VIA ELECTRONIC MAIL ONLY November 16, 2020

Dear Chief State Education Officer:

We represent the plaintiffs in *NAACP v. DeVos*, a lawsuit challenging the U.S. Department of Education's ("USED") interim final rule, 85 Fed. Reg. 39,479 (July 1, 2020), regarding the provision of equitable services to private school students under the Coronavirus Aid, Relief, and Economic Security ("CARES") Act, Pub. L. No. 116-136, 134 Stat. 281 (2020).

We previously wrote on September 16, 2020 to inform you of the final order issued on September 4, 2020 by Judge Dabney L. Friedrich of the U.S. District Court for the District of Columbia, which invalidated the interim final rule nationwide. *See Nat'l Ass'n for Advancement of Colored People v. DeVos*, No. 20-CV-1996 (DLF), 2020 WL 5291406 (D.D.C. Sept. 4, 2020).[1] We also requested that you immediately notify all local educational agencies ("LEAs") in your state of the District Court's ruling and its effect—*i.e.*, that LEAs must determine the proportional share of Elementary and Secondary School Emergency Relief ("ESSER") and Governor's Emergency Education Relief ("GEER") funds for equitable services based solely on the number of *students from low-income families* attending private schools—and that you immediately correct any prior conflicting state guidance. Finally, we asked that you instruct your state's LEAs to immediately cease providing equitable services based on total enrollment in private schools.

In recent weeks, however, we have received reports of state educational agencies ("SEAs") continuing to direct or allow their LEAs to distribute funding for equitable services allocated *before* the District Court's September 4, 2020 order even if that funding was calculated using the unlawful formula based on total private school enrollment contained in the invalidated rule. As we explain, the District Court's order had not just prospective, but also retroactive effect. Therefore, we write again to reiterate that **your SEA may not advise, require, or allow LEAs to distribute any ESSER or GEER funds based on the invalid rule, whether allocated before or after the District Court's ruling.**[2]

[1] For ease of reference, we attach a copy of our September 16, 2020 letter. The September 16 letter contains a more fulsome description of the relevant provisions of the CARES Act, the components of the interim final rule, and the District Court's ruling that vacated the rule nationwide. We also attach Judge Friedrich's Memorandum Opinion and Order granting the plaintiffs' motion for summary judgement and vacating the rule. Because USED did not appeal the order, the District Court's judgment became final on November 3, 2020. *See* 28 U.S.C. § 2107(b)(2)–(3).

[2] This letter is intended for general information purposes only. The information provided in this letter does not, and is not intended to, constitute legal advice. Recipients should contact their legal counsel to obtain advice pertaining to this letter.

In issuing the September 4, 2020 order, the District Court did not exercise its narrow discretion to vacate USED's interim final rule only *prospectively*. Thus, the Court's order vacating the rule applies *retroactively* as well. This means that agencies—whether federal or state, including SEAs—have no discretion to require or allow LEAs to limit the Court's ruling only to equitable services funding that was, or will be, allocated and disbursed after the Court issued its order. As the D.C. Circuit has explained:

> Because the decision of an Article III court . . . announces the law "as though [it] were finding it—discerning what the law is, rather than decreeing what it is . . . changed to, or what it will tomorrow be," *all parties charged with applying that decision*, whether *agency* or court, *state* or federal, *must treat it as if it had always been the law*. The agency must give retroactive effect to the ruling of a federal court because of the nature of that court. Just as an Article III court may not issue an advisory decision, it may not issue a decision for less than all seasons, for some citizens and not others, as an administrator shall later decide. In sum, the decision of a federal court must be given retroactive effect regardless whether it is being applied by a court or an agency.

