



WASHINGTON OFFICE • 1730 RHODE ISLAND AVENUE NW • WASHINGTON DC 20036

202-835-0414 • FAX: 202-835-0424

**Agudath
Israel
of America**
אגודת ישראל באמריקה

Rabbi Abba Cohen
Vice President for Government Affairs
Washington Director and Counsel

July 31, 2020

Filed through the Federal eRulemaking Portal

U.S. Department of Education
400 Maryland Avenue, S.W.
Washington, D.C. 20202

***Re: CARES Act Programs: Equitable Services to
Students and Teachers in Non-Public Schools,
Docket ID: ED-2020-OESE-0091-0001***

Dear Sir or Madam:

On behalf of Agudath Israel of America, we respectfully submit these comments in response to the Interim Final Rule (IFR) issued by the U.S. Department of Education (Department) entitled, "CARES Act Programs: Equitable Services to Students and Teachers in Non-Public Schools." Under the Coronavirus Aid, Relief, and Economic Security (CARES) Act, a local educational agency (LEA) is required to provide "equitable services" to non-public school students and teachers in the administration of the Governor's Emergency Education Relief (GEER) and the Elementary and Secondary School Emergency Relief (ESSER) funds.

A 98-year-old national Orthodox Jewish organization, Agudath Israel is an advocate for the interests of the entire range of Orthodox Jewish educational institutions, including the hundreds of elementary and secondary schools across the country that come under the umbrella of the National Society for Hebrew Day Schools. As such, we have been involved for decades in Washington and state capitals on matters pertinent to education-related legislation and public policy, and their impact on our community's schools and the students and families they serve. In several cities, Agudath Israel also acts as the official liaison between local Orthodox schools and the LEA for purposes of administering Title funds.

A central feature of the IFR is the Department's clarification that the services provided under the CARES Act are to be made available to *all* students in the district, public and non-public – without regard to poverty or low achievement. We concur with the Department, both as a matter of statutory interpretation and of sound public policy, and offer these comments to provide further support for that position.

Equitable Services

In passing the CARES Act, Congress provided for “equitable services” for non-public school children. In doing so, it followed a time-honored tradition that left no doubt as to the term’s intent or effect.

For decades, equity in federal education programs has been a fixture in our law and policy. Simply put, it means: look at the child, and needs of the child, and address those needs. It is the child who counts, and helping the child achieve educational excellence is the mission of our government. No matter where the child lives; no matter the school he or she attends. This has been known in educational policy circles as the “child benefit theory, and has been accepted and adopted by various administrations – both Democratic and Republican – since the enactment of the Elementary and Secondary Education Act in 1965.

The equity calculation is simple: If participating private school students comprise a certain percentage of the school age population in a district, the private school students and teachers should receive that appropriate share of the available funding. If all public school children are receiving CARES services, without regard to poverty, low achievement, or residence, then all private school children should receive those services on the same basis. The IFR reflects this well-established understanding of what the term “equitable services” embodies.

Title I Limitation/Statutory Interpretation

Despite the clear understanding of what equity has meant, some have taken the position that the CARES Act, by its terms, limits its relief only to non-public school children who participate in Title I. We believe, however, that the Department provided an incisive analysis of the statutory language demonstrating that the CARES Act programs are not to be viewed or administered as low-income or Title I programs. The Department has also made a compelling case in earlier guidance differentiating, in numerous respects, the operation of Title I from what is called for under the CARES Act. We will not repeat those arguments here.

We will simply make the point that, in our opinion, the statutory language in no way leads to the conclusion that the distribution of funds to students or schools on the local level is related to participation in the Title I program. The only references to Title I are in Section 18002 (GEER) and Section 18003 (ESSER) of the CARES Act, and they relate to *allocation to states and local educational agencies, not to distributions to students or schools*. At the same time, the provision dealing specifically with “Assistance to Non-Public Schools,” Section 18005, makes no reference at all to Title I in regard to its *allocation*. It simply directs the LEA “to 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.” This means that, after the state and local allocation for non-public schools is determined under Sections 18002-18003, LEAs are to provide services *in the same manner* i.e. according to the same equitable standard, as that which is provided under the requirements of Section 1117.

