds were specifically designed to assist *all* public schools in LEAs that receive CARES Act funds—not just the Title I schools within these LEAs. And, even for the public-school students at Title I schools, the funds could only be used for supplemental costs or else risk a Title I supplanting violation. Thus, the LEA would be prohibited from using the CARES Act funds for general educational expenses in Title I schools, such as teacher salaries, books, or general sanitation, among other uses. This erroneous restriction is directly contradicted by many of the listed "Uses of Funds" for moneys from the ESSER Fund in the CARES Act. *See* CARES Act §§ 18003(d)(2)-(11). In addition, at-risk private-school students, who are eligible for equitable services under Section 1117, will receive fewer funds per student, and the funds reserved for private-school students will be used to provide services for all private-school students (both at-risk and not at-risk), diluting funding that Congress intended for vulnerable students.

101. Under Option #2, private-school students will receive a significantly greater proportion of the funds than they are entitled to under the CARES Act, as all private-school students will be considered when apportioning the funds. In turn, public schools will lose funding diverted to the private schools. In addition, the money set aside for private-school students will

be used to provide services to all private-school students, reducing the amount of money per student for the at-risk private-school students who are eligible for services under Section 1117.

102. Under either proportional share option, the Rule—like the Guidance Document—requires LEAs to provide equitable services to all private-school students. 34 C.F.R. § 76.665(d)(2). This requirement does not comport with the plain text of the CARES Act, which adopts the Section 1117 eligibility requirements, limiting equitable services to at-risk private-school students. *See* CARES Act § 18005(a); 20 U.S.C. § 6320(a) (incorporating the definition of "eligible children" from 20 U.S.C. § 6315(c)).

B. The Department Lacks Authority to Issue the Rule and Failed to Follow the Procedural Requirements of the APA.

103. The Rule cites 20 U.S.C. § 1221e-3 and 20 U.S.C. § 3474 as authority for rulemaking related to the CARES Act. Neither of these statutes authorizes the Department to issue the Rule.

104. Congress gave no authority to the Department to issue rules interpreting the CARES Act either generally, with regard to the GEER and ESSER Funds, or in particular to the distribution of appropriated funds for equitable services for private-school students.

105. Nor did Congress authorize the Department to issue rules related to the provision of equitable services for private-school students without compliance with the notice and comment procedures of the APA.

106. The Department issued the Rule as an interim final rule without demonstrating good cause that the notice and public procedures were impracticable, unnecessary, or contrary to the public interest.

107. Because the Department cannot satisfy the requirements for issuing the Rule as an interim final rule, the Rule does not comply with the Administrative Procedure Act's procedural requirements.

V. THE RULE WILL CAUSE IMMEDIATE AND IRREPARABLE HARM TO PLAINTIFF STATES, SCHOOLS, AND STUDENTS.

108. The Rule and Guidance Document will cause immediate, irreparable harm to the interests of the States, LEAs, and the vulnerable students whom Congress meant to assist through the CARES Act.

109. Plaintiff States, themselves and through their publicly administered educational institutions, are directly regulated by the Rule and will suffer direct harm because of the Rule.

110. Each of the Plaintiff States is constitutionally required to administer a system of K-12 public education funded primarily by state moneys:

a. *Michigan*: The Michigan Constitution charges the Michigan Legislature with "maintain[ing] and support[ing] a system of free public elementary and secondary schools as defined by law." Mich. Const. art. VIII, § 2. The State Board of Education is vested with "[l]eadership and general supervision over all public education . . . ." *Id.* § 3. The State Board of Education further "serve[s] as the general planning and coordinating body for all public education . . . and shall advise the legislature as to the financial requirements in connection therewith." *Id.* Separate from any federal funding, Michigan provides more than $13 billion each year to its approximately 831 LEAs and 56 intermediate school districts. The 3,400 school buildings in these districts educate almost 1.5 million students each year. While the school districts exercise primary responsibility over budgetary and other decisions within their respective districts, the Michigan Department of Education (MDE) implements federal and state legislative mandates in education and carries out the policies of the State Board of Education. *See* Mich. Comp. Laws § 388.1009.

