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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

STATE OF MICHIGAN, STATE OF CALIFORNIA, DISTRICT OF COLUMBIA, STATE OF HAWAII, STATE OF MAINE, STATE OF MARYLAND, STATE OF NEW MEXICO, COMMONWEALTH OF PENNSYLVANIA, STATE OF WISCONSIN, THE BOARD OF EDUCATION FOR THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, BOARD OF EDUCATION FOR THE CITY OF CHICAGO, CLEVELAND MUNICIPAL SCHOOL DISTRICT BOARD OF EDUCATION, and SAN FRANCISCO UNIFIED SCHOOL DISTRICT,

Plaintiffs,

v.

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

Defendants.

Case No. 3:20-cv-04478-SK

PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR PRELIMINARY INJUNCTION; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Judge: Hon. Sallie Kim
Trial Date: None set
Action Filed: July 7, 2020

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NOTICE OF MOTION AND MOTION FOR PRELIMINARY INJUNCTION

PLEASE TAKE NOTICE that Plaintiffs hereby move the Court under Federal Rule of Civil Procedure 65 for entry of a preliminary injunction prohibiting Defendants from imposing or enforcing an equitable services requirement under Section 18005 of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act or Act) in a manner not wholly and explicitly described by Section 1117 of the Elementary and Secondary Education Act of 1965 (ESEA). Defendants have promulgated a guidance document and interim final rule in violation of the U.S. Constitution and the Administrative Procedure Act. Plaintiffs seek an order from the Court prohibiting Defendants from imposing or enforcing unlawful limitations or requirements on the use of funds allocated under Sections 18002 and 18003 of the CARES Act. This motion is based on this Notice of Motion and Motion, the Memorandum of Points and Authorities, the accompanying declarations and Request for Judicial Notice (RJN), as well as the papers, evidence and records on file, and any other written or oral evidence or arguments as may be presented.

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Plaintiffs bring this motion to seek provisional relief to stop the U.S. Department of Education's (ED) unlawful attempt to divert hundreds of millions of dollars of emergency assistance, intended by Congress to enable public schools to prepare for and respond to the COVID-19 pandemic, for services to private-school students. In the CARES Act, H.R. 748, 116th Cong. (2020), Congress appropriated approximately $16 billion for elementary and secondary schools, funneling the money through well-established Title I allocation formulas—directing the funding to local educational agencies (LEAs) (i.e., school districts) with significant populations of students from low-income families. Congress directed that a portion of this funding be reserved by recipient LEAs to provide "equitable services" to at-risk private-school students in their districts, consistent with Title I's requirements. Rather than follow Congress's clear directive, ED essentially rewrote this equitable services provision of the CARES Act through a guidance document and, subsequently, an interim final rule, in a manner that favors private schools and contradicts the statute's plain language and congressional intent.

ED's guidance document directed LEAs to allocate CARES Act funds based on the total number of *all* private-school students, rather than the total number of *low-income* private-school students as provided under the Title I equitable services requirement that Congress referenced in the CARES Act, and then to provide equitable services to *all* private school students, rather than only those *at risk* as also required under the Title I equitable services requirement that Congress referenced in the CARES Act. ED's rewrite of the allocation method and eligibility of private-school students shifts a significantly higher percent of LEAs' CARES Act funding to private schools, leaving the public schools with less funding to respond to the pandemic.

After significant push back from numerous stakeholders, including state educational agencies, ED doubled down on its erroneous interpretation of the CARES Act with the publication of an interim final rule. The rule—which was effective immediately and did not provide for any notice and comment—followed ED's original guidance, pushing LEAs to divert their CARES Act funds away from public schools to fund services for all private school students. The Rule offered LEAs an untenable choice: follow ED's guidance or be subjected to punitive restrictions on the use of the funds for public schools. Both options are unsupported by the plain language of the statute, and the so-called "choice" appears to be an attempt to force LEAs to follow ED's original scheme and divert more funding to private schools.

The Department's guidance and interim final rule are *ultra vires* and violate separation of powers principles and the Spending Clause because the CARES Act neither requires LEAs to divert funding from public schools to provide equitable services for *all* private-school students, nor delegates authority to Defendants to impose any such allocation requirements. To the contrary, the Department's guidance and interim final rule directly conflict with the plain language of the statute, which manifests Congress's intent to: (a) allocate funding for equitable services for private-school students based on the number of low-income private-school students within the LEA, and (b) provide LEAs flexibility to use the CARES Act funding for their public schools. The Department's guidance and interim final rule violate the Administrative Procedure Act (APA) because they are in excess of statutory authority, are arbitrary and capricious, and were issued without complying with notice and comment requirements.

ED's guidance and rule will irreparably harm Plaintiffs and their public-school students by diverting funding away from the public schools at a time when such emergency relief is urgently needed and when state and local government budgets are stretched thin by the effects of the pandemic. Congress appropriated these funds for the express purpose of quickly providing emergency support for public-educational agencies' response to the fallout from the COVID-19 pandemic. Plaintiffs require such funding not only to assist their public schools' transition to remote learning, obtain personal protective equipment (PPE) for students and staff, and deep-clean their schools, among other emergency needs, but also to provide supports for their vulnerable populations beyond the provision of core educational services. ED seeks to force LEAs to divert hundreds of millions of dollars that Congress directed to these public schools and targeted at vulnerable students, for services to all private-school students—regardless of need—despite private schools having access to other funding sources in the CARES Act, which are unavailable to traditional public schools. Immediate relief is required as Plaintiff States and LEAs must have a clear understanding of how to allocate and use the emergency CARES Act funding as they prepare for the start of the 2020-2021 school year.

Plaintiffs respectfully request that the Court grant their motion and enjoin ED's erroneous and unauthorized guidance and rule.

BACKGROUND

I. THE PANDEMIC'S EFFECT ON PUBLIC ELEMENTARY AND SECONDARY EDUCATION

The effect of COVID-19 on elementary and secondary education has been swift, multifaceted, and unsparing. Schools across the county were forced to suspend in-person instruction to slow the spread of the virus and protect the health of students, staff, and their families. *See* Guerrant Decl. ¶ 13; Constancio Decl. ¶ 11; Goldson Decl. ¶ 11; Gordon Decl. ¶ 13; Hoffmann Decl. ¶ 10; Jackson Decl. ¶ 12; Jones Decl. ¶ 9; Kaneshiro-Erdmann Decl. ¶¶ 10, 12; Salmon Decl. ¶ 8; Stem Decl. ¶ 10; Stewart Decl. ¶ 14; Wallace Decl. ¶ 10. Many schools then transitioned quickly to remote learning. *See* Guerrant Decl. ¶¶ 13-14; Constancio Decl. ¶¶ 11-13; Baca Decl. ¶ 10; Goldson Decl. ¶ 11; Gordon Decl. ¶ 13; Hoffmann Decl. ¶ 9; Jackson Decl. ¶ 12; Jones Decl. ¶ 10; Makin Decl. ¶¶ 11-13; Salmon Decl. ¶ 8; Stewart Decl. ¶ 14; Wallace Decl.

¶ 11. This transition required significant expenditures on computer software, internet-connected devices for students, and other technologies to ensure learning could continue remotely. *See* Constancio Decl. ¶ 13; Goldson Decl. ¶ 11; Gordon Decl. ¶ 13; Hoffmann Decl. ¶¶ 10, 12; Jackson Decl. ¶¶ 12-13, 17; Jones Decl. ¶ 14; Kaneshiro-Erdmann Decl. ¶¶ 10-11; Makin Decl. ¶ 15; Oates Decl. ¶ 24; Salmon Decl. ¶ 9; Stewart Decl. ¶ 26; Wallace Decl. ¶ 11.

In addition to the ongoing costs associated with transitioning to remote learning, to prepare for the 2020-2021 school year, LEAs and schools have sought to procure PPE, deep-clean schools, and take other proactive measures to allow for safer in-person instruction. *See* Guerrant Decl. ¶ 28; Gordon Decl. ¶ 24; Jackson Decl. ¶ 15; Jones Decl. ¶¶ 14, 29; Kaneshiro-Erdmann Decl. ¶ 25; Makin Decl. ¶¶ 16-17, 29; Oates Decl. ¶ 24; Salmon Decl. ¶ 22; Stem Decl. ¶ 14; Stewart Decl. ¶ 26. Most States and LEAs are still determining how and if in-person instruction could restart for the 2020-2021 school year and what the additional costs would be if remote learning continued. *See* Guerrant Decl. ¶ 13; Constancio Decl. ¶¶ 13-14; Goldson ¶ 11; Jackson Decl. ¶ 18; Jones Decl. ¶ 11; Kaneshiro-Erdmann Decl. ¶ 10; Makin Decl. ¶ 13; Oates Decl. ¶ 24; Stem Decl. ¶ 13; Stewart Decl. ¶ 15.

