UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *et al.*,

Plaintiffs,

v.

B. Regulatory Background

Although the Department engaged in rulemaking to issue its interim final rule, the CARES Act does not vest the Department with rulemaking authority. *See generally* CARES Act §§ 18001–18005. The Department thus rested its authority to issue the interim final rule on its general rulemaking powers to administer programs under its purview. *See* 85 Fed. Reg. 39,481.

Further, the Department issued the interim final rule without engaging in notice and comment rulemaking. *See* 85 Fed. Reg. 39,484 ("Waiver of Proposed Rulemaking"). Instead, the Department opened a post-issuance comment period of thirty days. *Id.* To justify foregoing the usual rulemaking process, the Department cited the Administrative Procedure Act (APA) exception for good cause, finding that notice and comment was "impracticable, unnecessary, or contrary to the public interest," 5 U.S.C. § 553(b)(B), given the exigencies of the global pandemic. *Id.*

C. Procedural History

The plaintiffs—advocacy groups, public school districts, and parents of children who attend public schools—brought this suit on July 22, 2020.[1] Dkt. 1. On August 11, 2020, the plaintiffs moved for a preliminary injunction or, in the alternative, summary judgment. Dkt. 36. After providing notice and considering the parties' respective positions during a status hearing, the Court consolidated the preliminary injunction motion into an expedited motion for summary

[1] At the time of this writing, two other federal district courts have granted preliminary injunctions enjoining the Department's interim final rule. *See Michigan v. DeVos*, No. 3:20-cv-04478, ECF No. 82 at *7 (N.D. Cal. Aug. 26, 2020) ("The Department went well beyond its statutory authority by trying to replace the share formula mandated by Congress in Section 18005(a) with one of its own choosing."); *Washington v. DeVos*, No. 2:20-cv-1119, 2020 WL 4922256 (W.D. Wash. Aug. 21, 2020) (holding that "Congress neither explicitly, nor implicitly by ambiguity, granted the Department the authority to promulgate the Interim Final Rule").

judgment under Federal Rule of Civil Procedure 65(a)(2).[2] *See Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981) ("[T]he parties should normally receive clear and unambiguous notice [of the court's intent to consolidate] either before the hearing commences or at a time which will still afford the parties a full opportunity to present their respective cases.").

In this expedited motion, the plaintiffs assert four claims, each of which presents a pure question of law: first, whether the Department's actions are ultra vires, in violation of the separation of powers; second, whether the Department's interim final rule violates the Spending Clause, U.S. Const. art. I, § 8; and third and fourth, whether the Department's actions violate the APA as an agency action not in accordance with law or in excess of statutory authority, 5 U.S.C. § 706(2)(A), (C). In short, plaintiffs primarily contend that (1) the Department did not have authority to issue the interim final rule, and (2) the interim final rule the Department did issue was contrary to the CARES Act.

II. LEGAL STANDARD

becomes whether the agency's interpretation is a reasonable one. *Holland Mining*, 309 F.3d at 815. If the agency's interpretation is reasonable, it is entitled to deference. *Id.*

A court's "task is to construe what Congress has enacted. [A court] begin[s], as always, with the language of the statute." *Duncan v. Walker*, 533 U.S. 167, 172 (2001). The statute states: "A local educational agency receiving funds under sections 18002 or 18003 of this title shall 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." CARES Act § 18005 (emphasis added).

In some statutory interpretation cases, courts must make sense(m)2d undet § 18005 hool(s)14 (128 (s)4ef

providing equitable services "in the same manner" as § 1117 means to use the same methodology and procedures described in § 1117—the formula that accounts for the number of children from low-income families.

Section 8501, another provision of the ESEA, confirms as much. It provides equal funding to private and public schools without accounting for income. *See* 20 U.S.C. §§ 7881(a)–(b). Had Congress intended to permit the equal-funding formula the Department adopted in its interim final rule, it could have easily done so by referencing § 8501 in the CARES Act. Instead, however, Congress chose to reference § 1117. In doing so, Congress expressed a clear and unambiguous preference for apportioning funding to private schools based on the number of children from low-income families, even though the Department's chosen alternative of equal funding was readily available at the time of drafting. In the end, it is difficult to imagine how Congress could have been clearer.

The Department's arguments to the contrary do not change this straightforward conclusion. The Department first contends that the term "equitable services" is ambiguous and that its interpretation is reasonable. In isolation, it might be true that "equitable" is an ambiguous term. But the Act does not use the term in isolation. It does not say that funds should be disbursed in an equitable manner without further explanation. Quite the opposite, the Act directs a specific formula for providing "equitable services"—the one described in § 1117 of the En5oen5/0T14 (n514.3

students."). Although some might agree with the Department's position as a matter of policy, "[a]n agency has no power to 'tailor' legislation to bureaucratic policy goals by rewriting unambiguous statutory terms." *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 325 (2014).

In its interim final rule, the Department also argued that § 18005(a) as a whole is "facially ambiguous." 85 Fed. Reg. 39,481. It noted that "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." *Id.* But simply because Congress could have been clearer, that alone does not render an unambiguous text ambiguous. In any case, it is not at all obvious how the Department's proposed revision of "as provided in" is any clearer than Congress's chosen words of "in the same manner as provided under." *See Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 545–46 (interpreting "in the same manner" to mean "the same methodology and procedures.").