b. *California*: The State of California is the legal and political entity with plenary responsibility for educating all California public-school students. California has the constitutional responsibility to establish and maintain the system of common schools and a free education. Cal. Const. art. IX, § 5. California funds and oversees the operation of the largest common system of public schools in the nation, which serves nearly 6.8 million children in more than 10,500 schools. In 2018–2019, California provided about $56.1 billion in General Funds to its 1,037 school districts and over 1,200 charter schools. Under the California Constitution, "[t]he State itself has broad responsibility to ensure basic educational equality." *Butt v. State of California*, 4 Cal. 4th 668, 681 (1992). Emergency conditions causing inequitable conditions may

create a duty for the State to intervene and provide supplementary support. *See id.* at 688. The California State Board of Education makes education policy determinations, and adopts rules and regulations for the government of elementary and secondary schools. Cal. Educ. Code §§ 33000, 33030-33031. The California State Board of Education is responsible for applying for federal funds made available to state education agencies under federal law, is responsible for directing the allocation and apportionment of those federal funds to public schools, and is responsible for adopting implementing rules and regulations governing those federal funds. Cal. Educ. Code §§ 12000-12001. The California Superintendent of Public Instruction oversees the schools within the state and is the executive officer of the California State Board of Education and the California Department of Education. Cal. Educ. Code §§ 33112, 33301(b), 33302-33303. The California Department of Education is a state administrative agency responsible for administering and enforcing laws related to education throughout California. Cal. Educ. Code §§ 33300, 33301, 33306, 33308.

c. *District of Columbia*: The Office of the State Superintendent of Education (OSSE) is the state education agency for the District of Columbia charged with raising the quality of education for all DC residents. OSSE serves as the District's liaison to the Department and works closely with the District's traditional and public charter schools to achieve its key functions. D.C. Code § 38-2601. District of Columbia public schools received more than $902 million in state funding last year while charter schools in the District received more than $904 million. 95,820 students attend either a public or charter school in the District.

d. *Maine:* Maine's state policy on public education is that "[i]t is the intent of the Legislature that every person within the age limitations prescribed by state statute shall be provided an opportunity to receive the benefits of a free public education." Me. Rev. Stat. tit, 20-A, § 2(1). The Maine Department of Education is charged with "[s]upervis[ing], guid[ing] and plan[ning] for a coordinated system of public education for all citizens of the State . . . ." Me. Rev. Stat., tit. 20-A, § 201(1). The Commissioner of Education is responsible

for "[p]roviding educational public leadership for the State" and "[e]nforcing applicable regulatory requirements for school administrative units." Me. Rev. Stat., tit. 20-A, § 251-A(1), (3). The Commissioner determines the amount of state funding for Maine's school administrative units through the Essential Programs and Services Funding Act, Me. Rev. Stat., tit. 20-A, § 15670 et seq. The Commissioner is responsible for the distribution of funds and the oversight of the federal grants that the Department receives. Separate from any federal funding, Maine provides more than $ 1.2 billion each year to its 265 school administrative units (including public charter schools) and two state magnet schools. The 599 school buildings in these school administrative units educate approximately 175,600 students each year.

e. *New Mexico*: The New Mexico Constitution promises to establish and maintain a uniform, free public-school system "sufficient for the education of, and open to, all the children of school age." N.M. Const. Art. 12, § 1. In 2020, legislators appropriated $3.468 billion in state funds for public education from prekindergarten through secondary schools, or 45.5 percent of total recurring appropriations. In 2019, the definition of "school-age" was revised to include students through age 22. The Fiscal Year 2021 budget increased recurring appropriations by $216 million, or 6.6 percent, with significant additional funding to increase educator compensation, provide additional services to at-risk students, and provide professional development and mentorship support for early career teachers.

f. *Wisconsin*: The Wisconsin Constitution requires the Wisconsin Legislature to establish district schools which are to be "as nearly uniform as practicable" and "free and without charge for tuition to all children." Wis. Const. art. X, § 3. The supervision of public instruction is vested in the Superintendent of Public Instruction (State Superintendent). The State Superintendent is charged with the general supervision of public instruction and leads the Department of Public Instruction (DPI) in implementing policies and promulgating administrative rules. Wis. Stat. § 15.37; *see also*, *e.g.*, Wis. Stat. §§ 115.28(1), (3), (7). Her responsibilities also include accepting and administering federal funds. Wis. Stat. §§ 115.28(9) and (19). Wisconsin

> school district funding comes from state and federal aids, property taxes, and local revenue. Wisconsin provides state aids to 443 LEAs, with a combined total student enrollment of 854,959. In the 2019-2020 school year, DPI administered approximately $6.1 billion in state support for K-12 public schools.

