Dated: June 25, 2020.

Lowell J. Schiller,

Principal Associate Commissioner for Policy.

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DEPARTMENT OF EDUCATION

34 CFR Part 76

[Docket ID ED–2020–OESE–0091]

RIN 1810–AB59

CARES Act Programs; Equitable Services to Students and Teachers in Non-Public Schools

AGENCY: Office of Elementary and Secondary Education, Department of Education.

ACTION: Interim final rule with request for comments.

SUMMARY: The U.S. Department of Education (Department) issues this interim final rule to clarify the requirement in the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) that local educational agencies (LEAs) provide equitable services to students and teachers in non-public schools under the Governor's Emergency Education Relief Fund (GEER Fund) and the Elementary and Secondary School Emergency Relief Fund (ESSER Fund) (collectively, the CARES Act programs).

DATES:

Effective Date: This interim final rule is effective July 1, 2020.

Comment Due Date: We must receive your comments on or before July 31, 2020.

ADDRESSES: Submit your comments through the Federal eRulemaking Portal or via postal mail, commercial delivery, or hand delivery. We will not accept comments submitted by fax or by email or those submitted after the comment period. To ensure that we do not receive duplicate copies, please submit your comments only once. In addition, please include the Docket ID at the top of your comments.

- *Federal eRulemaking Portal:* Go to *www.regulations.gov* to submit your comments electronically. Information on using *Regulations.gov,* including instructions for accessing agency documents, submitting comments, and viewing the docket, is available on the site under ''How to use *Regulations.gov*.''
- *Postal Mail, Commercial Delivery, or Hand Delivery:* If you mail or deliver your comments about this interim final rule, address them to Amy Huber, U.S. Department of Education, 400 Maryland Avenue SW, Room 3W219, Washington, DC 20202.

Privacy Note: The Department's policy for comments received from members of the public is to make these submissions available for public viewing in their entirety on the Federal eRulemaking Portal at *www.regulations.gov.* Therefore, commenters should be careful to include in their comments only information that they wish to make publicly available.

FOR FURTHER INFORMATION CONTACT: Amy Huber, U.S. Department of Education, 400 Maryland Avenue SW, Room 3W219, Washington, DC 20202. Telephone: (202) 453–6132. Email: *EquitableServices.CaresAct@ed.gov.*

If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

SUPPLEMENTARY INFORMATION:

Invitation to Comment: We invite you to submit comments on this interim final rule. We will consider these comments in determining whether to take any future action. See **ADDRESSES** for instructions on how to submit comments.

During and after the comment period, you may inspect all public comments about this interim final rule by accessing *Regulations.gov.* Once the LBJ building reopens to the public, you may also inspect the comments in person in Room 3W219, 400 Maryland Avenue SW, Washington, DC, between the hours of 8:30 a.m. and 4:00 p.m., Eastern time, Monday through Friday of each week except Federal holidays. If you want to schedule time to inspect comments, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

Assistance to Individuals with Disabilities in Reviewing the Record: On request, we will provide an appropriate accommodation or auxiliary aid to an individual with a disability who needs assistance to review the comments or other documents in the public record for this interim final rule. If you want to schedule an appointment for this type of aid, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

Background: This rulemaking resolves a critical ambiguity in section 18005(a) of Division B of the CARES Act, Public Law 116–136, 134 Stat. 281 (Mar. 27, 2020) with respect to the equitable services obligation owed by LEAs that receive CARES Act funds to students and teachers in non-public schools. Section 18005(a) of the CARES Act, titled ''Assistance to Non-public Schools,'' requires an LEA to ''provide equitable services in the same manner as provided under section 1117 of the ESEA of 1965 [Elementary and Secondary Education Act of 1965 (ESEA)] to students and teachers in non-public schools, as determined in consultation with representatives of non-public schools.'' Section 18005(b) lodges control of funds for the services and assistance mandated in section 18005(a) in a ''public agency.''

The Department must construe the CARES Act based on plain meaning, context, and coherence within the overall statutory structure. We are obliged to interpret the CARES Act coherently, and fit, if possible, all its parts into a harmonious whole. Finally, we must give meaning to each element of the statute so that no language is surplus.

The CARES Act is a special appropriation to combat the effects of the novel Coronavirus Disease 2019 (COVID–19). 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.

Construing the phrase ''provide equitable services in the same manner as provided under section 1117 of the ESEA of 1965'' as if Congress simply incorporated the entirety of section 1117 by reference requires a wholly inappropriate disregard for statutory text and for controlling legal authorities requiring us to harmonize all relevant statutory provisions. It would create significant and unnecessary interpretative conflicts and ambiguity. Finally, a mechanistic application of section 1117 detached from the relevant CARES Act text would disadvantage some students based simply on where they live. Therefore, exercising our interpretative authority under *Chevron U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.,* 467 U.S. 837, 844 (1984), and relying on statutory language and context to develop a harmonious construction faithful to all relevant CARES Act text and to the entire statutory structure, *see Food and Drug Admin.* v. *Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 132–33 (2000), we have concluded the phrase ''in the same manner as provided under section 1117'' does not simply mean ''as provided under section 1117'' and that we must implement section 1117 in a fashion fully consistent with *all* relevant CARES Act text, purposes, and requirements.

On April 30, 2020, the Department issued guidance titled *Providing Equitable Services to Students and Teachers in Non-Public Schools under the CARES Act Programs* (Equitable Services guidance), available at *https://oese.ed.gov/files/2020/04/FAQs-Equitable-Services.pdf.* Specifically, the Department concluded that the provision of equitable services under the CARES Act ''in the same manner as provided under section 1117'' of Title I requires the application of, among other provisions, section 1117(a)(3)(A) as outlined in Question #7 of the Equitable Services guidance. Because 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, the Department instructed LEAs to use enrollment data in non-public schools that will participate under the CARES Act programs compared to the total enrollment in all public schools and participating non-public schools in the LEA to determine the proportional share of CARES Act funds available to provide equitable services.

A number of States took issue with the Department's guidance with respect to using total non-public school enrollment to determine the proportional share of CARES Act funds for equitable services.[1] The Council of Chief State School Officers (CCSSO), in particular, expressed concern on behalf of its members. According to CCSSO, 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.''

The text of the CARES Act is inconsistent with CCSSO's assertion that Congress intended a rigid application of section 1117. Rather, the CARES Act affords LEAs more flexibility. In light of concerns expressed, as discussed below, we are affording flexibility to an LEA that helps poor children by spending its CARES Act funds *only* in its Title I schools to use the proportional share it calculated under section 1117(a)(4)(A) for the 2019–2020 school year or to use the number of children, ages 5 through 17, who attend a non-public school in the LEA that will participate under a CARES Act program and who are from low-income families compared to the total number of children, ages 5 through 17, who are from low-income families in both Title I schools and participating non-public schools in the LEA. However, if an LEA spends *any* funds from a CARES Act program on students and teachers in non-Title I public schools, then the law requires equity for students and teachers in participating non-public schools, achieved by using enrollment to determine the proportional share.