Thus, as the statutory language makes clear, the guidepost the CARES Act provides for the actual funding of non-public schools under GEER and ESSER *is not Title I – it is the general principle of “equitable services,” as explained above.*

Title I Limitation/Public Policy Concerns

Not applying genuine equity to the CARES programs represents poor public policy. Indeed, if affording equity to non-public schools has become a hallmark of long-established federal education programs, it should certainly be afforded them now in regard to the response to the COVID-19 crisis. All children are affected by, and susceptible to, the dangers of the virus. All children are facing formidable challenges at school and at home. When health and safety are at risk, *all* children are deserving of our nation’s assistance.

By the same token, all schools need and deserve help to maintain their educational mission. In the best of times, Orthodox Jewish schools find themselves financially strapped and struggle to make ends meet, as a significant percentage of students in many of our schools come from low-income families. Tuition – which many of our parents struggle to pay – covers only a portion of the schools’ budget and, now, during the COVID 19 crisis, tuition payments and contributions are drying up. As many schools were shut down – sometimes by state order – and as many others are faced with the prospects of shutting down, participation by non-public school students and teachers must be maximized, not minimized.

Affording all public schools and all public school children in an LEA the benefits of the CARES Act, while inequitably tying non-public school assistance only to those children participating in Title I, frustrates the very purposes of the CARES Act and sends a dangerous message that our nation considers some children in the district – and their needs -- more deserving than others.

Following the April 30th Guidance and the release of the IFR on June 30th, non-public schools rightfully expected to receive the allocation based on total student enrollment. Any change in that allocation would cause irreparable harm to the students they serve. No system – whether public or non-public – can be characterized by income level, as both serve high-income and low-income populations. The unfortunate rhetoric that casts the IFR as shifting money from poor public school students to wealthy private schools is both erroneous and counterproductive, and dismisses the equally objectionable reality of high-income public schools benefitting at the expense of lower-income non-public schools.

This is an emergency relief program intended to address the health and educational crisis facing all of our children. It should have nothing to do with income levels or academic achievement.

It is both noteworthy and instructive that legislation passed in recent years that sought to address national emergencies facing schools and school children have not been tied to income levels. Assistance provided to non-public schools after Hurricanes Katrina and other disasters for the purpose of rebuilding and tuition reimbursements had no limitations tied to Title I participation, nor should they have. The same should hold true here.

Ensuring Equity

It is an unfortunate reality that legislative mandates of “equitable participation” do not always live up to their promise. All-too-often the federal guarantee is frustrated at the state and local levels, and services to which non-public school children are entitled are either not received or are severely limited. Based on this experience, there is justification for the concern many in the non-public school community have that this sector will not truly participate equitably in the CARES Act programs, despite the federal mandate.

Related to this, is a concern raised by the new position the Department has announced in the IFR – namely, that equity will be satisfied if Title I participation is the basis of the allocation for both public and non-public schools. While seemingly equitable on its face, and despite the “supplement and not supplant” requirement in the IFR, the advantages enjoyed by public school might work to undermine a fair and reasonable result. For example, public schools might have alternative fungible sources within state treasuries to provide COVID-19 assistance to even its non-Title I schools while non-public schools are bereft of such assistance. Thus, even if the same federal standards were to apply, the totality of the circumstances might yield a very different – inequitable – result.

These concerns over ways state and local authorities can directly or indirectly work around the equitable services mandate must be a Department priority. Not only are clear guidelines on equity necessary but so too is careful and constant oversight regarding the implementation of those guidelines. Evading the guidelines, either with intent or in effect, must not be tolerated. Perhaps the most effective solution to this problem would be for the Department to take concrete steps to ensure a full measure of equity by establishing meaningful penalties for non-compliance.