The Department also relies on purposive arguments. It posits that the purpose of the CARES Act is "to provide emergency relief to *all* students and schools," Opp'n at 9 (emphasis

Id.

scheme in 'mechanistic' fashion." Opp'n at 8. The Department's principal support for this point is that certain provisions in § 1117 of the ESEA (other than the formula for how to provide equitable services) are superfluous with other sections of the CARES Act. *See* Opp'n at 9 (noting that "two of § 18005's provisions are substantively identical to two provisions in § 1117"). For example, § 1117 of the ESEA includes a provision requiring public schools to consult with private schools about equitable services, much like the CARES Act. *Compare* CARES Act § 18005(a), *with* 20 U.S.C. § 6320(b). So too, both statutes contain language about public schools retaining control over funds. *Compare* CARES Act § 18005(b), *with* 20 U.S.C. § 6320(d). The Department reasons that "[i]f the CARES Act's use of the phrase 'in the same manner' incorporated every jot and tittle of section 1117, both the consultation and the public-control provisions of § 18005 would be superfluous." Opp'n at 9.

While it is true that courts generally avoid giving a statute a meaning that would render parts of the text superfluous, "the rule against giving a portion of text an interpretation which renders it superfluous does not prescribe that a passage which could have been more terse does not mean what it says." *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 236 (2011). "Redundancy is not a silver bullet. . . . Sometimes the better overall reading of the statute contains some redundancy." *Rimini St., Inc. v. Oracle USA, Inc.*, 139 S. Ct. 873, 881 (2019). And the plain reading of § 18005 is that it incorporates the formula described in § 1117 for distributing equitable services by the number of children [illegible]

Although Congress explicitly granted other agencies rulemaking authority in the text of the CARES Act, *see, e.g.*, CARES Act §§ 1114, 3513(f), 12003(c), there is no question that Congress did not vest the Department with express rulemaking authority, *see id.* §§ 18001–18005; Opp'n at 10 & n.4. Thus, the Department based its authority on its general rulemaking powers, *see* 85 Fed. Reg. 39,481: first, the power to make rules "governing the applicable programs administered by[] the department," 20 U.S.C. § 1221e-3; and second, the power to make rules "as the Secretary determines necessary or appropriate to administer and manage the functions of the Secretary or the Department." 20 U.S.C. § 3474.

Of course, "[a]n agency's general rulemaking authority does not mean that the specific rule the agency promulgates is a valid exercise of that authority." *Colo. River Indian Tribes v. Nat'l Indian Gaming Comm'n*, 466 F.3d 134, 139 (D.C. Cir. 2006). "Agencies are . . . bound, not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes." *Id.* And neither of the general rulemaking authority provisions provides support for the Department's actions here. As discussed above, § 1117 is not ambiguous. It left no gaps for the agency to fill and thus delegated no implicit authority to the Department.

After all, the GEER and ESSER sub-funds are not "programs" administered by the Department. *See* 20 U.S.C. § 1221e-3. The sub-funds, in contrast to other CARES Act provisions, provide the Secretary with no discretion as to disbursement or any other programmatic decisionmaking. Rather, they simply direct that the Secretary *shall* allocate funds in the same proportion and in the same manner as the cross-referenced ESEA statute. CARES Act §§ 18003, 18005. By contrast, other provisions of the CARES Act (which are not at issue in this case) do provide the Secretary with discretion. In the sub-fund for higher education

(HEER), for example, Congress appropriated 2.5% of the funds for the institutions that the Secretary determines have the greatest unmet needs. *See id.* § 18004(a)(3). Congress knew how to delegate programmatic authority to the Secretary when it wanted to and chose not to do so here.

Further, the rulemaking was neither "necessary" nor "appropriate" to "manage the functions of the Secretary or the Department," 20 U.S.C. § 3474. The interim final rule was not "necessary" to accomplish

See Unofficial Transcript at 4:3–7 (plaintiffs acknowledging that none of their remaining claims would survive if the rule were vacated).

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In enacting the education funding provisions of the CARES Act, Congress spoke with a clear voice. It declared that relief funding shall be provided to private schools "in the same manner as provided under section 1117." CARES Act § 18005. Contrary to the Department's interim final rule, that cannot mean the opposite of what it says.

"The authority to issue regulations is not the power to make law, and a regulation contrary to a statute is void." *Orion Reserves Ltd. P'ship v. Salazar*, 553 F.3d 697, 703 (D.C. Cir. 2009). It is long-settled that "[a] regulation which . . . operates to create a rule out of harmony with the statute, is a mere nullity." *Manhattan Gen. Equip. Co. v. Comm'r of Internal Revenue*, 297 U.S. 129, 134 (1936). Thus, the Department's interim final rule, which conflicts with the unambiguous text of the statute, is void. *See* 5 U.S.C. § 706(2)(A), (C); *see Nat'l Min. Ass'n v. U.S. Army Corps of Engineers*, 145 F.3d 1399, 1409 (D.C. Cir. 1998) ("[W]hen a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed.").

CONCLUSION

For the foregoing reasons, the plaintiffs' motion for summary judgment is granted. A separate order consistent with this decision accompanies the memorandum opinion.

United States District Judge

September 4, 2020