Discussion:

I. Legal Framework

It is a ''fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'' *Davis* v. *Michigan Dept. of Treasury,* 489 U.S. 803, 809 (1989). We must interpret the CARES Act ''as a symmetrical and coherent regulatory scheme,'' *Gustafson* v. *Alloyd Co.,* 513 U.S. 561, 569 (1995), and ''fit, if possible, all parts into an harmonious whole.'' *FTC* v. *Mandel Brothers, Inc.,* 359 U.S. 385, 389 (1959). When Congress has not supplied a definition, a statutory term generally has its ordinary meaning. *See, e.g., Schindler Elevator Corp.* v. *United States ex rel. Kirk,* 563 U.S. 401, 407 (2011). The plainness or ambiguity of statutory language is determined not only by reference to the language itself, but also by the specific context in which that language is used, and the broader context of the statute as a whole. *Yates* v. *United States,* 135 S.Ct. 1074, 1081 (2015). Constructions creating surplus language are disfavored as the Department is ''obliged to give effect, if possible, to every word Congress used.'' *Reiter* v. *Sonotone Corp.,* 442 U.S. 330, 339 (1979); *see also Nat'l Ass'n of Mfgs* v. *Dep't of Defense,* 138 S.Ct. 617, 632 (2018).

II. Analysis

A. The CARES Act

The CARES Act authorizes new Federal education programs to ''prevent, prepare for, and respond to'' COVID–19. Three of those programs—the GEER Fund (section 18002(c)(1), (3)), the ESSER Fund formula grants to LEAs (section 18003(c)), and the ESSER State educational agency (SEA) Reserve (section 18003(e))—make funds potentially available to LEAs.

GEER funds are available to, among other eligible entities, LEAs that the SEA deems have been ''most significantly impacted'' by COVID–19 to continue to provide educational services and to support the on-going functionality of the LEA (section 18002(c)(1)) or to LEAs that the Governor ''deems essential'' for carrying out emergency educational services authorized under section 18003(d)(1) of the ESSER Fund; provision of child care and early childhood education; social and emotional support; and the protection of education-related jobs (section 18003(c)(3)).[2]

Ninety percent or more of ESSER funds are awarded by formula to LEAs (including charter schools that are LEAs) in proportion to the amount of funds such LEAs ''received under part A of title I of the ESEA of 1965 in the most recent fiscal year'' (section 18003(c)). An LEA may allocate the ESSER funds it receives without restriction and use them for ''any'' activity in a long list, including any activity authorized under the ESEA, the Individuals with Disabilities Education Act, the Adult Education and Family Literacy Act, the Carl D. Perkins Career and Technical Education Act, and the McKinney-Vento Homeless Assistance Act (section 18003(d)(1)).

From the SEA Reserve under the ESSER Fund, an SEA may allocate those funds to LEAs, among other entities, for emergency needs determined by the SEA to address issues responding to COVID–19 (section 18003(e)).[3]

The CARES Act programs do not favor students based on public or non-public school attendance. *Any* student attending a public or non-public school may receive a broad array of services irrespective of where the student resides or whether he or she is low achieving or from a low-income family.

Section 18005(a) of the CARES Act requires an LEA receiving funds under sections 18002 or 18003 of the CARES Act 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, as determined in consultation with representatives of non-public schools.''

Section 1117 is a provision of Title I, Part A (Title I) of the ESEA, a program whose purpose is to improve the

[1] *See, e.g.,* letter from Carissa Moffat Miller, Executive Director, Council of Chief State School Officers, to Betsy DeVos, U.S. Secretary of Education (May 5, 2020), available at *https://ccsso.org/sites/default/files/2020-05/DeVosESLetter050520.pdf*; letter from Pedro A. Rivera, Secretary of Education, Pennsylvania Department of Education, to Frank T. Brogan, Assistant Secretary for Elementary and Secondary Education, U.S. Department of Education (May 7, 2020), available at *https://www.education.pa.gov/Documents/K-12/Safe%20Schools/COVID/CARESAct/Letter%20to%20Secretary%20Brogan.pdf.*

[2] A Governor may target GEER funds for a specific purpose or population of students, in which case an LEA would need to use the funds accordingly.

[3] An SEA may target ESSER SEA Reserve funds for a specific purpose or population of students, in which case an LEA would need to use the funds accordingly.

academic achievement of low-achieving students who reside in public school attendance areas with a high concentration of poverty (Title I schools) (20 U.S.C. 6301 *et seq.*). Section 1117 requires an LEA that receives Title I funds to provide equitable services to non-public school students (20 U.S.C. 6320; 34 CFR 200.62–200.68). Under Title I, funds for equitable services are generated by students from low-income families who reside in a participating Title I public school attendance area and attend a non-public school (20 U.S.C. 6320(a)(4)(A)(i); 34 CFR 200.64(a)). Using these funds, the LEA provides services to low-achieving students who reside in a participating Title I public school attendance area and attend a non-public school, regardless of the location of the non-public school (*i.e.,* inside or outside the public school attendance area or the LEA in which the student resides) (20 U.S.C. 6320(a)(1); 34 CFR 200.62(b)(1)).

The same framework applies for public school students under Title I. An LEA must identify eligible public school attendance areas and rank them on the basis of concentration of poverty (20 U.S.C. 6313(a)(2), (b); 34 CFR 200.78(a)). The LEA then selects areas to participate in Title I services in rank order of poverty, either for the LEA as a whole or within a grade span—*e.g.,* all elementary schools (20 U.S.C. 6313(a)(3)–(4); 34 CFR 200.78(a)). Eligible public school students must live in a school attendance area selected to participate under Title I and be low achieving (20 U.S.C. 6314(b)(6), 6315(c)). Thus, for both public and non-public school students, generation of Title I funds and eligibility for Title I services depend on residence in a participating Title I public school attendance area; that is, similarly situated students receive the same benefits under Title I (*i.e.,* are treated ''equitably'') whether they attend a public Title I school or a non-public school.

B. Resolving Ambiguity in Section 18005(a)

Section 18005(a) of the CARES Act is facially ambiguous. To begin with, Congress did not need to add the words ''in the same manner'' if it simply intended to incorporate ''section 1117 of the ESEA of 1965'' by reference in the CARES Act. The unqualified phrase ''as provided in'' alone would have been sufficient.