111. The CARES Act appropriates funds for the Plaintiff States and their LEAs to support public K-12 schools through the COVID-19 pandemic. Plaintiff States are facing severe budgetary cuts due to the economic impact of the pandemic—cuts that the ESSER and GEER Fund moneys were designed to mitigate. Under the Department's Rule and the Guidance Document, public schools in the Plaintiff States will lose a significant portion of the ESSER and GEER moneys that will be diverted to private schools. This result is inconsistent with the clear language of the CARES Act, and inequitable because public schools do not qualify for other CARES Act funding available to private schools. Accordingly, LEAs will look to States to bridge the gaps in their respective public-school budgets that the ESSER and GEER moneys were intended to fill.

112. If LEAs in the Plaintiff States follow the Rule's Option #1 (Title I-schools only Option) when apportioning CARES Act funds, non-Title I schools across the Plaintiff States stand to lose significant emergency funding to support their schools, and LEAs stand to lose the ability to use the funds to maintain operations that are funded on an LEA-wide basis. In addition, while Title I schools in the Plaintiff States will receive some CARES Act funds under Option #1, the Rule improperly limits how they can use the funds by effectively prohibiting them from using such funds for existing costs. Thus, for both Title I and non-Title I schools in the LEAs that receive CARES Act funds, the effect of the Rule is to stymie the States and LEAs from using the funds for their intended purpose—to "support and prevent, prepare for, and respond to coronavirus." CARES Act § 18001. As a result, the Plaintiff States will be required to allocate moneys to help these schools weather the budgetary storm created by the pandemic.

113. If LEAs in the Plaintiff States follow the Rule's Option #2 (Private school enrollment Option) when apportioning CARES Act funds, the Plaintiff States' LEAs and public schools will

lose out on significant amounts of ESSER and GEER moneys, which will be diverted to private schools for students who would not otherwise qualify for Title I-A equitable services.

a. *Michigan*: If Michigan's LEAs are forced to follow Option #2 in the Rule for apportioning CARES Act funds, an estimated $21,604,648.63 in ESSER moneys would be diverted from public schools in order to provide equitable services to all private-school students. If Michigan LEAs distribute the ESSER moneys in the same manner that Title I-A funds are usually distributed for equitable services based on low-income private-school students, as the plain language of the CARES Act requires, then only an estimated $5,107,921 will be distributed for equitable services to eligible private-school students. Thus, if the Department's Rule stands and LEAs used Option #2 to apportion their CARES Act funds, an estimated total of $16,496,727.63 in ESSER moneys will be diverted from low-income public schools to private-school students who are not qualified for Title I-A funds—7% of the total ESSER moneys that Michigan received. This would amount to $2,251,130.61 less for Detroit Public School Community District students; $2,643,213.87 less for Grand Rapids Public Schools students, and $1,474,676.48 less for Flint Community Schools students.

b. *California*: If California's LEAs are forced to follow Option #2 in the Rule for apportioning CARES Act funds, millions in ESSER and GEER moneys would be diverted from public schools in order to provide equitable services to all private-school students. If California's LEAs distribute the ESSER and GEER moneys in the same manner that Title I-A funds are usually distributed for equitable services based on low-income private-school students, as the plain language of the CARES Act requires, then a considerably smaller portion of the ESSER and GEER moneys will be distributed for equitable services to eligible private-school students. Thus, if the Department's Rule stands and LEAs used Option #2 to apportion their CARES Act funds, millions in ESSER and GEER moneys will be diverted from low-income public schools to private-school students who are not qualified for Title I-A funds.

