



STATE OF MICHIGAN  
DEPARTMENT OF EDUCATION  
LANSING


GRETCHEN WHITMER  
GOVERNOR

MICHAEL F. RICE, Ph.D.  
STATE SUPERINTENDENT

**MEMORANDUM**

**DATE:** September 11, 2020

**TO:** Local and Intermediate School District Superintendents  
Public School Academy Directors

**FROM:** Michael F. Rice, Ph.D., State Superintendent 

**SUBJECT:** CARES Act/ESSER Fund Equitable Services Lawsuits –  
MEMO #COVID-19-108

On July 7, I shared an update regarding legal action against the U.S. Secretary of Education and the U.S. Department of Education on the issue of allocating CARES Act/Elementary and Secondary School Emergency Relief (ESSER) funds for equitable services to nonpublic schools.

In brief, the [update](#) noted that Michigan Attorney General Nessel and other attorneys general had filed suit to enjoin the U.S. Secretary of Education and the U.S. Department of Education from enforcing the U.S. Secretary's interim final rule (IFR) for the allocation of these CARES Act funds for equitable services to nonpublic schools. The U.S. Secretary had used a formula different from the one in the CARES Act in her April 30 guidance as the basis for local school districts to allocate funds for equitable services to nonpublic schools. In her July 1 interim final rule, the U.S. Secretary had offered a choice of formulas, one of which is unmentioned in the CARES Act and the other with conditions unmentioned in the CARES Act.

In Michigan, the difference between what nonpublic schools would receive under the U.S. Secretary's formula and what they would receive under the Title I, Part A formula in the CARES Act was over \$16 million.

To date, three U.S. district courts have ruled against the U.S. Secretary and the U.S. Department of Education: in Washington State, in Northern California (the suit led by Attorney General Nessel), and in Washington, D.C. While the judges in the first two cases ordered preliminary injunctions prohibiting the U.S. Secretary and the U.S. Department of Education from implementing or enforcing the IFR until the case is fully argued and decided, the judge in the most recent case ruled last Friday by granting summary judgment and vacating the interim final rule. On September 9, the

**STATE BOARD OF EDUCATION**

CASANDRA E. ULBRICH – PRESIDENT • PAMELA PUGH – VICE PRESIDENT  
MICHELLE FECTEAU – SECRETARY • TOM MCMILLIN – TREASURER  
TIFFANY D. TILLEY – NASBE DELEGATE • JUDITH PRITCHETT  
LUPE RAMOS-MONTIGNY • NIKKI SNYDER

U.S. Department of Education's Office of Elementary & Secondary Education confirmed that, as a result of this court's ruling, "the IFR is no longer in effect." (<https://oese.ed.gov/offices/education-stabilization-fund/elementary-secondary-school-emergency-relief-fund/?source=email>). In the absence of an appeal to the U.S. circuit court, this case is closed.

We will keep you apprised of any appeal that may arise. The U.S. Secretary has 60 days from last Friday to appeal the Washington D.C. district court's decision. She may also appeal the preliminary injunction orders entered by the courts in Washington State and California. Otherwise, the allocation of CARES Act funds for equitable services will be by the Title I, Part A formula, as noted clearly in the CARES Act.

Please share this communication with your district legal counsel and business administrator. While we remain cautiously optimistic that the U.S. Secretary's position will not be upheld in a court of law, your decision regarding holding in reserve ESSER funds equal to the difference between the two formulas should be made in consultation with your district legal counsel.

Thank you for your attention to this important matter.

cc: Michigan Education Alliance  
Confederation of Michigan Tribal Education Directors