

441 G St. N.W.  
Washington, DC 20548

B-332982

February 25, 2021

The Honorable Patty Murray  
Chair  
The Honorable Richard Burr  
Ranking Member  
Committee on Health, Education, Labor, and Pensions  
United States Senate

The Honorable Robert C. "Bobby" Scott  
Chairman  
The Honorable Virginia Foxx  
Republican Leader  
Committee on Education and Labor  
House of Representatives

Subject: *Department of Education: CARES Act Programs; Equitable Services to Students and Teachers in Non-Public Schools*

Pursuant to section 801(a)(2)(A) of title 5, United States Code, this is our report on a major rule promulgated by the Department of Education (Department) entitled "CARES Act Programs; Equitable Services to Students and Teachers in Non-Public Schools" (RIN: 1810-AB59). We received the rule on February 12, 2021. It was published in the *Federal Register* as an interim final rule with request for comments on July 1, 2020. 85 Fed. Reg. 39479.<sup>1</sup> The effective date of this interim final rule is July 1, 2020.

According to the Department, this interim final rule (IFR) clarifies the requirement in the Coronavirus Aid, Relief, and Economic Security Act (CARES Act). This IFR requires local educational agencies to provide equitable services to students and teachers in non-public schools under the Governor's Emergency Education Relief Fund and the Elementary and Secondary School Emergency Relief Fund. See *generally* CARES Act, Pub. L. No. 116-136, § 18002, 18003, 134 Stat. 281, 564-565 (Mar. 27, 2020).

The Congressional Review Act (CRA) requires a 60-day delay in the effective date of a major rule from the date of publication in the *Federal Register* or receipt of the rule by Congress, whichever is later. 5 U.S.C. §§ 553(b)(3)(B), 808(2). The 60-day delay in effective date can be

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<sup>1</sup> The House of Representatives received the IFR on July 6, 2020, but the *Congressional Record* does not reflect the date the Senate received the rule. See 166 Cong. Rec. H42121 (daily ed. July 21, 2020). The Department informed GAO that they resent the rule to both chambers of Congress, and it was delivered to the Senate on February 22, 2021. E-mail from the Division of Regulation Staff, the Department, to Staff Attorney, GAO, *RE: Department of Education rule to GAO RIN 1810-AB59*, (Feb. 24, 2021). Thus, GAO is providing this major rule report now in accordance with 5 U.S.C. 801(a)(2)(A).

waived, however, if the agency finds for good cause that delay is impracticable, unnecessary, or contrary to the public interest, and the agency incorporates a statement of the findings and its reasons in the rule issued. Here, although the Department did not specifically mention CRA's 60-day delay in effective date requirement, the Department stated that notice and comment procedures were unnecessary because it found good cause to waive such procedures under section 553(b)(3)(B) of the Administrative Procedure Act. The Department stated, 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 of the CARES Act, the normal rulemaking process would be impracticable and contrary to the public interest because time is of the essence.

Enclosed is our assessment of the Department's compliance with the procedural steps required by section 801(a)(1)(B)(i) through (iv) of title 5 with respect to the rule. If you have any questions about this report or wish to contact GAO officials responsible for the evaluation work relating to the subject matter of the rule, please contact Shari Brewster, Assistant General Counsel, at (202) 512-6398.

A handwritten signature in black ink that reads "Shirley A. Jones". The signature is written in a cursive style with a large initial 'S' and 'J'.

Shirley A. Jones  
Managing Associate General Counsel

Enclosure

cc: Amanda Amann  
Deputy Assistant General Counsel  
Division of Regulatory Services  
Department of Education

REPORT UNDER 5 U.S.C. § 801(a)(2)(A) ON A MAJOR RULE  
ISSUED BY THE  
DEPARTMENT OF EDUCATION  
ENTITLED  
“CARES ACT PROGRAMS; EQUITABLE SERVICES TO STUDENTS  
AND TEACHERS IN NON-PUBLIC SCHOOLS”  
(RIN: 1810-AB59)

(i) Cost-benefit analysis

The Department of Education (Department) provided an accounting statement for this interim final rule (IFR). The Department stated that this IFR will provide clarity and flexibility in administration of equitable services, by local education agencies (LEA), 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 Coronavirus Aid, Relief, and Economic Security Act (CARES Act) programs). See *generally* CARES Act, Pub. L. No. 116-136, § 18002, 18003, 134 Stat. 281, 564–565 (Mar. 27, 2020). The Department estimated the cost of determining the proportional share for equitable services, which is required under this IFR, to be \$2.7 million. The Department also estimated the transfer from the federal government to LEAs to be \$16,182 million.

(ii) Agency actions relevant to the Regulatory Flexibility Act (RFA), 5 U.S.C. §§ 603-605, 607, and 609

The Department stated that the RFA does not apply to this rulemaking because there is good cause to waive notice and comment under 5 U.S.C. § 553(b)(3)(B).

(iii) Agency actions relevant to sections 202-205 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§ 1532-1535

This IFR does not discuss the Unfunded Mandates Reform Act. In its submission to us, the Department indicated that it did not prepare a written statement under the Act with respect to this IFR.

(iv) Other relevant information or requirements under acts and executive orders

Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*

According to the Department, notice and comment procedures were unnecessary for this IFR and the Department found good cause to waive such procedures under section 553(b)(3)(B) of the Administrative Procedure Act. The Department stated, 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 of the CARES Act, the normal rulemaking process would be impracticable and contrary to the public interest because time is of the essence. The Department stated further that it found good cause to waive the 30-day delay in effective date required under 5 U.S.C. § 553(d)(3), because this IFR is necessary immediately to address the effects of COVID-19 on both public and non-public school students and teachers.

Finally, the Department noted that it is providing a 30-day comment period and invites interested persons to participate in this rulemaking by submitting written comments. The Department also noted that it will consider the comments received and may conduct additional rulemaking based on the comments.

Paperwork Reduction Act (PRA), 44 U.S.C. §§ 3501-3520

According to the Department, this IFR contains information collection requirements (ICR) subject to the Act. The Department stated that the ICRs related to the CARES Act programs are included in paperwork clearances associated with Office of Management and Budget (OMB) Control Numbers 1810-0741 and 1810-0743. The Department stated that it is requesting emergency paperwork clearance from OMB on the data collections associated with this IFR, and it will add the burden to the clearances currently out for public comment under OMB Control Numbers 1810-0741 and 1810-0743. The Department estimated the total burden of the ICRs in this IFR to be \$2,674,530.

Statutory authorization for the rule

The Department promulgated this IFR pursuant to sections 1221e-3 and 3474 of title 20, United States Code, and the CARES Act, Pub. L. No. 116-136, § 18002, 18003, 134 Stat. 281, 564-565 (Mar. 27, 2020).

Executive Order No. 12866 (Regulatory Planning and Review)

The Department stated that this IFR is economically significant under the Order.

Executive Order No. 13132 (Federalism)

The Department did not discuss the Order in this IFR. However, the Department stated that it determined that this IFR does not unduly interfere with state, local, or tribal governments in the exercise of their governmental functions.