c. *District of Columbia:* If the District of Columbia Public Schools (DCPS) is forced to follow Option #2 in the Rule for apportioning CARES Act funds, approximately $5,404,710.77 in ESSER and GEER moneys would be diverted from public school funds in order to provide equitable services to all private-school students. If DCPS distributes the ESSER and GEER moneys in the same manner that Title I-A funds are usually distributed for equitable services based on low-income private-school students, as the plain language of the CARES Act requires, then only $1,550,917 will be distributed for equitable services to eligible private-school students. Thus, if the Department's Rule stands and LEAs used Option #2 to proportion their CARES Act funds, a total of $3,853,793.77 in ESSER and GEER moneys will be diverted from low-income public schools to private-school students that are not qualified for Title I-A funds—8.06% of the total ESSER/GEER moneys that DC received.

d. *Maine*: If Maine's LEAs are forced to follow the Department's Rule and Guidance, the Maine Department of Education (MDOE) estimates that $2.1 million in ESSER money would be apportioned to provide equitable services to private-school students. If Maine's LEAs distribute the ESSER money in the same manner that Title I-A funds are usually distributed for equitable services based on low-income private-school students, as the plain language of the CARES Act requires, then only $248,000 will be distributed for equitable services to eligible private-school students. Thus, if the Department's Rule stands, a total of $1,852,000 in ESSER money will potentially be diverted from low-income public schools to private-school students that are not qualified for Title I-A funds—4.25% of the total ESSER money that Maine received.

e. *New Mexico*: If New Mexico's LEAs are forced to follow Option #2 in the Rule for apportioning CARES Act funds, millions in ESSER and GEER moneys would be diverted from public school funds in order to provide equitable services to all private-school students. If New Mexico's LEAs distribute the ESSER and GEER moneys in the same manner that Title I-A funds are usually distributed for equitable services based on low-income private-school students, as the plain language of the CARES Act requires,

then a considerably smaller portion of the ESSER and GEER moneys will be distributed for equitable services to eligible private-school students. Thus, if the Department's Rule stands and LEAs used Option #2 to apportion their CARES Act funds, millions in ESSER and GEER moneys will be diverted from low-income public schools to private-school students that are not qualified for Title I-A funds.

f. *Wisconsin*: If Wisconsin's LEAs are forced to follow Option #2 in the Rule for apportioning CARES Act funds, $28,429,916.56 in ESSER and GEER moneys would be diverted from public school funds in order to provide equitable services to all private-school students. If Wisconsin LEAs distribute the ESSER and GEER moneys in the same manner that Title I-A funds are usually distributed for equitable services based on low-income private-school students, as the plain language of the CARES Act requires, then only $24,245,400.92 will be distributed for equitable services to eligible private-school students. Thus, if the Department's Rule stands and LEAs used Option #2 to apportion their CARES Act funds, a total of $4,184,515.64 in ESSER and GEER moneys will be diverted from low-income public schools to private-school students that are not qualified for Title I-A funds—approximately 2% of the total ESSER/GEER moneys that Wisconsin will distribute to LEAs.

114. In total, if every LEA receiving CARES Act funds in the Plaintiff States uses Option #2 to apportion CARES Act funds, the Plaintiff States will be required to divert tens of millions of dollars in CARES Act funding to provide services to private-school students. The States' public schools were expecting to receive these ESSER and/or GEER moneys.

115. Many LEAs may also have to rework their methodologies for allocating State and local funds to public schools to accommodate the new funds and ensure that CARES Act dollars do not result in a violation of the Title I-A supplement, not supplant requirement. This is a result that was not contemplated by Congress and an administrative cost not taken into account in the Rule.

116. On top of the additional funding that each Plaintiff State will be required to expend in lieu of the CARES Act funds diverted to private school services, the Department's Guidance Document and Rule impose significant administrative burdens on SEAs, which have fielded and will continue to field numerous questions from LEAs about how ESSER and/or GEER Fund moneys should be apportioned in light of the Department's Rule, which is particularly confusing given its clear inconsistency with the CARES Act.

117. The confusion caused by the Department has required the SEAs to divert resources to drafting and issuing memoranda, letters, and other technical assistance to assist LEAs in apportioning the moneys.