While ED emphasizes that "[t]he pandemic has harmed all our Nation's students by disrupting their education," the health and economic impacts of the virus have been concentrated among the Nation's low-income families, especially families of color. RJN Ex. G; *see* Jones Decl. ¶ 12. These are, in many cases, the same students who will need more assistance when school returns, including remedial instruction, mental health services, free and reduced-price meals, and other supports. States and LEAs must ensure that meals are served to qualifying students and families; special education and related services are provided to students with disabilities; English learners and migrant students have access to appropriate instruction and supports; and public education is free and accessible to all students, including economically disadvantaged students. Public schools are financially responsible for providing these supports; private schools are not.

As they take on the financial challenges of transitioning to remote learning and preparing for the 2020-2021 school year, State Education Agencies' (SEAs) and LEAs' budgets have been substantially impacted by the economic effects of the pandemic on state and local tax revenues.

See Guerrant Decl. ¶¶ 12, 15, 26; Constancio Decl. ¶ 16; Goldson ¶¶ 10, 13; Gordon Decl. ¶ 12; Hoffmann Decl. ¶ 13; Jackson Decl. ¶ 26; Jones Decl. ¶ 14; Kaneshiro-Erdmann Decl. ¶¶ 15, 25; Oates Decl. ¶ 10; Salmon Decl. ¶ 11; Stem Decl. ¶ 27; Wallace Decl. ¶ 12. In short, the States and their public schools are facing a perfect storm caused by COVID-19 and the economic impact of efforts to combat it.

II. ESSER AND GEER FUNDS TO ASSIST PUBLIC SCHOOLS

To address the described needs in public schools, on March 27, Congress enacted the CARES Act, under which it appropriated $30.75 billion to ED "to prevent, prepare for, and respond to coronavirus, domestically or internationally." Coronavirus Aid, Relief, and Economic Security Act (CARES Act or Act), P.L. No. 116-136, 134 Stat. 281, 564. Within that amount, relevant here, Congress created two programs, the Governor's Emergency Education Relief Fund (GEER) and the Elementary and Secondary School Emergency Relief Fund (ESSER), and appropriated approximately $16 billion for public elementary and secondary education for these programs. *Id.* §§ 18001(b)(1), (3), 18002-18003.

In the CARES Act, Congress directed ED to provide emergency grants from the GEER fund to state governors; in turn, governors are to distribute the funds to LEAs and other educational entities that "have been most significantly impacted by coronavirus." *Id.* § 18002(a), (c). The funds may then be used to support the LEAs "to continue to provide educational services to their students and to support the on-going functionality of the [LEA]." *Id.* § 18002(c)(1).

Congress instructed ED to distribute the ESSER funds to SEAs "in the same proportion as each State received under [Title I, Part A] in the most recent fiscal year." *Id.* § 18003(b). Allocation of Title I-A funds to states is based primarily on the numbers of children from low-income families and foster children in each state's LEAs. *See* 20 U.S.C. §§ 6332-6339. The SEAs must then sub-grant 90 percent of the ESSER funds to LEAs in the state "in proportion to the amount of funds such [LEAs] and charter schools that are local educational agencies received under [Title I-A] in the most recent fiscal year." CARES Act § 18003(c). Thus, only LEAs that participate in the Title I-A program—because they have a high proportion of economically-disadvantaged children—are eligible to receive ESSER local subgrants. *See* RJN Ex. A at 4.

Through the CARES Act, Congress provided LEAs that receive ESSER funds wide latitude to use the funds, listing twelve authorized uses in the Act, including for broad purposes such as "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); *see also id.* § 18003(d)(1)-(12).

Congress required LEAs that receive GEER and/or ESSER funds to reserve a portion of these funds to provide "equitable services" to private-school students "*in the same manner* as provided under Section 1117 of the ESEA of 1965." *Id.* § 18005(a) (emphasis added). Section 1117 of the ESEA, 20 U.S.C.§ 6320, which is part of Title I-A, sets both the method of apportioning funds for equitable services and the eligibility for such services. For allocation, the LEA calculates the "proportional share" of the funds 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"). Once the LEA has calculated the proportional share for equitable services, it uses those funds to provide services to at-risk private-school students after consultation with the private schools. 20 U.S.C. § 6320(a) (incorporating definition of "eligible children" from 20 U.S.C. § 6315(c)). ED confirmed the Section 1117 proportional share calculation and the eligibility for equitable services under Section 1117 in a guidance document issued in October 2019. *See* RJN Ex. B at 30.

III. THE DEPARTMENT'S GUIDANCE AND THE RULE

Despite ED reiterating the well-established proportional share calculation and eligibility requirements for equitable services under Section 1117 just months ago, ED decided to modify these requirements for CARES Act funds, contradicting Congress's clear instruction in the CARES Act that equitable services be provided "*in the same manner* as provided under Section 1117." CARES Act § 18005(a) (emphasis added).

On April 30, 2020, the Department issued a guidance document, titled *Providing Equitable Services to Students and Teachers in Non-Public Schools Under the CARES Act*

Programs (Guidance), interpreting Section 18005 of the CARES Act. RJN Ex. C. In the Guidance, ED instructs LEAs to calculate the proportional share of their CARES Funds for equitable services by 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). *Compare* RJN Ex. C at 6-7 *with* 20 U.S.C. § 6320(a)(4)(A)(i). In essence, ED rejects the calculation of the proportionate share under Section 1117 that Congress specified in the CARES Act and instead adopts the calculation under a different section of the ESEA, Section 8501 (found at 20 U.S.C. § 7881). By changing the calculation method to determine the proportional share of CARES Act funding for equitable services, the amount of CARES Act funds allocated for private schools is drastically inflated because low-income students generally comprise a relatively smaller share of their overall enrollment than at public schools. *See, e.g.*, Hoffmann Decl. ¶ 33. In addition to changing the proportional share calculation, ED instructed LEAs to provide equitable services to all private-school students, rather than only the at-risk private-school students in the participating school attendance area. RJN Ex. C at 5. This aspect of the Guidance ignores Section 1117's eligibility requirements providing that only at-risk private-school students are entitled to services. 20 U.S.C. § 6320(a).

The Guidance generated significant push back from Congressional leaders and multiple educational associations. *See, e.g.*, RJN Ex. D. Secretary DeVos responded to a letter from an organization representing chief state school officers nationwide with a letter of her own in which she accused those who opposed the Guidance of seeking to "improperly discriminate against an entire class of children," and implied that LEAs have a "reflex to share as little as possible with students and teachers outside of their control" and a lack of "concern[]" for private school students "concentrated in low-income and middle-class communities." RJN Ex. E.

ED published the interim final rule (the Rule) in the Federal Register on July 1, 2020. 85 Fed. Reg. 39,479. The Rule was published without notice and comment and was effective immediately.

While the Rule reflects ED's general position in the Guidance, ED added language under which LEAs are ostensibly presented with two choices regarding how to calculate the

proportional share of CARES Act funds for equitable services—neither of which comports with the CARES Act requirements and each of which relies on an interpretation of the reference to Section 1117 in the underlying statutory text that is irreconcilable with the other. Under Option #1 (Title I-Only Schools Option), the LEA could use the Section 1117 proportional share calculation; as directed by the plain language of Section 18005, however, they would then be subject to two "poison pill" requirements, severely restricting the LEA's use of the public-school share of the funds. 34 C.F.R. § 76.665(c)(1)(i). Under Option #2 (Private School Enrollment Option), the LEA would calculate the proportional share of CARES Act funds for equitable services using the Guidance's calculation, which apportions the funds between public and private schools based on the *total* number of students in each group, contrary to Section 1117. 34 C.F.R. § 76.665(c)(1)(ii).

For LEAs that calculate the proportional share of CARES Act funds for equitable services using Option #1 (Title I-Only Schools Option), the LEA would incur two poison pills: (1) the public-school share of the CARES Act funds must be used exclusively at Title I schools, thereby excluding districts' non-Title I schools; and (2) the public-school share of the CARES Act funds could only be used for costs that were not previously covered by state and local funds to avoid a violation of Title I's "supplement not supplant" requirements for federal funding under Section 1118 of the ESEA. 34 C.F.R. § 76.665(c)(1), (c)(3); 20 U.S.C. § 6321(b)(1). Under Option #1, the LEA's hands are tied; it cannot use the funds as explicitly stated in the CARES Act to assist all of its schools in responding to the pandemic nor address the severe diminution of state and local funding.