Practical Implementation Issues

The IFR raises several practical issues regarding equitable participation of non-public students and teachers that we believe require further clarification and detail.

Proportionality – In section 76.665(c)(1), the IFR allows LEAs to utilize several methodologies to determine the proportionate share of funding for equitable services under the CARES Act. One option is to use “enrollment data” from non-public schools participating in the CARES program compared to the total enrollment in all public schools and participating private schools. Our experience has shown that this method yields the most accurate and reliable results, and maximizes participation and equitable services. Significantly, as this is meant to be an emergency measure, it is also the fastest way of determining eligibility. As such, while the local school districts are given options, we think it is appropriate and advisable for the Department to encourage them to adopt the methodology that is best suited for maximizing and expediting participation.

Poverty Count – As noted above, aside from non-public school enrollment data, the IFR also provides other options to determine proportionality: (1) Using the proportionate share the LEA

calculated for Title I in the 2019-2020 school year, or (2) Conduct a poverty count of students ages 5-17, from low-income families in Title I and participating non-public schools.

Use of the alternative methods raises questions that need to be addressed. For example, where will the poverty count data come from for students that were not participating in Title I in previous years? Will these students and schools not be included in the benefits of the CARES Act? How can these alternative methods be completed during a pandemic when many schools have been closed for in-person instruction since March? The Department must address this issue and again we emphasize the preferability of using the “enrollment data” method and of encouraging its use.

Moreover, the use of these alternatives has caused concern among some non-public school leaders who believe that they rely on poverty counts that might be manipulated to maximize public school participation at the expense of non-public school participation. Indeed, utilizing poverty counts, some districts have been alleged to intentionally undercount non-public schools. And for this reason, some non-public schools favor the collection of poverty data to be derived from surveys of non-public school students and, in absence of actual and more complete data, to allow such survey results to be extrapolated. We, therefore, believe that, while various options exist, the Department should encourage the use of such surveys.

Census Data – When the federal government allocates funding for Title I, it does so on the basis of formulas that are used to calculate the number of low-income students. These formulas utilize data collected through the U.S. Census and result in dollars flowing to the local school districts. There is a discrepancy, however, between how public school and non-public school children are counted. All low-income public school children are counted, while only non-public school children who live in the school district *and* are in a grade designated as a Title I attendance area are counted. This discrepancy inevitably leads to inequities that the Department must address.

Multiple School Districts – Another issue with having two options of allocating funds relates to the many non-public schools that serve students from multiple LEAs. The Department should issue clear guidance for situations where the LEA where the student lives uses a different method than LEA where school is located.

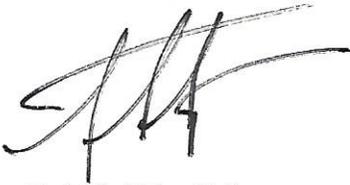
Use of Funds – We agree with the Department that the only reasonable way to interpret the plain meaning of the CARES Act is to conclude that “irrespective of the measure an LEA uses to determine the proportional share, the LEA still has the obligation to afford students and teachers in any non-public school in the LEA the opportunity to receive CARES Act services.’ No one would suggest that a non-public school can only sanitize the desks of academically at-risk students, and the same logic should apply to any of the allowable uses of the CARES Act funding.

Agudath Israel appreciates the Department’s IFR and believes it will be an important asset in bringing greater clarity to the CARES Act’s school relief programs, as well as provide greater equity to the non-public school children and teachers who desperately need the vital assistance

this statute promises. We welcome the opportunity to discuss these matters with the Department further.

Thank you for considering our views.

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'A. Cohen', written in a cursive style.

Rabbi Abba Cohen
Vice President for Government Affairs
and Washington Director

A handwritten signature in black ink, appearing to be 'A.D. Motzen', written in a cursive style.

Rabbi A.D. Motzen
National Director for State Relations

RAC, RADM/me