Furthermore, Congress included a separate consultation requirement in section 18005(a) of the CARES Act, and a public control of funds provision in section 18005(b), notwithstanding the fact that section 1117 contains precisely parallel provisions. *Compare* section 18005(a) and (b) of the CARES Act *with* section 1117(b) and (d) of Title I, respectively. If Congress intended to incorporate ''section 1117 of the ESEA of 1965'' wholesale into the CARES Act, and to have the Department mechanistically apply it, then these provisions in sections 18005(a) and (b) must be deemed superfluous and other key CARES Act text ignored. *Compare, e.g.,* section 1117(a)(1) (meeting the needs of non-public school students who are low-achieving and reside in a participating Title I public school attendance area) *with* sections 18002(c)(1) (emergency support for LEAs significantly impacted by COVID–19 to continue education services to their students and to support on-going functionality of the LEAs) and 18003(d) (support any activity from a broad array of permissible purposes for any student and staff without limitation on income, residence, or school attendance).

Finally, the CARES Act is a separate appropriation allowing separate permissible uses of taxpayer funds. By definition, the provisions in section 1117 relating to funding and eligibility for services, *e.g.,* section 1117(a)(1) and (4) and (b)(1)(E) and (J)(ii), are inapposite in a CARES Act frame. However, the provisions in section 1117 relating to the ''manner'' in which services are delivered, *e.g.,* section 1117(a)(2), (3), and (b)(1)(A)–(D), (F)–(I), and (K), arguably do fit within and can be applied under the CARES Act.

These facts must be acknowledged and should drive construction of section 18005(a)'s operative phrase ''in the same manner as provided under section 1117'' of Title I. Accordingly, in the exercise of our interpretative discretion, the Department has resolved the ambiguity by permitting LEAs flexibility to provide equitable services, particularly with respect to determining the proportional share, based on the services it provides to public school students. An LEA that spends funds from a CARES Act program *only* on students and teachers in Title I schools may determine the proportional share on the basis of enrollment or by either using the LEA's Title I proportional share for the 2019–2020 school year or by using the number of students from low-income families in participating non-public schools compared to the total number of students from low-income families in Title I and participating non-public schools in the LEA. All other LEAs must determine the proportional share based on enrollment in public and participating non-public schools.

We believe this flexibility is a reasoned and consistent construction giving effect to all relevant statutory text. Any other construction requires the words of section 18005(a) ''in the same manner'' to be denuded of meaning, the consultation and public use of funds provisions of section 18005(a) and (b) to be discarded as surplus language, and, paradoxically, the equity mandate of section 1117(a)(3) to be ignored.

Significant Regulations

To carry out functions vested in the Secretary by law, she is ''authorized to make, promulgate, issue, rescind, and amend rules and regulations . . . governing the applicable programs administered by, the Department.'' 20 U.S.C. 1221e–3; *see also* 20 U.S.C. 3474 (Secretary is ''authorized to prescribe such rules and regulations as the Secretary determines necessary or appropriate to administer and manage the functions of the Secretary or the Department''). A ''rule'' is defined broadly to include ''statement[s] of general or particular applicability and future effect'' that are designed to ''implement, interpret, or prescribe law or policy.'' 5 U.S.C. 551(4).

We discuss substantive issues under the sections of the interim final rule to which they pertain. There are no current regulations.

In General

Statute: Section 18005(a) of the CARES Act requires an LEA that receives funds under the GEER Fund or the ESSER Fund to provide equitable services in the same manner as provided under section 1117 of the ESEA to students and teachers in non-public schools, as determined in consultation with representatives of non-public schools.

New Regulations: Section 76.665(a)(1) incorporates the statute. Section 76.665(a)(2) identifies the CARES Act programs to which this section applies: The GEER Fund, the ESSER Fund formula grants to LEAs, and the ESSER SEA Reserve.

Reasons: It is necessary to include the statutory requirement that an LEA provide equitable services ''in the same manner'' as provided under section 1117 of the ESEA to students and teachers in non-public schools to provide context and authorization for the remaining provisions.

Consultation

Statute: Section 18005(a) of the CARES Act requires an LEA to provide equitable services ''as determined in consultation with representatives of non-public schools.''

New Regulations: Consultation must be ''in the same manner'' as conducted under section 1117 of the ESEA. Section 76.665(b)(1) incorporates section 1117's requirement that consultation must occur during the design and development of the LEA's plans to spend CARES Act funds and before the LEA makes any decision affecting the opportunities of students and teachers in non-public schools to benefit from those funds. As provided in section 1117(b)(1) of the ESEA, the LEA and private school officials shall both have the goal of reaching timely agreement on how to provide equitable and effective programs for private school students and teachers.

Section 76.665(b)(2) makes clear that the requirements for consultation in section 1117(b) of the ESEA apply to the CARES Act programs unless they are inconsistent with the CARES Act statutory provisions. For example, sections 1117(b)(1)(E) and (J)(ii), which deal with calculating the proportional share in accordance with section 1117(a)(4)(A) of the ESEA, would not apply if an LEA chooses the measure in § 76.665(c)(1)(i)(B) or (ii).

Reasons: Consultation is the foundation on which equitable services are provided and is mandated by section 18005(a). The regulations clarify that section 1117(b) of the ESEA, including the due process safeguards it contains, applies to the CARES Act programs, unless certain provisions are inconsistent with the CARES Act. We have identified two provisions that, on their face, are inconsistent with two of the measures these regulations permit for determining the proportional share because they refer to the proportional share as calculated under Title I. The CARES Act is an emergency appropriation to address exigent circumstances caused by responses to the pandemic. Although section 18005(a) does not specify how consultation is to occur, the Department believes using the section 1117(b) framework (to the extent consistent with the CARES Act itself), which is very familiar to schools and families, is a highly effective approach for the speedy provision of equitable services.

Determining Proportional Share

Statute: Section 18005(a) of the CARES Act requires an LEA to provide equitable services ''in the same manner as provided under section 1117 of the ESEA'' to students and teachers in non-public schools.

New Regulations: Section 76.665(c) sets out measures that an LEA may use to determine the proportional share of funds available under each CARES Act program to provide equitable services to students and teachers in non-public schools. An LEA need not use the same measure for each CARES Act program; however, it must use only one measure for a single program.

Section 76.665(c)(1)(i) addresses an LEA that allocates *all* its funds under a CARES Act program *only* to students and teachers in Title I schools. In that case, the LEA has two options in addition to using enrollment to determine the proportional share: (1) By using the proportional share it calculated under section 1117(a)(4)(A) for the 2019–2020 school year; or (2) by using the number of children, ages 5 through 17, who attend a non-public school in the LEA that will participate under a CARES Act program and who are from low-income families compared to the total number of children, ages 5 through 17, who are from low-income families in both Title I schools and participating non-public schools in the LEA. If an LEA uses one of these options, then the LEA must take care to ensure that it does not violate the supplement not supplant requirement in section 1118(b)(2) of the ESEA by allocating CARES Act funds to Title I schools and redirecting State and local funds from those schools to non-Title I schools. See § 76.665(c)(3).