Regardless of how the LEA calculates the proportional share of CARES Act funds, the Rule still requires eligibility for all private-school students to receive equitable services, ignoring the Section 1117 eligibility requirements that only at-risk private-school students are eligible for services. 34 C.F.R. § 76.665(d)(2). This results in less equity even for private schools and their at-risk students, as private schools that serve large numbers of at-risk students will receive a diminished allocation of CARES Act funds and the services for at-risk students could be diluted. *See, e.g.*, Hoffmann Decl. ¶¶ 32, 43.

The proportional share calculation methods, the poison pill requirements, and the eligibility requirements in the Rule are all nowhere to be found in the CARES Act. ED, through the Rule, has rewritten Section 18005 to drive emergency moneys away from public schools and at-risk students when they need the money most.

IV. THE IMPACT OF THE DEPARTMENT'S ACTIONS ON PLAINTIFFS

Plaintiffs estimate that their LEAs will be forced to divert over $150 million in CARES Act funds from public schools to provide equitable services to all private-school students if they follow Option #2 (Private School Enrollment Option). *See* Guerrant Decl. ¶¶ 23, 37; Constancio Decl. ¶¶ 27, 35; Goldson Decl. ¶¶ 18, 21; Gordon Decl. ¶¶ 19, 31; Hoffmann Decl. ¶¶ 22, 42; Jackson Decl. ¶¶ 22, 26, 36; Jones Decl. ¶¶ 25, 27, 39; Kaneshiro-Erdmann Decl. ¶ 22; Makin Decl. ¶¶ 26, 41; Oates Decl. ¶ 20; Salmon Decl. ¶ 18; Stem Decl. ¶¶ 25, 35; Stewart Decl. ¶ 24; Wallace Decl. ¶¶ 16, 21. And, as described further below, many of the LEAs in the Plaintiff States and the Plaintiff LEAs will be forced to follow Option #2, as Option #1 would impose too strict a requirement on their usage of the funds to be practically effective. *See* Hoffmann Decl. ¶ 29; Oates Decl. ¶¶ 15, 19. Put simply, if the Department's Rule and Guidance are allowed to stand, hundreds of millions of dollars will be diverted away from public schools to private schools, seriously impeding public schools' ability to respond to and prepare for education during the pandemic. Additional impacts to the Plaintiffs are described below. *See infra* Argument, § II.

LEGAL STANDARD

A preliminary injunction is appropriate when the plaintiffs establish that they are likely to succeed on the merits, they are likely to suffer irreparable harm in the absence of preliminary relief, the balance of equities tips in their favor, and an injunction is in the public interest. *Winter v. NRDC*, 555 U.S. 7, 20 (2008). A preliminary injunction is "often dependent as much on the equities of [the] case as the substance of the legal issues it presents." *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017). "[S]erious questions going to the merits and a balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction," so long as the other preliminary injunction factors are met. *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011) (internal quotations omitted).

ARGUMENT

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THEIR CLAIMS THAT THE RULE AND THE GUIDANCE ARE UNLAWFUL AND UNCONSTITUTIONAL

A. The Rule and the Guidance Are Ultra Vires, Violate the Separation of Powers, and Exceed ED's Statutory Authority

The U.S. Constitution "exclusively grants the power of the purse to Congress, not the President." *City & Cty. of San Francisco v. Trump*, 897 F.3d 1225, 1231 (9th Cir. 2018). "[B]ecause Congress has the exclusive power to spend," if Congress "has not delegated authority to the Executive to [impose funding] condition[s]," the executive branch lacks the authority to impose the conditions. *Id.* at 1233. Also, when "Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). The executive branch, thus, cannot coopt Congress's spending power by imposing a condition that Congress did not unambiguously impose or delegate authority to impose. *Cf. La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986) ("[A]n agency literally has no power to act . . . unless and until Congress confers power upon it."). Furthermore, the executive branch "may not decline to follow a statutory mandate . . . simply because of policy objections." *In re Aiken Cty.*, 725 F.3d 255, 259 (D.C. Cir. 2013). As discussed below, the Rule and the Guidance cannot survive under these foundational constitutional principles.

1. ED Has No Rulemaking Authority under Sections 18002, 18003, and 18005 of the CARES Act

The absence of rulemaking authority in Sections 18002, 18003, and 18005 is in contrast to other portions of the Act where Congress clearly delegated rulemaking authority to federal agencies. For example, Congress: granted "emergency rulemaking authority" to the Small Business Administration to carry out the Paycheck Protection Program, CARES Act § 1114, H.R. 748-32; directed the Bureau of Prisons to engage in rulemaking to provide for video visitations for inmates (and exempted those rules from notice and comment requirements), CARES Act § 12003(c), H.R. 748-236; and delegated authority to the ED Secretary to "waive the application of . . . negotiated rulemaking" under the Higher Education Act of 1965 to suspend collection of student loans, CARES Act § 3513(f), H.R. 748-124.

"[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983); *see also Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1813 (2019) (applying this principle to grants of rulemaking authority). So too here. Congress expressly delegated rulemaking authority in other sections of the Act, but did not include it with respect to the GEER and ESSER funds. Accordingly, this Court should find that Congress did not delegate rulemaking authority to ED to interpret Section 18005 of the Act, and that ED therefore lacks authority to promulgate the Rule.

2. ED Has No Authority to Attach a Supplement-Not-Supplant Condition to ESSER or GEER Funds

Elsewhere in the Act, Congress chose to expressly include supplement-not-supplant requirements, similar to the supplement-not-supplant condition that ED attaches to ESSER and GEER funds through the Guidance and Rule. The CARES Act requires that federal funds from the "Payments to States for the Child Care Development Block Grant" "shall be used to supplement, not supplant State . . . general revenue funds for child care assistance for low-income families," and that funds allocated for "carrying activities under the Runaway and Homeless Youth Act . . . shall be used to supplement, not supplant, existing funds." H.R. 748-277. Because Congress expressly attached supplement-not-supplant conditions on other allocations in the CARES Act, it can be presumed Congress intended to exclude ESSER and GEER funds from such conditions, and ED exceeded its statutory authority in attaching such conditions in the Rule, 34 C.F.R. § 76.665(c)(3). *See also United States v. Youssef*, 547 F.3d 1090, 1094 (9th Cir. 2008) (omission of a requirement in one statutory provision combined with the requirement's inclusion in a similar provision is "evidence of Congress's expressed intent not to impose" the requirement). Additionally, Congress expressly authorized uses of GEER and ESSER funds that are incompatible with a supplement-not-supplant requirement, CARES Act § 18002(c)(1) (funds "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"; *id.* § 18003(d)(12) (funds can be used "to maintain the operation of and continuity of services in local educational agencies and continuing to employ existing staff of the local educational agency"), further underscoring congressional intent *not* to create such a requirement that ED purports to impose.

3. ED Does Not Have Implicit Authority to Issue the Rule

ED claims that it has implicit interpretive authority to impose restrictions and requirements on the formula grants funds received by LEAs in the CARES Act. 85 Fed. Reg. at 39,481, 39,488. Courts have been skeptical of claims of implicit authority, as well as claims of broad authority to impose conditions on formula grants and interpret general appropriation statutes. The U.S. Supreme Court held the Attorney General lacked authority to issue a rule interpreting the meaning of a law, even when Congress had delegated the authority to ensure compliance with the law to the Attorney General. *Gonzales v. Oregon*, 546 U.S. 243, 263-64 (2006). Similarly, the Ninth Circuit held that an executive agency's broad interpretation of its authority to impose grant conditions without specific authority "would be antithetical to the concept of a formula grant[.]" *City of Los Angeles v. Barr*, 941 F.3d 931, 942 (9th Cir. 2019); *see also City of Los Angeles v. McLaughlin*, 865 F.2d 1084, 1088 (9th Cir. 1989) ("formula grants," unlike discretionary ones, "are not awarded at the discretion of a state or federal agency, but are awarded pursuant to a statutory formula"). Thus, Plaintiffs are entitled to their share of the GEER and ESSER funds, and ED is prohibited from redirecting these funds or placing additional conditions on the grants.

In the CARES Act, Congress chose to adopt proportional allocation under Title I-A of the ESEA, and the method and procedure of Section 1117 of the ESEA for equitable services, but chose not to incorporate or involve the ESEA itself. *See* CARES Act § 18003(b)-(c). Instead of simply making an additional appropriation under the existing Title I-A program of the ESEA with conditions specific to address the COVID-19 pandemic, Congress instead directed the funds in such a way that they are not a part of the Title I-A program and thus not subject to Title I-A

restrictions. Therefore, because the CARES Act funds are not Title I-A funds, any authority ED maintains to administer the Title I-A program does not provide authority to impose rules on CARES Act funds.