118. While facing numerous remote learning-related challenges in the throes of the pandemic, the SEAs are now forced to redirect resources to assist LEAs in addressing the conflicting requirements generated by the Department's Rule that misinterprets the Act.

119. In addition, the Department's Rule imposes strict restrictions on LEAs using Option #1 to apportion the funds, which will increase costs incurred by the SEAs and LEAs to administer equitable services and provide necessary oversight and control over funding, as required under CARES Act Section 18005(b).

120. The additional time and work caused by the Department's confusing and erroneous interpretation of Section 18005 of the CARES Act will create a substantial burden on the SEAs. Since the COVID-19 pandemic enveloped the nation, SEAs, LEAs, and schools in the Plaintiff States have been working tirelessly to transition to remote learning; secure computers and other electronic devices to facilitate students' continued learning; create health and safety plans for returning to school; and plan for the 2020-2021 school year. The time, money, and effort SEAs have diverted to assisting LEAs with how to apportion ESSER/GEER moneys for equitable services for private-school students are directly caused by the Department's Guidance Document and the Rule. The Department's estimate of administrative burden does not adequately capture the amount of administrative time that will be needed to implement this new Rule.

121. The Department's inconsistent interpretations in the Guidance Document and the Rule have also caused a delay in distributing funds to students and teachers—the intended beneficiaries of these funds—which is contrary to the purpose of the CARES Act funding.

122. Moreover, the Plaintiff States' SEAs are required to certify in their ESSER Fund applications that the SEAs and the LEAs will comply with the equitable service provision of the CARES Act (§ 18005) and "any other applicable law or regulation."[22]

123. Because the Department's Rule contradicts the CARES Act's requirements, SEAs (and LEAs) cannot certify that they will comply both with the CARES Act and the Rule.

124. The Department's Rule places the SEAs in a position where they would be in breach of the certification in the Certification and Agreement, subjecting the SEAs to "liability under the False Claims Act . . . [and the] OMB Guidelines to Agencies on Governmentwide Debarment and Suspension (Non-procurement)."[23] Accordingly, SEAs may face potential legal consequences as a direct result of the Department's Rule.

125. The Plaintiff States incurred, and will continue to incur, these financial, legal, and other harms vis-a-vis their SEAs, and the other state-supported K-12 educational institutions in the Plaintiff States.

126. The Plaintiff States also have an interest in protecting the health, safety, education, and well-being of their residents. The Department's interpretation severely impacts the use of the emergency ESSER/GEER funds for public-school students affected by the COVID-19 pandemic. It therefore jeopardizes the education of the Plaintiff States' nearly ten million public-school students.

127. Indeed, above and beyond their state constitutional obligations to educate school-aged children, as set forth above, the States have made it a priority to ensure that vulnerable students like those who are served by Title I-A receive robust educational opportunities. *See, e.g.*, Cal. Educ. Code §§ 8801 (Healthy Start Support Services for Children Act), 42920 (educational

[22] U.S. Dep't of Educ., Certification and Agreement for Funding under the Education Stabilization Fund Program Elementary and Secondary School Emergency Relief Fund (ESSER Fund), CFDA Number 84.425D (April 24, 2020), *available at* https://oese.ed.gov/files/2020/04/ESSERF-Certification-and-Agreement-2.pdf.

[23] *Id.*

services for foster youth); Wis. Stat. §§ 118.43-44 (Achievement Gap Reduction Program), 121.136 (state aid for high-poverty school districts), 115.28(23) & 115.43-44 (Wisconsin Educational Opportunity Program). The Rule undermines and frustrates these State policies.

128. Option #2 (Private school enrollment Option) of the Rule harms the States' interest in providing educational opportunities for their most vulnerable students by requiring LEAs to divert moneys away from their public schools to private-school students who are not at-risk and therefore would not be eligible for equitable services under Title I-A.

129. Even if LEAs in Plaintiff States calculate the proportional share of CARES Act funds for private-school students under Option #1 in the Rule, public schools in the Plaintiff States that were intended to receive money under the CARES Act will lose access to these funds. Non-Title I schools will receive no funds. And Title I schools will not be able to use the CARES Acts to cover existing, ongoing costs, even if related to the pandemic, as such allocation would lead to a violation of the LEA's Title I-A supplanting prohibition.