For all other LEAs, § 76.665(c)(1)(ii) applies. This requires the LEA to calculate the proportional share based on enrollment in participating non-public elementary and secondary schools in the LEA compared to the total enrollment in both public and participating non-public elementary and secondary schools in the LEA.

Section 76.665(c)(2) requires an LEA to calculate the proportional share of CARES Act funds off the top of the LEA's total CARES Act allocation for each program under which it receives funds prior to any expenditures or transfers by the LEA in accordance with section 1117(a)(4)(A)(ii) of the ESEA.

Reasons: Under § 76.665(c)(1)(i), an LEA spending *all* its funds under a CARES Act program *only* in its Title I schools may determine the proportional share for equitable services based on enrollment or in two additional ways based on the share of students from low-income families attending participating non-public schools within the LEA. One path permits an LEA to use the proportional share it calculated for Title I purposes in the 2019–2020 school year. This approach has the obvious advantage of simplicity because it is a known proportion. Alternatively, if an LEA believes an actual poverty count would better meet respective needs, then it may count students, ages 5 through 17, from low-income families in Title I and participating non-public schools using one of the poverty measures in section 1117(c)(1) of the ESEA.

Given that the purpose of the CARES Act is to ''prevent, prepare for, and respond to'' the effects of COVID–19, timely provision of services to both public and non-public students and teachers is critical. To the extent collecting poverty data from non-public school families under § 76.665(c)(1)(i)(B) would delay services, we encourage an LEA to use proportionality, wherein the LEA would apply the poverty percentage of its Title I schools as a whole to the enrollment in non-public schools that will participate in a CARES Act program. Whichever path an LEA chooses, it achieves the equity required under section 1117(a)(3) of the ESEA—that is, educational services and other benefits for students in non-public schools must be equitable in comparison to those for public school students.

For all other LEAs, equity requires comparable treatment for non-public school students and teachers, which is achieved by basing the proportional share on enrollment in both public and participating non-public schools in the LEA.

Congress has already taken poverty into consideration in allocating CARES Act funds to LEAs. An LEA receives ESSER funds based on its proportionate share of Title I funds (section 18003(c) of the CARES Act). The Department allocates Title I funds to LEAs through four statutory formulas, all of which are based on poverty counts that include both public and non-public school children.[4] An LEA's Title I allocation is generally the sum it receives through each formula less any required or authorized reservations by the State. Similarly, 40 percent of the GEER funds a Governor receives is based on the State's share of Title I formula children (section 18002(b)(2) of the CARES Act). Thus, Congress targeted both ESSER and GEER funds to high-poverty areas to reflect their need.

However, once this allocation is made, the CARES Act authorizes an LEA to serve all students—public and non-public—who have been affected by COVID–19. If the CARES Act does not limit services based on residence and

[4] Title I's four formulas direct funds to LEAs based primarily on an LEA's relative share of formula children, 97 percent of whom are children ages 5 through 17 in poverty in public and non-public schools as determined annually by the Census Bureau. In varying degrees, the formulas address concentrations of poverty. 20 U.S.C. 6333–6337.

poverty, then it stands to reason that an LEA should not use residence and poverty to determine the proportional share of available funds for equitable services to non-public school students. In this context, only the use of enrollment data ensures that sufficient CARES Act funds are reserved to provide services to non-public school students and teachers that are equitable in comparison to their public school counterparts.[5] In fact, this is the only way to give meaning to the phrase ''in the same manner'' consistent with section 1117(a)(3) of the ESEA, which requires that benefits for ''private school children shall be equitable in comparison to services and other benefits for public school children.'' In other words, if an LEA elects to use CARES Act funds to serve all its students, then only a calculation of proportional share based on all students—*i.e.,* enrollment—satisfies the requirements of section 1117(a)(3).

To best meet its needs, an LEA may choose to use funds from one CARES Act program (*e.g.,* ESSER formula-grant funds) to serve students and teachers only in its Title I schools and funds from another CARES Act program (*e.g.,* GEER funds) to serve students and teachers in any school. In this case, the LEA would use the appropriate measure in § 76.665(c)(1) to determine the proportional share under each program.

In sum, the measures in § 76.665(c)(1)ensure the equitable treatment of non-public school students and teachers compared to their public school counterparts. The measures are also reasonable from the standpoint of administrative efficiency, minimizing LEA and parent burden, and carrying out the CARES Act's mandate to provide funds in response to the COVID–19 pandemic promptly and to do so in a way providing for equitable treatment of all students and teachers.

Equity

Statute: Section 18005(a) of the CARES Act requires an LEA to provide equitable services ''in the same manner as provided under section 1117 of the ESEA'' to students and teachers in non-public schools.

New Regulations: Section 76.665(d)(1) implements section 1117(a)(3) of the ESEA, which requires educational services and other benefits for students and teachers in non-public schools be equitable in comparison to services and other benefits for public school students and teachers. Section 76.665(d)(2) makes clear that, irrespective of the measure an LEA uses to determine the proportional share under paragraph (c)(1), 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.

Reasons: As explained above, section 1117(a)(3) of the ESEA mandates *equity* in equitable services. Only if services and other benefits to students and teachers in non-public schools are comparable to those provided to public school students and teachers can they be equitable.

Under § 76.665(d)(2), each non-public school in an LEA may request CARES Act services for its students and teachers. A non-public school, however, is not required to accept equitable services. In fact, the Department particularly discourages the small number of financially well-resourced non-public K–12 schools from accepting CARES Act-funded equitable services. Such schools include non-public boarding and day schools with tuition and fees comparable to those charged by the most highly selective postsecondary institutions. These schools tend to serve families from the highest income brackets, although they sometimes offer a limited number of scholarships to low- and middle-income students each year. The Department believes 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.

Secular, Neutral, and Nonideological

Statute: Section 18005(a) of the CARES Act requires an LEA to provide equitable services ''in the same manner as provided under section 1117 of the ESEA'' to students and teachers in non-public schools. Section 1117(a)(2) of the ESEA requires educational services or other benefits, including materials and equipment, be secular, neutral, and nonideological.

New Regulations: Section 76.665(e) implements section 1117(a)(2) of the ESEA.

Reasons: Section 76.665(e) makes clear that the services and benefits an LEA provides under the CARES Act programs must be secular, neutral, and nonideological.

Public Control of Funds

Statute: Section 18005(b) of the CARES Act requires the control of CARES Act funds for services and assistance to students and teachers in non-public schools and title to materials, equipment, and property must be in a public agency and a public agency must administer those funds, materials, equipment, and property. An LEA must provide services directly or contract for the provision of services with a public or private entity.

New Regulations: Section 76.665(f) implements section 18005(b) of the CARES Act.

Reasons: Section 76.665(f) emphasizes the importance of the statutory requirements that control of CARES Act funds and title to materials, equipment, and property for equitable services to students and teachers in non-public schools be in a public agency and that the LEA or public agency continuously administers the funds, materials, equipment, and property.