Congress' actions in this area contrast with how Congress made a number of other CARES Act appropriations and reflect a deliberate policy choice. For example, to carry out section 4631 of the ESEA, Congress simply made an additional appropriation for the established "Safe Schools and Citizen Education" fund. *Compare* 133 Stat. 2534, 2589 (appropriating funds for the "Safe Schools and Citizenship Education" program to carry out activities authorized by Title IV-F of the ESEA) *with* CARES Act, H.R. 748-289 (appropriating an additional amount for "Safe Schools and Citizenship Education" as part of the CARES Act). ED lacks authority to override Congress's decision that LEAs provide equitable services "in the same manner" as an ESEA program, but not as part of an ESEA program, and similarly cannot override Congress's decision that ESSER and GEER funds be distributed outside an established ESEA program.

Nor did the language of the Act leave any interpretative gap for ED to fill. ED points to the supposed facial ambiguity in the language "in the same manner as provided under Section 1117 of the ESEA." 85 Fed. Reg. 39,481.[1] However, "in the same manner" has a well-understood meaning in the statutory context, and that meaning applies to the procedure or methods used to effect the statutorily prescribed act. *See, e.g.*, *Wilder's S.S. Co. v. Low*, 112 F. 161, 164 (9th Cir. 1901) ("[T]he phrase 'in the same manner' has a well-understood meaning in legislation, and that meaning is not one of restriction or limitation, but of procedure."). The Supreme Court found a legislative direction to collect a penalty "in the same manner" as under a set of statutes was "best read" as a directive to an agency to use "the same 'methodology and procedures'" as within the referenced statutes. *Nat'l Fed'n of Indep. Bus. v. Sebelius (NFIB)*, 132 S. Ct. 2566, 2583-84

[1] ED promulgated a grant requirement that education systems in the outlying territories provide equitable services "in the same manner as provided under section 8501 of the ESEA" in order to receive CARES Act education funding grants. Section 8501 is referenced nowhere in the Act. Thus, ED clearly does not regard the phrase "in the same manner as provided under" as ambiguous, since it used this phrase itself. RJN Ex. F at 4. ED has not promulgated any guidance or rules to clarify this grant requirement. ED's position that this language is ambiguous in Section 18005(a) is fatally inconsistent with ED's own actions.

(2012); *see also United States v. Timilty*, 148 F.3d 1, 3, 5 (1st Cir. 1998) (federal law allowing restitution order to be enforced "in the same manner as a judgment in a civil action," meant the judgment was enforced by same procedural mechanism as a judgment in civil action). Here, Congress has used well-understood language to directly instruct LEAs receiving ESSER and GEER funds to adopt the established methodology and procedures used to administer equitable services as they would for services attached to Title I-A allocations, while unequivocally declining to impose programmatic requirements of Title I-A, such as use of funds and supplement-not-supplant restrictions. There is no ambiguity.[2]

The final clause of Section 18005(a) instructs LEAs to determine the provision of equitable services "in consultation with representatives of [private] schools." ED argues that Congress did not intend to completely incorporate Section 1117 because Section 1117 requires consultation with representatives of private schools, thus rendering the final clause of Section 18005(a) "superfluous." 85 Fed. Reg. at 39,481. However, because Section 18005(a) only applies to LEAs, the language to "determine[] in consultation with representatives of non-public schools" is best read as excluding other parties from the consultation process. In particular, this reasonably excludes SEAs from consultation procedure, as Section 18005(a)'s requirement to provide equitable services only applies to LEAs but SEAs may be required to provide equitable services under Section 1117(b)(6)(C) of the ESEA. Section 18005(b) requires that the control of funds and property provided by equitable services be retained by a public agency, similar to the requirement of Section 1117(d) of the ESEA. ED again claims that a reading which incorporates wholesale Section 1117 renders Section 18005(b) surplusage. *See* 85 Fed. Reg. at 39,481. The well-understood meaning of "in the same manner" incorporates methodology and procedure, so this

[2] Leaving aside the threshold ambiguity question, ED's proposed resolution to the purported ambiguity of the phrase "in the same manner" is also flawed because it creates multiple "manners" from whole cloth, an interpretation at odds with Congress' intent. ED provides no reasoned analysis of how Congress' instruction that LEAs are to provide equitable services "in the same manner" as under Section 1117 can be read to empower ED to create two entirely different methods of doing so, still less how ED is justified in putting forth two methods that diverge so dramatically (a divergence caused in large part by the fact that they derive from two distinct provisions of the ESEA). As a basic matter of statutory construction, it strains credulity for ED to interpret the singular term "manner" to mean two entirely distinct and divergent "manners," further underscoring the arbitrary and capricious nature of its action.

reasserted non-procedural restraint is not surplusage. In any event, ED does not provide a reasoned explanation as to how its reading does not render the final clause of Section 18005(a) and all of Section 18005(b) surplusage.

Instead of adopting the well-understood meaning of "in the same manner"—and without providing a reasoned or supportable alternative meaning for this phrase—ED has decided that Congress did not intend Sections 1117(a)(1), (b)(1)(E), (J)(ii), and (c) to be applied to CARES Act funds because "the CARES Act is a separate appropriation allowing separate permissible uses of taxpayer funds" than a Title I-A appropriation. 85 Fed. Reg. 39,481. However, these provisions—which describe methods or procedures to apportion funding for equitable services to private schools based on the relative population of low-income children, or to consider the proportion of low-income children when apportioning funding for equitable services—are squarely within the accepted definition of "manner." As a section of Title I, Part A of the ESEA, Section 1117 *only* applies to a provision of equitable services proportioned on low-income children; applying convoluted logic to somehow apply Section 1117 in a manner which ignores these provisions aimed at ensuring that fundamental congressional purpose is carried out is nonsensical. Without providing reasoning, ED argues that because Title I-A fund's permissible uses differ from those of ESSER or GEER funds, Section 1117's funding and eligibility criteria are "inapposite" of the CARES Act. However, Congress was aware of these broader uses when it explicitly instructed the LEAs to provide equitable services in the same manner as provided by Section 1117. CARES Act § 18003(d)(1)-(12) (allowing the use of ESSER funds for any activity authorized by the ESEA and eleven other categories of activities).

Rather than follow the Congressional directive that LEAs provide equitable services in the same manner as under Section 1117 of the ESEA, ED is attempting to substitute the agency's choice; namely, ED effectively requires LEAs to follow section 8501 from the ESEA. Section 8501 of the ESEA is the general rule for equitable services under the ESEA, and Section 1117 is an exception only applicable to Title I-A. See 20 U.S.C. § 7881(a)(1), (b)(1) (stating that Section 8501 governs "[e]xcept as otherwise provided in this act" and is expressly applicable to Titles I-C, II-A, III-A, IV-A, and IV). The key difference in the operation of the two statutes is that while

Section 1117(a)(1) calculates the expenditures for equitable services based on the proportion of private-school students from low-income families residing in the LEA's public school attendance area, Section 8501 calculates expenditures for equitable services based on the proportion of all eligible children in the LEA's area. RJN Ex. K at 34-35.

Congress decided that equitable services expenditures under ESSER and GEER funds should be proportional and provided to typical Title I-A eligible private school students, and DOE decided this was "inapposite." An agency's disagreement with Congress's policy cannot be permitted to serve as a source of ambiguity. ED should not be permitted to rely on an invented ambiguity to override the will of Congress as reflected in the text of the Act.

B. The Funding Conditions in the Rule and the Guidance Violate the Spending Clause

Under the Spending Clause of the U.S. Constitution, funding conditions may only be imposed if they are "unambiguous[]" and related "to the federal interest in particular . . . programs." *South Dakota v. Dole*, 483 U.S. 203, 207 (1987) (internal quotations omitted). The funding conditions in the Rule violate both of these criteria.