130. Public school systems depend on state moneys. The CARES Act education stabilization funding is intended to assist public school systems, including both Title I and non-Title I schools, to address the numerous issues created by the pandemic. Private-school interests are addressed through eligibility for other stimulus funding within the CARES Act.

131. Protecting and maintaining public-school education in the Plaintiff States is imperative to ensuring the long-term success of students. The loss of federal funding for public schools will have significant, adverse impacts on public-school students. The States have an interest in ensuring that funds are not diverted from other vital state priorities and programs providing long-term assistance to public-school students who would otherwise have had access to a free and quality public education absent the Rule.

132. The Rule will injure the States' interests by causing significant harm to their residents, including children and other students who attend K-12 public-school educational institutions within the States.

CAUSES OF ACTION

COUNT I
Violation of Separation of Powers Principles

133. Plaintiffs incorporate by reference the foregoing paragraphs of this Complaint as if set forth herein.

134. Article I, Section 1 of the U.S. Constitution enumerates that "[a]ll legislative Powers herein granted shall be vested in . . . Congress."

135. Article I, Section 8 of the U.S. Constitution vests exclusively in Congress the spending power to "provide for . . . the general Welfare of the United States."

136. The executive branch's authority to act "must stem either from an act of Congress or from the Constitution itself." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952); *see also Clinton v. City of New York*, 524 U.S. 417, 438 (1998) ("[N]o provision in the Constitution . . . authorizes the President to enact, to amend, or to repeal statutes.").

137. This principle is particularly strong in the spending context, because "[w]hen it comes to spending, the President has none of his own constitutional powers to rely upon." *California v. Trump*, No. 19-16299, 2020 WL 3480841, at *16 (9th Cir. June 26, 2020) (quoting *San Francisco*, 897 F.3d at 1233–34). Thus, "[a]bsent congressional authorization, the Administration may not redistribute or withhold properly appropriated funds in order to effectuate its own policy goals." *See San Francisco*, 897 F.3d at 1235. Nor may it impose conditions on funds appropriated by Congress without congressional authorization. *See id.* at 1233–34.

138. The Department's Rule and Guidance Document require LEAs to allocate or use GEER and ESSER funds in a manner that is contrary to the plain language of Section 18005 of the CARES Act, thereby violating constitutional separation of powers principles by requiring distribution of funds based on conditions not provided for in the CARES Act. Defendants did not have inherent authority to change the manner in which LEAs distribute the GEER and ESSER funds. Nor did Congress afford Defendants any discretion or authority to issue rules governing the LEAs' allocation or use of these funds through the CARES Act.

139. By unilaterally imposing its interpretation of Section 18005 of the CARES Act, the Department abrogated the significant discretion given to the SEAs and LEAs in the CARES Act and usurped Congress' power to legislate in violation of the principles of separation of powers.

140. Absent injunctive and declaratory relief suspending and vacating the Rule and the Guidance Document, Plaintiff States and their residents will be immediately, continuously, and irreparably harmed by Defendants' illegal actions.

COUNT II
Ultra Vires Action

141. Plaintiffs incorporate by reference the foregoing paragraphs of this Complaint as if set forth herein.

142. An agency acts ultra vires when it exceeds its statutory authority conferred by Congress.

143. There is no provision in the CARES Act that imposes the proportional share calculations, use restrictions, or eligibility requirements in the Rule for CARES Act funds. Further, Congress has not delegated to Defendants the authority to impose such requirements.

144. Nothing in the CARES Act requires LEAs to calculate the private-school student share of CARES Act funds using the Section 8501 calculation; prohibits non-Title I schools from receiving funds; prohibits Title I schools from using CARES Act funds on any of the permissible uses in the statute; or requires LEAs to provide equitable services to all private-school students. Moreover, Congress explicitly required that LEAs follow Section 1117 when apportioning CARES Act funds for equitable services and determining which private students were eligible for such services. Congress also explicitly listed permitted uses for the CARES Act funds and permitted both Title I and non-Title I schools to receive and use CARES Act funds.