Waiver of Proposed Rulemaking and Delayed Effective Date

Under the Administrative Procedure Act (APA) (5 U.S.C. 553), the Department generally offers interested parties the opportunity to comment on a proposed rule. However, the APA provides that an agency is not required to conduct notice and comment rulemaking when the agency, for good cause, finds that the requirement is impracticable, unnecessary, or contrary to the public interest. 5 U.S.C. 553(b)(B). There is good cause here for waiving rulemaking. The CARES Act programs were enacted to address the immediate effects of COVID–19. The statute requires an LEA to provide services for students and teachers in non-public schools that are equitable in comparison to services provided to public school students and teachers. Before an LEA makes any decision that affects the opportunity of non-public school students and teachers to participate, it must consult with appropriate non-public school representatives. Thus, an LEA cannot begin services for public or non-public school students and teachers without consulting on determining the amount of funds available for those services. Therefore, in light of the current national emergency, its disruption on education in both public and non-public schools, and the immediate need for certainty regarding applicable requirements, the normal rulemaking process would be

[5] About 4.9 million students or 9.1 percent of all elementary and secondary school students in the Nation are enrolled in non-public schools. Broughman, S.P., Kincel, B., and Peterson, J. (2019). Characteristics of Private Schools in the United States: Results From the 2017–18 Private School Universe Survey First Look (NCES 2019–071), U.S. Department of Education. Using enrollment to determine the share of CARES Act funds for equitable services and assuming that every private elementary and secondary school chose to participate in the CARES Act programs, less than 10 percent of the CARES Act funding nationwide would be provided for equitable services for non-public school students and teachers, with more than 90 percent of the funding directed to public school students and teachers nationwide.

impracticable and contrary to the public interest because time is of the essence. However, the Department is providing a 30-day comment period and invites interested persons to participate in this rulemaking by submitting written comments. The Department will consider the comments received and may conduct additional rulemaking based on the comments.

The APA also generally requires that a final or interim final rule be published at least 30 days before its effective date, unless the agency has good cause to implement its regulations sooner (5 U.S.C. 553(d)(3)). Again, this interim final rule is necessary immediately to address the effects of COVID–19 on both public and non-public school students and teachers. In response to the pressing need for States and LEAs to have clear guidance on the use of funds under the CARES Act programs so that they can help all schools address the disruption created by COVID–19 and ensure that learning continues for all students, consistent with the purposes of the CARES Act, it is impracticable and contrary to the public interest to delay the effective date. Accordingly, we make this rule effective on the day it is published.

Executive Orders 12866, 13563, and 13771

Regulatory Impact Analysis

Under Executive Order 12866, the Office of Management and Budget (OMB) must determine whether this regulatory action is ''significant'' and, therefore, subject to the requirements of the Executive order and subject to review by OMB. Section 3(f) of Executive Order 12866 defines a significant regulatory action as an action likely to result in a rule that may—

(1) Have an annual effect on the economy of $100 million or more, or adversely affect a sector of the economy; productivity; competition; jobs; the environment; public health or safety; or State, local, or Tribal governments or communities in a material way (also referred to as ''economically significant'' regulations);

(2) Create serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles stated in the Executive order.

This regulatory action is an economically significant regulatory action subject to review by OMB under section 3(f) of Executive Order 12866. Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), the Office of Information and Regulatory Affairs designated this rule as a ''major rule,'' as defined by 5 U.S.C. 804(2).

Under Executive Order 13771, for each new regulation that the Department proposes for notice and comment or otherwise promulgates that is a significant regulatory action under Executive Order 12866 and that imposes total costs greater than zero, it must identify two deregulatory actions. For FY 2020, any new incremental costs associated with a new regulation must be fully offset by the elimination of existing costs through deregulatory actions. The designation of this rule under Executive Order 13771 will be informed by public comments.

We have also reviewed these regulations under Executive Order 13563, which supplements and explicitly reaffirms the principles, structures, and definitions governing regulatory review established in Executive Order 12866. To the extent permitted by law, Executive Order 13563 requires that an agency—

(1) Propose or adopt regulations only upon a reasoned determination that their benefits justify their costs (recognizing that some benefits and costs are difficult to quantify);

(2) Tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives and taking into account, among other things, and to the extent practicable, the costs of cumulative regulations;

(3) In choosing among alternative regulatory approaches, select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity);

(4) To the extent feasible, specify performance objectives, rather than the behavior or manner of compliance a regulated entity must adopt; and

(5) Identify and assess available alternatives to direct regulation, including economic incentives—such as user fees or marketable permits—to encourage the desired behavior, or providing information that enables the public to make choices.

Executive Order 13563 also requires an agency ''to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible.'' The Office of Information and Regulatory Affairs of OMB has emphasized that these techniques may include ''identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes.''

The Department has assessed the potential costs and benefits, both quantitative and qualitative, of this regulatory action, and we are issuing this interim final rule only on a reasoned determination that its benefits justify its costs. In choosing among alternative regulatory approaches, we selected those approaches that would maximize net benefits. Based on the analysis that follows and the reasons stated elsewhere in this document, the Department believes that this interim final rule is consistent with the principles in Executive Order 13563.

We also have determined that this regulatory action does not unduly interfere with State, local, or Tribal governments in the exercise of their governmental functions.

In this regulatory impact analysis, we discuss the need for regulatory action, the potential costs and benefits, net budget impacts, assumptions, limitations, and data sources, as well as regulatory alternatives we considered.

Elsewhere, under *Paperwork Reduction Act of 1995,* we identify and explain burdens specifically associated with information collection requirements.

1. Need for Regulatory Action and Analysis of Benefits

The Department is issuing this interim final rule to clarify the provision of equitable services under section 18005 of the CARES Act. More specifically, this interim final rule specifies the measures that LEAs may use to determine the proportional share of CARES Act funds available for equitable services to students and teachers in non-public schools. This interim final rule is meant to provide flexibility and clarify administration for SEAs and LEAs so that the equitable services provisions are implemented consistent with the requirements of the CARES Act and that funds may be used to provide services to both public and non-public students and teachers in a timely manner while imposing as little burden and costs on program participants as possible. In doing so, it reconciles applicable equitable services provisions of the CARES Act in a manner that is reasonable, offers appropriate flexibility, and ensures that CARES Act programs serve public and non-public school students equitably. In particular, the rule expands the options available for determining the proportional share of CARES Act funds that must be made available for equitable services by allowing an LEA to

select a measure based on the students and schools it will serve with CARES Act funds. The Department believes that these benefits outweigh any associated costs.