The Rule violates the Spending Clause's clear and settled requirements in three respects. First, the Rule's funding conditions were not "unambiguously" imposed by Congress. *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."); *see also Kollaritsch v. Mich. State Univ. Bd. of Trs.*, 944 F.3d 613, 629 (6th Cir. 2019) ("Congress ha[s] to identify any condition on its funding 'unambiguously.'"). The CARES Act "in no way suggests that the grant of . . . funds is 'conditioned'" on 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 LEAs' uses of funds, or limit their distribution of funds to Title I schools only. *See Pennhurst*, 451 U.S. at 23. Congress, therefore, did not in "clear terms" authorize the Rule's proportional share and eligibility requirements as required to satisfy the Spending Clause. *See id.* at 17, 23 (Congress must "speak with a clear voice" to impose conditions under the Spending Clause). To the contrary, Congress explicitly and clearly directed LEAs to follow

Section 1117 of the ESEA when apportioning CARES Act funds for equitable services and determining which private-school students were eligible for such services, and specified twelve broad purposes for which ESSER funds can be used by both Title I and non-Title I schools. CARES Act § 18003.

Second, the inconsistencies between the CARES Act and the Rule, as well as between the 2019 guidance, RJN Ex. B., and the Guidance (*see infra* at 6-7.), did not "enable the [Plaintiffs] to exercise their choice knowingly, cognizant of the consequences of their participation" in CARES Act funding. *Pennhurst*, 451 U.S. at 17. While the plain language of the CARES Act requires that funds be apportioned in the same manner as Section 1117 of the ESEA, the Rule and Guidance impose proportional share and eligibility conditions that are contrary to and irreconcilable with the language of the CARES Act. These inconsistencies have created considerable confusion among SEAs and LEAs in the Plaintiff States and unforeseen consequences. Gordon Decl. ¶ 28; Hoffmann Decl. ¶¶ 35-37, Jackson Decl. ¶ 25; 40-41; Jones Decl. ¶¶ 28, 33, 36; Salmon Decl. ¶ 25; Stewart Decl. ¶ 35. ED's interpretation of Section 18005 of the CARES Act has created unanticipated administrative and financial burdens on SEAs and LEAs, has delayed the distribution of funds to students and teachers, and placed SEAs and LEAs in potential legal jeopardy. Guerrant Decl. ¶¶ 29-34; Constancio Decl. ¶¶ 29-30; Baca Decl. ¶ 21; Gordon Decl. ¶¶ 26-27; Hoffmann Decl. ¶¶ 30, 35-36, 40; Jackson Decl. ¶¶ 29-33; Jones Decl. ¶¶ 30-36; Kaneshiro-Erdmann Decl. ¶¶ 27, Makin Decl. ¶¶ 30-34, 36, 38, 43; Oates Decl. ¶ 23; 31; Salmon Decl. ¶¶ 23-25; Stem Decl. ¶¶ 28-30; Stewart Decl. ¶¶ 27-33, 35.

Third, the Rule's funding conditions violate the Spending Clause's prohibition on "post acceptance" conditions. *Pennhurst*, 451 U.S. at 25 (1981). "[L]egislation enacted pursuant to the spending power is much in the nature of a contract." *Id.* at 17. Like with contracts, 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). As such, the federal government cannot "surpris[e]" states with funding conditions after acceptance of congressionally appropriated funds. *Pennhurst*, 451 U.S. at

25; *see also NFIB*, 567 U.S. at 584. That is exactly what ED has done here. Plaintiff States did not know of ED's interpretation of Section 18005 at the time they applied for grants from the GEER and ESSER funds. Guerrant Decl. ¶ 18; Constancio Decl. ¶ 19; Baca Decl. ¶ 13; Gordon Decl. ¶ 16; Jones Decl. ¶ 18; Jackson Decl. ¶ 20; Kaneshiro-Erdmann Decl. ¶ 18; Makin Decl. ¶ 20; Salmon Decl. ¶ 14; Stewart Decl. ¶ 19. To receive CARES Act funds, the Plaintiff States' SEAs and some LEAs were required to certify, and did certify, that they would comply with the equitable service provision of the CARES Act and "any other applicable law or regulation," and ensure that LEAs 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." RJN Ex. H. Guerrant Decl. ¶¶ 16-17; Constancio Decl. ¶¶ 17-18; Baca Decl. ¶¶ 11-12; Makin Decl. ¶¶ 18-19; Goldson Decl. ¶¶ 14-15; Gordon Decl. ¶¶ 14-15; Jones Decl. ¶¶ 16-17; Kaneshiro-Erdmann Decl. ¶¶ 16-17; Salmon Decl. ¶¶ 12-13; Stem Decl. ¶¶ 16-17; Stewart Decl. ¶¶ 17-18. The Rule's post-application funding conditions effectively force the Plaintiff States to violate Section 18005 of the CARES Act, placing them at risk of breaching the certification. The States also relied on express assurances from ED that an LEA could use CARES Act funds for any schools in the district or target funds based on poverty, school needs, and other targeting measures without regard to Title I eligibility or funding, and without the funds being subject to a supplanting prohibition. RJN Ex. A at 5; Jones Decl. ¶ 28; *see* Constancio Decl. ¶ 34. The States "had no way to know at the time [they] accepted such funds" that ED would later impose conditions on the use of those funds that were inconsistent with the CARES Act. *See New York v. HHS*, 414 F. Supp. 3d 475, 568 (S.D.N.Y. 2019) *appeal docketed*, No. 20-32 (2nd Cir. Jan. 3, 2020).

Separately, ED's interpretation of Section 18005 of the CARES Act in the Rule and Guidance violates the Spending Clause's relatedness requirement because the Rule's proportional share and eligibility conditions do not have any "nexus" to the key purpose of Section 18005 of the CARES Act—filling the gap created by reduced state and local funding due to the COVID-19 pandemic. *See Cty. of Santa Clara v. Trump*, 275 F. Supp. 3d 1196, 1214 (N.D. Cal. 2017), *aff'd*

in part, vacated in part for unrelated reasons, remanded sub. nom. San Francisco, 897 F.3d 1225 (9th Cir. 2018). Instead, the Rule's funding mandates are in direct contradiction to Congress's plainly expressed intent to require SEAs and LEAs to follow Section 1117, and the Title I-A allocation formula generally, when apportioning CARES Act funds for equitable services, and undermine the purpose of the CARES Act. *Compare* 20 U.S.C. § 6320(a)(4)(i) (determining proportional share of expenditures for equitable services based on enrollment of children from low-income families) *with* 34 C.F.R. § 76.665(c)(ii) (determining proportional share of funds for equitable services based on enrollment of all children.). Under either proportional share option in the Rule, public schools stand to lose out on substantial emergency funding, which is not only unrelated to, but directly contrary to the central purpose of the Education Stabilization Fund. If LEAs follow the Rule's Title I-schools only option when apportioning CARES act funds, non-Title I schools across the States will receive no emergency funding to support their schools, and LEAs will lose the ability to use the funds to maintain operations that are funded on an LEA-wide basis. Guerrant Decl. ¶ 36; Constancio Decl. ¶¶ 32-33; Baca Decl. ¶ 24; Gordon Decl. ¶ 30; Hoffmann Decl. ¶¶ 30-31, 39; Jackson Decl. ¶¶ 27, 35; Jones Decl. ¶ 38; Kaneshiro-Erdmann Decl. ¶ 28; Makin Decl. ¶ 40; Oates Decl. ¶¶ 16-17; Salmon Decl. ¶¶ 20-21; Stem Decl. ¶ 32; Stewart Decl. ¶ 37; Wallace Decl. ¶ 20. If LEAs follow the second option to apportion funds based on total private school enrollment, LEAs and public schools will lose out on significant amounts of ESSER and GEER funds, which will be diverted to private schools for students who would not otherwise qualify for Title I-A equitable services. Guerrant Decl. ¶¶ 23, 27; Constancio Decl. ¶¶ 27, 35; Baca Decl. ¶ 20; Goldson Decl. ¶¶ 18, 21, 23; Gordon Decl. ¶¶ 19, 31; Hoffmann Decl. ¶¶ 22, 31-33, 42, 49; Jackson Decl. ¶¶ 22, 36; Jones Decl. ¶¶ 25, 27, 39; Kaneshiro-Erdmann Decl. ¶ 22; Makin Decl. ¶¶ 26, 41; Oates Decl. ¶¶ 20-21; Salmon Decl. ¶ 18; Stem Decl. ¶¶ 24, 33; Stewart Decl. ¶¶ 24, 38; Wallace Decl. ¶¶ 16, 21. This loss of emergency funding will have significant negative impacts on public schools, including to services for students and potential loss of jobs for teachers and staff. Guerrant Decl. ¶¶ 38-39; Jones Decl, ¶ 40; Goldson Decl. ¶¶ 24-25; Gordon Decl. ¶¶ 32-33; Oates Decl. ¶¶ 24-25; Stem Decl. ¶ 34; Wallace Decl. ¶¶

22-23. The funding conditions imposed by the Rule thus undermine the key purpose of the Education Stabilization Fund; *a fortiori*, they are unrelated to that purpose and are invalid under the Spending Clause. *See City & Cty. of San Francisco v. Sessions*, 349 F. Supp. 3d 924, 959 (N.D. Cal. 2018) (immigration requirements were unrelated to grant's purpose to provide flexibility to the states through formula grants), *aff'd in part, vacated in part for unrelated reasons sub. nom. City & Cty. of San Francisco v. Barr*, Nos. 18-17308, 18-17311 (9th Cir. July 13, 2020) (affirming requirements were unlawful but narrowing geographic scope of injunction).