145. Through the CARES Act, Congress required the Department to issue ESSER funds to Plaintiff States' SEAs without conditioning the receipt of funds on Plaintiffs' agreement to require LEAs to calculate the proportional share for equitable services with the improper Section 8501 formula, prohibit non-Title I schools from receiving funds, prohibit Title I schools from

using CARES Acts on any of the permissible uses in the statute, or require LEAs to provide equitable services to all private-school students.

146. Absent injunctive and declaratory relief suspending and vacating the Rule and the Guidance Document, Plaintiff States and their residents will be immediately, continuously, and irreparably harmed by Defendants' illegal actions.

COUNT III
Spending Clause

147. Plaintiffs incorporate by reference the foregoing paragraphs of this Complaint as if set forth herein.

148. Article I, Section 8, Clause 1 of the United States Constitution, also known as the Spending Clause, states that "Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States[.]"

149. Under the Spending Clause, conditions may not be placed on federal funds that are (1) so coercive that they compel (rather than encourage) recipients to comply, (2) ambiguous, (3) retroactive, or (4) unrelated to the federal interest in a particular program. *Nat'l Fed'n of Indep. Bus. v. Sebelius (NFIB)*, 567 U.S. 519, 575–78 (2012); *South Dakota*, 483 U.S. at 206–08.

150. To the extent that Congress delegated its authority to the Department to impose its own requirements on the allocation and use of GEER and ESSER funds (which it has not), the Department's Rule and Guidance Document violate the Spending Clause of the U.S. Constitution.

151. The Department's interpretation of Section 18005 of the CARES Act in the Rule and Guidance Document violates the relatedness requirement under the Spending Clause because it is contrary to Congress's plainly expressed intent in the CARES Act to require SEAs and LEAs to follow Section 1117 when apportioning CARES Act funds for equitable services and determining which private-school students were eligible for such services, and to permit specific uses for the CARES Act funds by both Title I and non-Title I schools.

152. The Department's Rule and Guidance Document also violate the "unambiguous" requirement under the Spending Clause. Congress has not "unambiguously" imposed the requirement that LEAs calculate and set aside their GEER and ESSER Funds for equitable services to all private-school students and teachers, provide equitable services to all private-school students, limit their uses of funds, and limit their distribution of funds to Title I schools only. *See Pennhurst*, 451 U.S. at 17 ("[I]f Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously.").

153. In addition, the Department's interpretation was an improper "post-acceptance" restriction. *Id.* at 17, 25. States "cannot knowingly accept conditions of which they are 'unaware' or which they are 'unable to ascertain.'" *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006) (quoting *Pennhurst*, 451 U.S. at 17). Accordingly, the Spending Clause does not permit what the Department has improperly done here through unauthorized rulemaking: "surprising participating States with post acceptance or 'retroactive' conditions" on congressionally appropriated funds. *Pennhurst*, 451 U.S. at 25; *see also NFIB*, 567 U.S. at 519.

154. Plaintiff States did not know of the Department's interpretation at the time they applied for and received emergency financial aid grants from the GEER and ESSER funds. Therefore, they were unable to exercise their choice knowingly, cognizant of the consequences of their participation, and they were surprised with post acceptance or retroactive conditions.

155. Absent injunctive and declaratory relief suspending and vacating the Rule and the Guidance Document, Plaintiff States and their residents will be immediately, continuously, and irreparably harmed by Defendants' illegal actions.

COUNT IV
Violation of the Administrative Procedure Act
(Agency Action in Excess of Statutory Authority, Short of Statutory Right, or Not in Accordance with Law)

156. Plaintiffs incorporate by reference the foregoing paragraphs of this Complaint as if set forth herein.

157. The APA requires that a court hold unlawful and set aside agency action, findings, and conclusions found to be in excess of statutory authority, short of statutory right, or not in accordance with law. 5 U.S.C. § 706(2)(A), (C).

158. Congress did not grant the Department authority to interpret or make rules regarding Section 18005 of the CARES Act. The Department's Rule and the Guidance Document are unauthorized by and contrary to Section 18005 of the CARES Act. They therefore are in excess of statutory authority, short of statutory right, and not in accordance with law.