As discussed elsewhere in this preamble, in light of the current national emergency and the importance of ensuring that LEAs provide services immediately under the CARES Act to students and teachers in schools—both public and non-public—consistent with the requirements of law, the normal rulemaking process would be impracticable and contrary to the public interest. Moreover, in light of clear evidence that a significant number of SEAs have indicated their intention to implement the equitable services provisions of the CARES Act in a manner that the Department deems contrary to statutory requirements, which means that thousands of LEAs in these States may be in the process of violating the CARES Act as it pertains to equitable services, it is essential to clarify those requirements as soon as possible.

2. Analysis of Costs

Section 18005 of the CARES Act is intended to ensure that LEAs receiving funds under the GEER Fund or ESSER Fund provide equitable services to students and teachers in non-public schools, as determined in consultation with representatives of non-public schools. In accordance with OMB Circular A–4 (available at *www.whitehouse.gov/sites/default/files/omb/assets/omb/circulars/a004/a-4.pdf*), we are evaluating the costs and benefits of this interim final rule compared to a pre-statutory baseline. This rule defines the measures that may be used to determine the proportional share of funds that LEAs must reserve for equitable services but does not interpret or otherwise alter other statutory requirements related to equitable services. Affected LEAs will likely face some administrative costs to implement these statutory requirements, but the Department largely lacks data to quantify these costs. However, the Department expects that these entities will largely experience benefits exceeding these administrative costs. Because an LEA has flexibility in the manner in which it provides equitable services under the CARES Act programs, including the extent to which it relies on processes and procedures previously established to consult with non-public school officials and provide services under ESEA programs, and because the Department lacks data on the extent to which non-public schools may choose to participate in equitable services under the CARES Act, the Department does not know the exact costs attributable to the statutory requirements. Moreover, LEAs are permitted to reserve funds, from the proportional share determined in accordance with this interim final rule, to pay the reasonable and necessary costs of administering equitable services under the CARES Act.

In the following paragraphs, we estimate the costs of determining the proportional share in accordance with the interim final rule, while recognizing that those costs may be financed using CARES Act program funds.[6]

Implementation Costs for SEAs, LEAs, Affected Schools, and the Government

Costs of Determining the Proportional Share for LEAs Serving Students and Teachers in Both Title I and Non-Title I Schools

For LEAs using CARES Act funds to serve students and teachers in both Title I and non-Title I schools, the interim final rule requires the use of enrollment data to determine the proportional share. For the majority of these LEAs, enrollment data should already be available for non-public schools that participate in equitable services under ESEA programs other than Title I. Equitable services under those programs are governed by section 8501 of the ESEA, which requires in determining expenditures for equitable services that an LEA take into account the number of non-public school students to be served. In complying with this requirement, an LEA customarily obtains enrollment data from participating non-public schools. For such LEAs, complying with the interim final rule accordingly imposes no additional burden with respect to those schools.

If an LEA does not already obtain enrollment data in this manner from a non-public school that will participate in equitable services under the CARES Act programs, we expect that, in a majority of States, the LEA can obtain the data immediately from the SEA, particularly the approximately 35 SEAs that collect enrollment data from their non-public schools on an annual basis.[7] For LEAs in this circumstance, the interim final rule similarly imposes no burden, and it imposes a negligible burden on affected SEAs, which would merely need to share previously collected enrollment data through long-established means of communication with their LEAs.

For LEAs that do not already have enrollment data for one or more participating non-public schools and that cannot obtain such data from the SEA, complying with the interim final rule entails obtaining the data directly from those schools through the consultation process. The Department believes this will be minimally burdensome on these LEAs, which we estimate to include 20 percent of affected LEAs. Specifically, we estimate that an LEA will have on average two non-public schools for which enrollment data are needed and that it will take on average 0.5 total hours to obtain the data from those schools. At $35 per hour for LEA staff, the average cost is an estimated $18 per LEA. Assuming that 10,125 LEAs (or 75 percent of an estimated 13,500 LEAs with attendance areas) are subject to the equitable services provisions of the CARES Act and that 7,595 (or 75 percent) of these LEAs will choose to serve students and teachers in both Title I and non-Title I schools, approximately 1,520 LEAs (20 percent of 7,595 affected LEAs) would bear this cost, for a total estimated cost of $27,360.

Costs of Determining the Proportional Share for LEAs Serving Title I Schools Only

For LEAs using CARES Act funds to serve students and teachers only in Title I schools, the interim final rule provides the option to determine the proportional share using one of two poverty alternatives. The first is simply to use as the proportional share for CARES Act purposes the proportional share of Title I funds available for equitable services under section 1117(a)(4)(A) of the ESEA, which is determined based on residence of students from low-income families in participating Title I public school attendance areas. Using this pre-existing alternative would of course impose no additional burden on LEAs.

The second alternative is to determine the proportional share for equitable services using data on the number of students from low-income families who attend participating Title I schools and participating non-public elementary and secondary schools in the LEA. Under this alternative, an LEA may choose to obtain poverty counts for students in non-public schools that wish to participate. We estimate that 12.5 percent of affected LEAs will implement this alternative by obtaining poverty counts and that it will take an LEA on average 240 hours to obtain those counts. At $35 per hour for LEA staff, the average cost is an estimated $8,400

[6] For the purpose of this analysis, we assume that an LEA receiving funds under the GEER Fund and ESSER Fund will use the same measure to determine the proportional share for each program.

[7] *See https://www2.ed.gov/about/inits/ed/non-public-education/regulation-map/index.html.*

per LEA. Assuming that 2,530 LEAs (or 25 percent of the estimated 10,125 LEAs subject to the equitable services provisions of the CARES Act) will choose to serve students and teachers in Title I schools only, approximately 315 LEAs (12.5 percent of 2,530 affected LEAs) would bear this cost, for a total estimated cost of $2,646,000.

As discussed elsewhere in this document, LEAs may also implement this poverty alternative using a proportionality method, wherein the LEA applies the average poverty rate of its Title I schools to the enrollment in non-public schools that will participate in a CARES Act program to generate poverty estimates for those schools. LEAs that choose to implement this alternative using a proportionality method would accordingly need to have enrollment data from participating non-public schools, but not poverty data—that is, the same enrollment data required of LEAs serving students and teachers in both Title I and non-Title I schools to determine the proportional share. As discussed elsewhere in this analysis with respect to those LEAs, enrollment data are generally already available. We estimate that only 20 percent of affected LEAs would need to obtain those data from one or more participating non-public schools, and that it would take on average 0.5 hours to obtain the data. At $35 per hour for LEA staff, the average cost is an estimated $18 per LEA. Assuming that 315 LEAs (or 12.5 percent of the estimated 2,530 LEAs that will choose to serve students and teachers in Title I schools only) will choose to implement this poverty alternative using a proportionality method or, as permitted, use enrollment data to determine the proportional share, approximately 65 LEAs (20 percent of 315 affected LEAs) would bear this cost, for a total estimated cost of $1,170.