C. ED's Actions Are Arbitrary and Capricious in Violation of the APA

Even if Congress had somehow granted discretion to the Secretary to conduct rulemaking as to the implementation of the GEER and ESSER Funds (it did not), ED's actions are also "arbitrary, capricious, [and] an abuse of discretion" and must be set aside under the APA. 5 U.S.C. § 706(2)(A).[3] ED has failed to meet the APA's requirements that an agency "examine the relevant data and articulate a satisfactory explanation for its action." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). It has offered a legally erroneous rationalization for its misconduct, failed to articulate a reasoned explanation for its reversal of its prior position, acted contrary to statutory language and congressional intent, and failed to consider the reliance interests implicated by its actions and other important aspects of the problem.

First, as discussed above, Defendants did not and cannot articulate how their position comports with the plain text of Section 18005 of the CARES Act. Thus, their action must be set aside as based on an incorrect legal premise. *See Safe Air for Everyone v. EPA*, 488 F.3d 1088, 1101 (9th Cir. 2007). ED's basic argument for the Guidance and Rule—that "the phrase 'provide equitable services in the same manner as provided under section 1117 of the ESEA of 1965'" should not be construed "as if Congress simply incorporated the entirety of section 1117 by

[3] For the same reasons that their actions are ultra vires, violate separation of powers principles, and exceed ED's statutory authority, *supra* at 10-20, these requirements and limitations also violate the APA's prohibition on agency action "contrary to constitutional right, power, privilege, or immunity" or "in excess of statutory jurisdiction, authority or limitations, or short of statutory right." 5 U.S.C. § 706(2)(B)-(C).

reference," 85 Fed. Reg. 39,479—is incorrect. *Supra* at 12-16. Because "that flawed premise is fundamental" to ED's agency action, the action must be set aside. *Safe Air for Everyone*, 488 F.3d at 1101; *see also SEC v. Chenery Corp*., 318 U.S. 80, 94 (1943) ("an order may not stand" if based on agency's mistake of law).

Second, ED failed to adequately explain (or explain at all) why it was reversing its own prior guidance and other instructions to SEAs and LEAs regarding how equitable services under Section 1117 should be provided. *See, e.g.*, *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009) (where agency changes policy, "a reasoned explanation is needed for disregarding facts and circumstances that underlay . . . the prior policy"); *see also Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1912 (2020) (requiring "reasoned analysis to support" rescission of prior policy) (quoting *State Farm*, 463 U.S. at 52) (punctuation omitted). As a predicate to fulfilling this requirement, an agency must "display awareness that it *is* changing position" and "may not, for example, depart from a prior policy *sub silentio*." *Fox Television*, 556 U.S. at 515.

It is clear that Defendants have materially changed their position. *First*, ED'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—confirmed 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: "[T]o 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." RJN Ex. B at 30. But in the 2020 Guidance and the Rule, ED requires LEAs to provide equitable services to *all* private school children, rather than only "low achieving" students in a Title I-A school attendance area. *Second*, in the 2019 guidance, ED specified that, under Section 1117, funding for equitable services should be based on the number of children in private schools who are economically disadvantaged or in foster care. It instructed LEAs to "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." RJN Ex. B at 30. But

the 2020 Guidance and Rule instruct LEAs to ignore Section 1117's proportional share calculation based on the number of low-income students, and proportion the funds based on the total number of students—regardless of income. *Third*, in May 2020, ED published a "Frequently Asked Questions" document which explicitly stated that "supplement not supplant" rules did not apply to CARES Act funds. RJN Ex. A at 5. But one of the poison pill restrictions on "Option #1" would apply "supplement not supplant" restrictions to CARES Act funds. ED has failed to even acknowledge its changed positions on these crucial issues regarding the equitable services requirements, much less provide a "reasoned explanation" for them.

Relatedly, ED failed to take into account the reliance interests that its former position generated on the part of the States and LEAs. "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*, 140 S. Ct. at 1913 (quoting *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016)) (punctuation omitted); *see also Fox Television*, 556 U.S. at 515-16 (requiring agencies to "provide a more detailed justification than what would suffice for a new policy created on a blank slate" under such circumstances). The "serious reliance interests" engendered by ED's prior policies include school districts' reliance on the May 2020 FAQ document when they developed their budgets; as discussed above, in that document, ED explicitly stated that "supplement and not supplant" rules did *not* apply to CARES Act funds. RJN Ex. A at 5. The new "supplement not supplant" requirement of Option #1 represents an unexplained about-face, which will require school districts which choose (or, for LEAs with only Title I schools, are forced to use) this option to revamp their budgets to reflect their significantly curtailed flexibility to use these funds to address COVID-19. *See* Jones Decl. ¶ 28; Hoffmann Decl. ¶ 40.

ED's rewrite of the equitable services requirements is also arbitrary and capricious because, in imposing the Rule, ED "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem," and "offered an explanation for its decision that runs counter to the evidence before the agency." *State Farm,* 463 U.S. at 43. ED ignored "important aspect[s] of the problem," including, among others, the myriad harms to

students, States, and LEAs discussed herein. These harms include: (1) the impact on LEAs from loss of ESSER and GEER moneys diverted to private schools, and the predictable adverse impact on the States' and LEAs' fiscs as they fill the gap created by these diversions; (2) for LEAs that choose Option #1 (Title I-schools only Option), (a) the loss of all CARES Act emergency funding for LEAs' non-Title I schools, (b) those LEAs' inability to use the funds to maintain operations that are funded on an LEA-wide basis, and (c) those LEAs' Title I schools' inability to use CARES Act funds for existing costs (due to the application of "supplement not supplant"); (3) for LEAs that choose Option #2 (Private-school enrollment Option) when apportioning CARES Act funds, the LEAs' and public schools' loss of millions 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; (4) significant added administrative burdens on LEAs and SEAs;[4] (5) diversion of SEA resources to provide technical assistance to LEAs regarding the Guidance and Rule; and (6) the delay in distributing funds to students and teachers caused by Defendants' inconsistent interpretations, contrary to the core purpose of the CARES Act to quickly deploy these urgently needed funds. *See* s*upra* at 9, 17-19; *infra* at 27-29.

Further, the imposition of this burden runs contrary to Congress's intent. Congress intended SEAs and LEAs to have a great deal of flexibility in their uses of CARES Act funds. *See, e.g.*, CARES Act §§ 18002(c)(1), 18003(d)(12) (setting forth broad set of permitted uses for CARES Act funds, expressly including maintaining continuity of services and continuing to employ existing LEA staff); Congress intended to deliver LEAs "need[ed] funding flexibility due to the disruption in the academic year from COVID-19." 166 Cong. Rec. H1856 (daily ed. Mar. 27, 2020) (statement of Rep. Underwood). ED's awareness of Congress's intent was made manifest

[4] The Rule contains a brief discussion of "implementation costs," 85 Fed. Reg. 39,485-86, but this discussion focuses only on data collection and not the numerous other administrative burdens discussed herein. Indeed, in the Rule ED acknowledges that "[a]ffected LEAs will likely face some administrative costs to implement these statutory requirements, but ED largely lacks data to quantify these costs," 85 Fed. Reg. 39,485, demonstrating ED's utter failure to gather and examine the relevant data before enacting the Rule. (Such information may well have been supplied had ED followed the APA's notice and comment requirements.) The Rule goes on to assert, without any support: "However, ED expects that these entities will largely experience benefits exceeding these administrative costs." *Id.*

in a letter sent on June 12, 2020, acknowledging that "Congress . . . intended that grantees have substantial flexibility in the use of these [CARES Act] dollars." RJN Ex. I at 3, as well as the Rule itself, *see* 85 Fed. Reg. 39,480 ("the CARES Act affords LEAs . . . flexibility"). Defendants' imposition of these restrictions on LEAs, significantly limiting their flexibility to use the funds, is "contrary to plain congressional intent," and thus arbitrary and capricious.[5] *E. Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1277 (9th Cir. 2020).