159. To the extent the Department claims that its Guidance Document is merely an interpretation contained in a policy statement, agency manual, or enforcement guideline that lacks the force of law, the Department's interpretation is entitled to no or only limited deference. The Guidance Document is not persuasive, nor does it reflect thorough consideration, and is contrary to the plain language of the statute it purports to interpret. Congress's intent in the CARES Act is clear that equitable services are to be provided by LEAs to private-school students and teachers in the same manner as required under Section 1117 of the ESEA.

160. Absent injunctive and declaratory relief suspending and vacating the Rule and the Guidance Document, Plaintiff States and their residents will be immediately, continuously, and irreparably harmed by Defendants' illegal actions.

COUNT V
Violation of the Administrative Procedure Act
(Arbitrary and Capricious Agency Action)

161. Plaintiffs incorporate by reference the foregoing paragraphs of this Complaint as if set forth herein.

162. The APA requires that a court hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, or an abuse of discretion. 5 U.S.C. § 706(2)(A).

163. A rule is arbitrary and capricious if the agency has "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *State Farm*, 463 U.S. at 43.

164. The Department's interpretation of Section 18005 of the CARES Act in the Rule and the Guidance Document is arbitrary and capricious agency action because, among other reasons, the Department failed to articulate how its position comports with the plain text of Section 18005 of the CARES Act and why it was reversing its own guidance regarding how equitable services under Section 1117 should be provided, generating an unexplained inconsistency in the Department's position of which it appears to be unaware. Further, the Department ignores important aspects of the problem, and its decision to enact the Rule runs counter to the evidence before the Department. The Department also took into account factors Congress did not intend it to consider. Finally, the Department failed to take into account the reliance interests that its former position generated.

165. Absent injunctive and declaratory relief suspending and vacating the Rule and the Guidance Document, Plaintiff States and their residents will be immediately, continuously, and irreparably harmed by Defendants' illegal actions.

COUNT VI
Violation of the Administrative Procedure Act
(Agency Action Without Observance of Procedure Required by Law)

166. Plaintiffs incorporate by reference the foregoing paragraphs of this Complaint as if set forth herein.

167. The APA requires that a court hold unlawful and set aside agency action, findings, and conclusions found to be without observance of procedure required by law. 5 U.S.C. § 706(2)(D).

168. The agency must publish a "[g]eneral notice of proposed rulemaking" in the Federal Register. 5 U.S.C. § 553(b). That notice must describe "either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. § 553(b)(3).

169. The agency must further provide "interested persons" an "opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation." 5 U.S.C. § 553(c).

170. The Rule is a legislative rule adopted without complying with the notice and comment requirements of the APA.

171. The Rule was issued on an interim final basis without good cause.

172. The Department failed to establish good cause to waive the notice and public procedures required under the APA due to these procedural requirements being impracticable, unnecessary, or contrary to the public interest. 5 U.S.C. § 553(b).

173. Absent injunctive and declaratory relief suspending and vacating the Rule and the Guidance Document, Plaintiff States and their residents will be immediately, continuously, and irreparably harmed by Defendants' illegal actions.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff States request that this Court enter judgment in their favor and grant the following relief:

a. Declare the Rule and all versions of the Guidance Document unlawful within the meaning of 5 U.S.C. § 706(2)(A), (C), & (D);

b. Preliminarily and permanently enjoin the Department and its officers, employees, and agents from applying and enforcing the Rule or all versions of the Guidance Document;

c. Vacate and set aside the Rule and all versions of the Guidance Document;

d. Award Plaintiffs reasonable costs and expenses, including attorneys' fees; and

e. Grant such other and further relief as the Court deems just and proper.

Dated: July 7, 2020

Respectfully Submitted,

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ATTESTATION OF SIGNATURES

I, Garrett M. Lindsey, hereby attest, pursuant to Local Civil Rule 5-1(i)(3) of the Northern District of California that concurrence in the filing of this document has been obtained from each signatory hereto.

Dated: July 7, 2020

/s/ Garrett M. Lindsey

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Attorney for State of California