Nat'l Fuel Gas Supply Corp. v. FERC, 59 F.3d 1281 (D.C. Cir. 1995) (quoting *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 549 (1991) (Scalia, J., concurring)) (emphases added). In other words, because the District Court's ruling has retroactive effect, any allocations of ESSER and GEER funds for equitable services using the unlawful formula in USED's interim final rule are—and always have been—themselves unlawful, even if made prior to the Court's September 4, 2020 ruling. For that reason, SEAs may not require or allow LEAs to disburse ESSER and GEER funds for equitable services, or to provide equitable services using those funds, based on allocations made in accordance with the unlawful interim final rule.

We recognize that USED has stated that "[t]he Department will not take any action against States or local districts that followed the guidance and/or the [interim final rule] prior to notice of the court's decision."[3] However, that statement has no bearing on whether SEAs may lawfully require or allow LEAs to distribute funding for, or provide, equitable services as previously allocated pursuant to the interim final rule prior to the Court's September 4, 2020 order. The District Court's order explicitly held that "the GEER and ESSER sub-funds are not 'programs' administered by [USED]," such that USED has no statutory authority to decide whether SEAs and LEAs are in compliance with Section 18005(a) of the CARES Act. *NAACP*, 2020 WL 5291406, at *6 (quoting 20 U.S.C. § 1221e-3). Accordingly, USED has no authority to license SEAs to

[3] Letter from Betsy DeVos, U.S. Sec'y of Educ., to Chief State Sch. Officers (Sept. 28, 2020), https://www2.ed.gov/policy/elsec/guid/secletter/200925.html?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=.

require or allow LEAs to disburse funding for equitable services allocated prior to the Court's order in accordance with the unlawful formula based on total private school enrollment contained in USED's invalidated rule.

Further, reliance on USED's statement suffers from the same defect that the D.C. Circuit identified in *Natural Fuel Gas Supply Corporation*. Specifically, it "miss[es] the distinction between an administrative agency's retroactive application of a *judicial* decision" and the application of the *agency's* "own" decision. 59 F.3d at 1289 (emphasis added). While an agency's own decision may be applied only prospectively, a judicial decision such as the September 4, 2020 ruling in *NAACP* must be applied retroactively. *See id.*

Finally, USED's statement regarding potential enforcement actions is only a matter of prosecutorial discretion by the agency. *See Citizens for Responsibility & Ethics in Washington v. Fed. Election Comm'n*, 892 F.3d 434, 438 (D.C. Cir. 2018) ("The Supreme Court has recognized that federal administrative agencies in general . . . have unreviewable prosecutorial discretion to determine whether to bring an enforcement action." (citing *Heckler v. Chaney*, 470 U.S. 821, 831 (1985))). USED's decision not to bring an enforcement action against "States . . . that followed the guidance and/or the [interim final rule] prior to notice of the court's decision" has no bearing on whether an SEA's instruction that LEAs disburse funding for equitable services using a now-invalidated formula in the interim final rule violates the CARES Act or any other laws—including, for example, state administrative procedure acts.

To the extent the SEA for your state has directed LEAs to continue to disburse CARES Act funds allocated prior to the Court's September 4, 2020 order based on total private school enrollment pursuant to the now-vacated rule, we ask that you immediately rescind that directive. Further, we ask that you work with LEAs and appropriate legal counsel to help districts determine how they should proceed in order to comply with Judge Friedrich's order. This includes making all reasonable efforts to recoup inappropriately disbursed funds[4] as well as immediately halting disbursement of inappropriate allocations where districts have made financial commitments based on the USED's illegal rule.

[4] Any LEAs seeking to pursue reimbursement of ESSER and GEER funds disbursed for equitable services to private-school students prior to the District Court's September 4, 2020 order using the unlawful formula in the interim final rule may wish to review relevant authorities on the retroactivity of judicial decisions and should consult legal counsel to obtain appropriate legal advice.

Your state's LEAs desperately need to allocate and use the CARES Act funds affected by the invalidated interim final rule as Congress intended: by retaining the correct amount of funding in their public schools to support student learning and provide critical supports throughout this pandemic. Thank you in advance for your attention to this matter.

Sincerely,

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Southern Poverty Law Center

Jessica Levin, Esq.
Education Law Center

ENCLOSURES