3. Net Budget Impacts

We estimate that the discretionary elements of this interim final rule will not have an impact on the Federal budget. This rule specifies the measures that LEAs may use to determine the proportional share of funds for equitable services under the CARES Act programs but does not change the amount of funding available for such programs. We anticipate that $16.2 billion in CARES Act funds will be disbursed in 2020, and therefore estimate $16.2 billion in transfers in 2020 relative to a pre-statutory baseline.

4. Accounting Statement

As required by OMB Circular A–4, in the following table we have prepared an accounting statement showing the classification of the impacts associated with the provisions of these regulations in 2020. Impacts classified as transfers are from the Federal Government to LEAs.

ACCOUNTING STATEMENT: CLASSIFICATION OF ESTIMATED IMPACTS

[In millions]

Category	Benefits
Clarity and flexibility in administration of equitable services	Not Quantified.
	Costs
Determining proportional share for equitable services	$2.7.
	Transfers
Providing educational services in preparation for and response to COVID–19, including for students and teachers in non-public schools.	$16,182.

5. Regulatory Alternatives Considered

As an alternative to the options for determining the proportional share provided in this interim final rule, the Department considered requiring all LEAs subject to equitable services requirements in the CARES Act to determine the proportional share using enrollment data. Ultimately, we determined that such a requirement could be inequitable if an LEA chooses to serve only its Title I schools and therefore uses its Title I proportional share as the proportional share for CARES Act purposes.

Clarity of the Regulations

Executive Order 12866 and the Presidential memorandum ''Plain Language in Government Writing'' require each agency to write regulations that are easy to understand.

The Secretary invites comments on how to make these regulations easier to understand, including answers to questions such as the following:

- Are the requirements in the regulations clearly stated?
- Do the regulations contain technical terms or other wording that interferes with their clarity?
- Does the format of the regulations (grouping and order of sections, use of headings, paragraphing, etc.) aid or reduce their clarity?
- Would the regulations be easier to understand if we divided them into more (but shorter) sections? (A ''section'' is preceded by the symbol ''§ '' and a numbered heading; for example, § 76.665.)
- Could the description of the regulations in the **SUPPLEMENTARY INFORMATION** section of this preamble be more helpful in making the regulations easier to understand? If so, how?
- What else could we do to make the regulations easier to understand?

To send any comments that concern how the Department could make these regulations easier to understand, see the instructions in the **ADDRESSES** section.

Regulatory Flexibility Act Certification

The Regulatory Flexibility Act does not apply to this rulemaking because there is good cause to waive notice and comment under 5 U.S.C. 553.

The Secretary certifies that these interim final requirements would not have a significant economic impact on a substantial number of small entities. Under the U.S. Small Business Administration's Size Standards, small entities include small governmental jurisdictions such as cities, towns, or school districts (LEAs) with a population of less than 50,000. Although the majority of LEAs that receive CARES Act funds and are subject to CARES Act equitable services requirements would qualify as small entities under this definition, this rule will benefit small entities by providing multiple options for determining the proportional share of funds that must be reserved for equitable services and clarifying that such entities have discretion to select the option that

minimizes costs and burdens. As discussed in the Regulatory Impact Analysis, unless an LEA seeks to serve only Title I schools and determine the proportional share for equitable services by obtaining poverty counts based on student enrollment, the costs associated with the interim final rule are minimal. We estimate that the vast majority of LEAs (9,810 LEAs out of an estimated 10,125 LEAs subject to equitable services requirements) will choose to employ a minimally burdensome option in determining the proportional share. Moreover, for any small-entity LEA that chooses to serve only Title I schools and determine the proportional share for equitable services by obtaining poverty counts based on student enrollment, we presume the benefit of obtaining accurate poverty counts outweighs any associated costs. Finally, we note that all costs entailed in administering the equitable services provisions of the CARES Act may be paid for with funds received under the respective CARES Act programs; consequently, neither the statutory CARES Act equitable services requirements nor the provisions of this interim final rule impose any uncompensated costs on small entities.

Paperwork Reduction Act of 1995

As part of its continuing effort to reduce paperwork and respondent burden, the Department provides the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)). This helps ensure that the public understands the Department's collection instructions, respondents provide the requested data in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the Department can properly assess the impact of collection requirements on respondents.

A Federal agency may not conduct or sponsor a collection of information unless OMB approves the collection under the PRA and the corresponding information collection instrument displays a currently valid OMB control number. Notwithstanding any other provision of the law, no person is required to comply with, or is subject to penalty for failure to comply with, a collection of information if the collection instrument does not display a currently valid OMB control number.

Information collections related to the CARES Act programs are included in paperwork clearances OMB control numbers 1810–0741 and 1810–0743. The Department is currently requesting public comment on these clearances. Those clearances do not address the information collection applicable to this rule. Accordingly, the Department is requesting a separate emergency paperwork clearance from OMB on the data collections associated with this interim final rule and will add the burden to the clearances currently out for public comment.

As discussed in the Analysis of Costs and Benefits section of the Regulatory Impact Statement in these interim final regulations, for LEAs that do not already have enrollment data for one or more participating non-public schools and that cannot obtain such data from the SEA, complying with the interim final regulations entails obtaining the data directly from those schools through the consultation process. The Department believes this will be minimally burdensome on these LEAs, which we estimate to include 20 percent of affected LEAs. Specifically, we estimate that an LEA will have on average two non-public schools for which enrollment data are needed and that it will take on average 0.5 total hours to obtain the data from those schools. At $35 per hour for LEA staff, the average cost is an estimated $18 per LEA. Assuming that 10,125 LEAs (or 75 percent of an estimated 13,500 LEAs with attendance areas) are subject to the equitable services provisions of the CARES Act and that 7,595 (or 75 percent) of these LEAs will choose to serve students and teachers in both Title I and non-Title I schools, approximately 1,520 LEAs (20 percent of 7,595 affected LEAs) would bear this cost, for a total estimated cost of $27,360.

For LEAs using CARES Act funds to serve students and teachers only in Title I schools, the interim final regulations provide the option to determine the proportional share using one of two poverty alternatives; however, only one of these alternatives would impose additional burden. For the alternative that imposes additional burden, LEAs would determine the proportional share for equitable services using data on the number of students from low-income families who attend participating Title I schools, which are already available, and participating non-public elementary and secondary schools in the LEA. Under this alternative, an LEA may choose to obtain poverty counts for students in non-public schools that wish to participate. We estimate that 12.5 percent of affected LEAs will implement this alternative by obtaining poverty counts and that it will take an LEA on average 240 hours to obtain those counts. At $35 per hour for LEA staff, the average cost is an estimated $8,400 per LEA. Assuming that 2,530 LEAs (or 25 percent of the estimated 10,125 LEAs subject to the equitable services provisions of the CARES Act) will choose to serve students and teachers in Title I schools only, approximately 315 LEAs (12.5 percent of 2,530 affected LEAs) would bear this cost, for a total estimated cost of $2,646,000.