Another way in which the Rule is incompatible with congressional intent is its failure to follow Congress' unambiguously expressed directive that CARES Act funds should be used to support the most vulnerable students. Congress made this clear by using the Title I-A allocation method, which tracks low-income students; statements by members of Congress further support this intent. *See, e.g.*, 166 Cong. Rec. E340 (daily ed. Mar. 31, 2020) (statement of Rep. Jayapal) (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 homelessness"). ED's repeated insistence that Congress actually intended to prioritize support for all private-school students, *see, e.g.*, 85 Fed. Reg. 39,479 ("The pandemic has harmed *all* our Nation's students by disrupting their education. Nothing in the CARES Act suggests Congress intended to differentiate between students based upon the public or non-public nature of their school with respect to eligibility for relief"), 39,480 ("services under the CARES Act programs can be available for all students—public and non-public—without regard to poverty, low achievement, or residence in a participating Title I public school attendance area"), 39,482 ("the CARES Act authorizes an LEA to serve all students—public and non-public—who have been affected by COVID-19"), reflects its erroneous premise that Congress intended to direct these funds to all private-school students—

[5] Ironically, Defendants list "flexibility in administration of equitable services" as one of the positive impacts of the Rule, 85 Fed. Reg. 39,486, and repeatedly claim that they are providing LEAs with flexibility through the Rule. 85 Fed. Reg. 39,480 ("we are affording flexibility to . . . LEA[s]"); 39,481 ("ED has resolved the ambiguity by permitting LEAs flexibility to provide equitable services"); 39,484 ("This interim final rule is meant to provide flexibility . . . for SEAs and LEAs"), (the Rule "offers appropriate flexibility").

many of whom are affluent or at least economically secure[6]—on an equal basis with public schools that educate large populations of at-risk and low-income students.[7] Further, private schools appear to have been able to receive significant financial support from the CARES Act's Paycheck Protection Program, CARES Act § 1102, H.R. 748-6, far exceeding what is guaranteed to LEAs from the ESSER fund. *See* Hoffman Decl. ¶¶ 44-49.

D. The Rule Is Procedurally Defective Under the APA as ED Did Not Have Good Cause to Issue the Rule As an Interim Final Rule.

"The APA requires that, prior to promulgating rules, an agency must issue a general notice of proposed rulemaking." *California v. Azar*, 911 F.3d 558, 575 (9th Cir. 2018); 5 U.S.C. § 553(b); *see also Paulsen v. Daniels*, 413 F.3d 999, 1005 (9th Cir. 2005) ("[I]t is antithetical to the structure and purpose of the APA for an agency to implement a rule first, and then seek comment later."). Here, Defendants issued the Rule as an interim final rule, making the Rule effective immediately and circumventing the notice and comment requirements of the APA. *See* 85 Fed. Reg. 39,479.

Pursuant to 5 U.S.C. § 553(b)(B), an agency may publish a rule without prior notice and comment only "for good cause" when the "notice and public procedure . . . are impracticable, unnecessary, or contrary to the public interest." This good cause exception is "usually invoked in emergencies" and the agency "must overcome a high bar if it seeks to invoke the good cause

[6] ED recognizes that some "financially well-resourced" private schools have "tuition and fees comparable to those charged by the most highly selective postsecondary institutions," and "tend to serve families from the highest income brackets," but dismisses these as small in number and notes that such private schools are "not required to accept equitable services." 85 Fed. Reg. 39,483. Further, ED says that it "particularly discourages" such schools from accepting CARES Act funds, and proclaims its belief that "such non-public schools have ample resources to serve their students and teachers during the COVID-19 national emergency and should not rely on taxpayer funds to do so." *Id.* First, it should be noted that according to the most recent Census data, almost 600,000 students attend non-sectarian private schools, with an average annual tuition of over $22,000. *See* RJN Ex. J. And ED's "discourage[ment]" and "belie[f]," of course, do not impact those schools' *eligibility* for CARES Act funds under the Rule.

[7] In the Rule, ED briefly discusses CCSSO's position that Congress "'intended to concentrate ESSER funds in areas of the most need, where the educational and social impacts of the COVID crisis will be most extreme and difficult to overcome with limited local funds,'" but summarily dismisses this view as a "rigid" interpretation not supported by the text of the CARES Act. 85 Fed. Reg. 39,480. ED points to its Option #1 (Title I-schools only Option) as a means to address the needs of an "LEA that helps poor children by spending its CARES Act funds only in its Title I schools," ignoring the fact that ED then imposes draconian restrictions on the use of funds under this option which are completely untethered from the CARES Act's text.

exception to bypass the notice and comment requirement." *Azar*, 911 F.3d at 575; *United States v. Valverde*, 628 F.3d 1159, 1164 (9th Cir. 2010).[8]

In the Rule, ED states that there is good cause to waive these notice and comment procedures because of "the immediate need for certainty regarding applicable requirements" for "determining the amount of funds available for [equitable] services." 85 Fed. Reg. at 39,483. This rationale cannot satisfy good cause for multiple reasons.

First, remedying uncertainty in a statute "is not a reasonable justification for bypassing notice and comment." *Valverde*, 628 F.3d at 1166. As the Ninth Circuit has adopted, "if 'good cause' could be satisfied by an Agency's assertion that 'normal procedures were not followed because of the need to provide immediate guidance and information[,] . . . then an exception to the notice requirement would be created that would swallow the rule." *Id.* (quoting *Zhang v. Slattery*, 55 F.3d 732, 746 (2d Cir. 1995)).

Further, the Rule allows for a 30-day post-promulgation comment period, *see* 85 Fed. Reg. at 39,484, which "casts further doubt upon the authenticity and efficacy of the asserted need to clear up potential uncertainty." *Valverde*, 628 F.3d at 1166; *see also Azar*, 911 F.3d at 576. "[A]llowing for post-promulgation comments implicitly suggests that the rules will be reconsidered and that the 'level of uncertainty is, at best, unchanged.'" *Azar*, 911 F.3d at 576 (quoting *United States v. Reynolds*, 710 F.3d 498, 510 (3d Cir. 2013)).

And, most damning here, the ostensible uncertainty regarding the calculation of the proportional share of CARES Act funds for equitable shares is a phantom "problem" of ED's invention. The CARES Act clearly adopts the Section 1117 proportional share calculation as discussed above—ED is the only entity that seems to dispute the plain language of the CARES Act, and its indefensible position is what has created the uncertainty for SEAs and LEAs across

[8] 5 U.S.C. § 553(a)(2) exempts some regulatory actions from the requirements of 5 U.S.C. § 553, but ED is generally prohibited from using this exemption for actions governing formula grants or existing grants. 20 U.S.C. § 1232(d) (restricting ED's use of the 5 U.S.C. § 553(a)(2) exemption only to regulatory actions "that govern the first grant competition under a new or substantially revised program authority"). Additionally, ED has stated in the notice it published with the Rule in the federal register that it would comply with 5 USC § 553, 85 Fed. Reg. 39,483, and it is bound by that commitment. *See Sequoia Orange Co. v. Yeutter*, 973 F.2d 752, 757 (9th Cir. 1992).

the Nation. ED should not be permitted to create uncertainty, and then leverage that uncertainty to justify promulgating a rule without following notice and comment procedures.

The APA requires courts to hold unlawful and set aside agency actions that fail to comply with the procedures required by law. 5 U.S.C. § 706(2)(D). Because Defendants promulgated the Rule without following the APA's notice and comment requirements and failed to demonstrate good cause for dispensing with them, the Rule should be held unlawful.

II. PLAINTIFFS WILL SUFFER IRREPARABLE HARM

The Rule threatens imminent and irreparable harm to the States, LEAs, their public schools, and the students they serve. The public schools will lose significant CARES Act funds to private schools or be unable to use the funds for their response to the pandemic. With state and local budgets stretched, students will lose out where sufficient resources are simply not available to make up the shortfalls caused by the diversion of CARES Act funds caused by the Guidance and Rule. As a result of ED's rewriting of the requirements under Section 18005 of the CARES Act, Plaintiffs also face adverse legal action against them no matter which option their LEAs choose.

The financial harm to the public schools and LEAs from the Guidance and the Rule is enormous. In sum, for the Plaintiff States and Plaintiff LEAs, if their LEAs choose to utilize Option #2 to calculate the proportional share of CARES Act funds for equitable services, the LEAs and their public schools will lose over $150 million, compared to if the LEAs follow the CARES Act's explicit instruction to use the Section 1117 calculation method. *See* Guerrant Decl. ¶¶ 23, 37; Constancio Decl. ¶¶ 27, 35; Goldson Decl. ¶¶ 18, 21; Gordon Decl. ¶¶ 19, 31; Hoffmann Decl. ¶¶ 22, 42; Jackson Decl. ¶¶ 22, 26, 36; Jones Decl. ¶¶ 25, 27, 39; Kaneshiro-Erdmann Decl. ¶ 22; Makin Decl. ¶¶ 26, 41; Oates Decl. ¶ 20; Salmon Decl. ¶ 18; Stewart Decl. ¶ 24; Stem Decl. ¶¶ 25, 35; Wallace Decl. ¶¶ 16, 21. Plaintiff States and LEAs will be required to backfill this lost funding for their public schools. *See* Guerrant Decl. ¶ 26; Jackson Decl. ¶ 26; Jones Decl. ¶ 29; Kaneshiro-Erdmann Decl. ¶ 25; Makin Decl. ¶ 27; Oates Decl. ¶ 22; Stem Decl. ¶ 27; Stewart Decl. ¶¶ 25-26. If the LEAs in the Plaintiff States and Plaintiff LEAs follow Option #1 under the Rule to calculate the proportional share of CARES Act funds for equitable services, the LEAs would only be able to use the funds to support their Title I schools. *See* Guerrant Decl.

¶¶ 27, 36; Constancio Decl. ¶ 33; Baca Decl. ¶ 24; Hoffmann Decl. ¶¶ 29-30, 39; Jones Decl. ¶ 38; Jackson Decl. ¶¶ 27, 35; Kaneshiro-Erdmann Decl. ¶¶ 26, 28; Makin Decl. ¶¶ 28, 40; Oates Decl. ¶ 16; Salmon Decl. ¶ 20; Stem Decl. ¶¶ 28, 34; Stewart Decl. ¶¶ 25, 37; Wallace Decl. ¶ 20. The thousands of non-Title I schools in LEAs that would otherwise receive CARES Act funds will receive zero funding to address the many problems created by the pandemic. *See* Guerrant Decl. ¶¶ 27, 36; Constancio Decl. ¶ 33; Baca Decl. ¶ 24; Hoffmann Decl. ¶¶ 29, 39; Jones Decl. ¶ 38; Jackson Decl. ¶¶ 27, 35; Kaneshiro-Erdmann Decl. ¶¶ 26, 28; Makin Decl. ¶¶ 28, 40; Oates Decl. ¶ 16; Salmon Decl. ¶ 20; Stem Decl. ¶¶ 28, 34; Stewart Decl. ¶¶ 25, 37; Wallace Decl. ¶ 20. To make matters worse, the Title I public schools receiving funds will be unable to use the CARES Act funds where they are needed most. *See* Guerrant Decl. ¶¶ 27, 36; Constancio Decl. ¶ 33; Baca Decl. ¶ 24; Gordon Decl. ¶ 30; Hoffmann Decl. ¶¶ 29-31, 39-41; Jackson Decl. ¶¶ 27, 35; Jones Decl. ¶ 28; Kaneshiro-Erdmann Decl. ¶¶ 26, 28; Makin Decl. ¶¶ 28, 40; Oates Decl. ¶ 18; Salmon Decl. ¶ 21; Stem Decl. ¶ 34; Stewart Decl. ¶¶ 25, 37; Wallace Decl. ¶ 20. Thus, even if all LEAs utilize Option #1 in the Rule, the Plaintiff States and LEAs will need to allocate hundreds of millions of dollars to the schools that will no longer be eligible to receive CARES Act funds and to assist schools that cannot use the CARES Act funds for their intended purposes.

This significant monetary loss to the SEAs, LEAs, public schools, and public-school students constitutes irreparable harm. *Azar*, 911 F.3d at 581 (states could establish irreparable harm where they suffer economic harm and "will not be able to recover monetary damages connected to the IFRs" (citing 5 U.S.C. § 702 (permitting relief "other than money damages")); *see also Cty. of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 537 (N.D. Cal. 2017) (federal executive order interfering with counties' ability to budget, plan for the future, and properly serve their residents constituted a basis for irreparable harm); *Texas v. United States*, 809 F.3d 134, 186 (5th Cir. 2015), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016) (impact on state's resources caused by federal program enabling certain immigrants to obtain drivers' licenses constituted irreparable harm)).

Alternatively, if LEAs—either unilaterally or with a State's permission—calculate the proportionate share of CARES Act funds for equitable services as required by the Act, i.e., using

the Section 1117 calculation and using the funds for the purposes expressly provided for in the Act, both the Plaintiff States and Plaintiff LEAs will face legal jeopardy as they cannot comply with certifications verifying that they will abide by both the CARES Act and ED's regulations. *See* Guerrant Decl. ¶ 33; Baca Decl. ¶ 21; Constancio Decl. ¶ 30; Gordon Decl. ¶ 26; Jackson Decl. ¶ 32; Jones Decl. ¶ 34; Kaneshiro-Erdmann Decl. ¶ 27; Makin Decl. ¶ 36; Stem Decl. ¶ 31; Stewart Decl. ¶ 33. This leaves Plaintiff States and LEA in an untenable position in which, regardless of what their LEAs choose, they will be in violation of either the CARES Act's requirements or the Rule's requirements. Whatever choice Plaintiffs make, they will be harmed. *See Am. Trucking Ass'ns v. City of Los Angeles*, 559 F.3d 1046, 1057-58 (9th Cir. 2009) (a party faces an irreparable injury when it is harmed no matter what choice it makes).

Finally, as the Guidance and Rule impinge on constitutional separation of powers principles and the Spending Clause, Defendants' "constitutional violation alone, coupled with the damages incurred," from loss of public-school funding "suffice to show irreparable harm." *Am. Trucking Ass'ns, Inc.*, 559 F.3d at 1058-59.

III. THE PUBLIC INTEREST WEIGHS HEAVILY IN FAVOR OF PROVISIONAL RELIEF

The "balance of the equities" and "public interest" factors of the *Winter* test merge when the government is a party. *Nken v. Holder*, 556 U.S. 418, 435 (2009). In assessing these factors, courts consider the impacts of the injunction on nonparties as well. *See League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Connaughton,* 752 F.3d 755, 766 (9th Cir. 2014).

The public interest in allowing schools to respond to the myriad urgent challenges posed by the COVID-19 pandemic weighs overwhelmingly in favor of an injunction here. As discussed *supra* at 3-4, the challenges caused by the pandemic have contributed to heightened need for public-school funding, particularly for schools with a high proportion of low-income and at-risk children. Congress specifically responded to this crisis by making GEER and ESSER funds available to public schools that needed assistance to respond to the pandemic and provided flexibility to the SEAs and LEAs in using these funds to best serve students. An injunction is needed to preserve this congressional intent, as the "public . . . has an interest in ensuring that

statutes enacted by their representatives are not imperiled by executive fiat." *Sierra Club v. Trump*, No. 19-16102, 2020 WL 3478900, at *16 (9th Cir. June 26, 2020) (quoting *E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 779 (9th Cir. 2018)) (punctuation omitted); *see also San Francisco*, 897 F.3d at 1244 (upholding injunction regarding federal grants because "the public interest cannot be disserved by an injunction that brings clarity to all parties and to citizens dependent on public services").

Supporting public schools' continued ability to provide their students with an education is also in the public interest. *See, e.g.*, *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) ("The American people have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted."). Diverting funding to private schools and away from public schools, when private schools can access, and have accessed, other funding sources under the CARES Act that are unavailable to public schools, leaves public schools without the emergency relief funding Congress sought to provide them during the pandemic.

Conversely, Defendants "cannot suffer harm 'from an injunction that merely ends an unlawful practice'." *Sierra Club*, 2020 WL 3478900, at *16 (quoting *Rodriguez v. Robbins*, 715 F.3d 1127, 1145 (9th Cir. 2013)). In fact, an injunction here would only require that the ESSER and GEER funds be utilized in the manner that Congress intended—making assistance available for public schools and at-risk private-school students, and providing flexibility to SEAs and LEAs to use the funds. *See id.* ("[t]he public interest favors enforcing" Congress's "calculated choice").

COVID-19 has had particularly insidious effects on low-income communities, and Congress recognized this effect by directing the majority of the ESSER and GEER funds to those LEAs particularly harmed by the pandemic. Private schools have access to other avenues of funding under the CARES Act. ED should not divert funding from public schools to private schools contrary to the plain language of the CARES Act, Congress' clear intent, and in the face of this public health crisis's crushing blow to public education.

CONCLUSION

For the foregoing reasons, Plaintiffs request this Court grant their Motion.

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