As discussed elsewhere in this document, LEAs may also implement this poverty alternative using a proportionality method, wherein the LEA applies the average poverty rate of its Title I schools to the enrollment in non-public schools that will participate in a CARES Act program to generate poverty estimates for those schools. LEAs that choose to implement this alternative using a proportionality method would accordingly need to have enrollment data from participating non-public schools, but not poverty data—that is, the same enrollment data required of LEAs serving students and teachers in both Title I and non-Title I schools to determine the proportional share. With respect to those LEAs, enrollment data are generally already available. We estimate that only 20 percent of affected LEAs would need to obtain those data from one or more participating non-public schools, and that it would take on average 0.5 hours to obtain the data. At $35 per hour for LEA staff, the average cost is an estimated $18 per LEA. Assuming that 315 LEAs (or 12.5 percent of the estimated 2,530 LEAs that will choose to serve students and teachers in Title I schools only) will choose to implement this poverty alternative using a proportionality method or, as permitted, use enrollment data to determine the proportional share, approximately 65 LEAs (20 percent of 315 affected LEAs) would bear this cost, for a total estimated cost of $1,170.

Intergovernmental Review

The CARES Act programs covered by the interim final rule are not subject to Executive Order 12372 and the regulations in 34 CFR part 79.

Accessible Format: Individuals with disabilities can obtain this document in an accessible format (*e.g.,* braille, large print, audiotape, or compact disc) on request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT**.

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You may also access documents of the Department published in the **Federal Register** by using the article search feature at: *www.federalregister.gov.*

Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

List of Subjects in 34 CFR Part 76

Accounting, Administrative practice and procedure, American Samoa, Education, Grant programs—education, Guam, Northern Mariana Islands, Pacific Islands Trust Territory,Prisons, Private schools, Reporting and recordkeeping requirements, Virgin Islands, Youth organizations.

Betsy DeVos,

Secretary of Education.

For the reasons discussed in the preamble, the Secretary amends title 34 of the Code of Federal Regulations by revising part 76 to read as follows:

PART 76—STATE-ADMINISTERED PROGRAMS

■ 1. The authority citation for part 76 continues to read as follows:

Authority: 20 U.S.C. 1221e–3 and 3474, unless otherwise noted.

§§ 76.663 and 76.664 [Reserved]

■ 2. Add reserved §§ 76.663 and 76.664.

■ 3. Add an undesignated center heading after reserved § 76.664 to read as follows:

Equitable Services Under the CARES Act

■ 4. Section 76.665 is added to read as follows:

§ 76.665 Providing equitable services to students and teachers in non-public schools.

(a) *In general.* (1) A local educational agency (LEA) receiving funds under a CARES Act program must provide equitable services to students and teachers in non-public elementary and secondary schools in the LEA ''in the same manner'' as provided under section 1117 of the Elementary and Secondary Education Act of 1965 (ESEA), as determined in consultation with representatives of non-public schools.

(2) For purposes of this section, the CARES Act programs are the Governor's Emergency Education Relief (GEER) Fund (Section 18002), formula grants to LEAs under the Elementary and Secondary School Emergency Relief (ESSER) Fund (Section 18003(c)), and ESSER SEA Reserve (Section 18003(e)).

(b) *Consultation.* (1) An LEA must promptly consult with representatives of non-public elementary and secondary schools during the design and development of the LEA's plans to spend funds from a CARES Act program and before the LEA makes any decision affecting the opportunities of students and teachers in non-public schools to benefit from those funds. As provided in section 1117(b)(1) of the ESEA, the LEA and non-public school officials shall both have the goal of reaching timely agreement on how to provide equitable and effective programs for non-public school students and teachers.

(2) Consultation must occur in accordance with section 1117(b) of the ESEA, except to the extent inconsistent with the CARES Act and this section, such as section 1117(b)(1)(E) and (J)(ii).

(c) *Determining proportional share.* (1) To determine the proportional share of funds for equitable services to students and teachers in non-public elementary and secondary schools for each CARES Act program, an LEA must use one of the following measures. The LEA need not use the same measure for each CARES Act program.

(i) An LEA using *all* its funds under a CARES Act program to serve *only* students and teachers in public schools participating under Title I, Part A of the ESEA may calculate the proportional share in accordance with paragraph (c)(1)(ii) of this section or by using—

(A) The proportional share of Title I, Part A funds it calculated under section 1117(a)(4)(A) of the ESEA for the 2019–2020 school year; or

(B) The number of children, ages 5 through 17, who attend each non-public school in the LEA that will participate under a CARES Act program and are from low-income families compared to the total number of children, ages 5 through 17, who are from low-income families in both Title I schools and participating non-public elementary and secondary schools in the LEA.

(ii) Any other LEA must calculate the proportional share based on enrollment in participating non-public elementary and secondary schools in the LEA compared to the total enrollment in both public and participating non-public elementary and secondary schools in the LEA.

(2) An LEA must determine the proportional share of funds available for services for students and teachers in non-public elementary and secondary schools based on the total amount of CARES Act funds received by the LEA under a CARES Act program prior to any allowable expenditures or transfers by the LEA.

(3) An LEA using funds from a CARES Act program in Title I schools under paragraph (c)(1)(i) of this section must comply with the supplement not supplant requirement in section 1118(b) of the ESEA, which would prohibit the LEA from allocating CARES Act funds to Title I schools and then redirecting State or local funds to non-Title I schools, among other things.

(d) *Equity.* (1) Educational services and other benefits for students and teachers in non-public elementary and secondary schools must be equitable in comparison to services and other benefits for public school students and teachers participating in CARES Act programs, and must be provided in a timely manner.

(2) The measure an LEA uses to determine the proportional share under paragraph (c)(1) of this section does not limit the obligation of the LEA to provide the opportunity to receive services to students and teachers in any non-public elementary or secondary school in the LEA.

(e) *Secular, neutral, and nonideological.* Educational services and benefits, including materials and equipment, an LEA provides to students and teachers in non-public elementary and secondary schools under the CARES Act programs must be secular, neutral, and nonideological.

(f) *Public control of funds.* An LEA must—

(1) Maintain control of CARES Act funds;

(2) Keep title to and exercise continuing administrative control of all materials, equipment, and property purchased with CARES Act funds; and

(3) Provide services with CARES Act funds directly or through a contract with a public or private entity.

(*Authority:* 20 U.S.C. 6320, 6321(b); section 18005 of the CARES Act)

§§ 76.666 through 76.669 [Reserved]

■ 5. Add reserved §§ 76.666 through 76.669.

[FR Doc. 2020–14224 Filed 6–30–20; 8:45 am]

BILLING CODE 4000–01–P