

## Questions and Answers

### Equitable Services for the CARES Act/ESSER Fund Grant

On Sept. 4, 2020, the U.S. District Court for the District of Columbia issued an opinion and an order vacating the [interim final rule](#) (IFR) on equitable services provisions for eligible non-public schools under the Coronavirus Aid, Relief, and Economic Security (CARES) Act. On Sept. 9, the U.S. Department of Education (ED) subsequently updated their CARES Act webpage to indicate that the IFR is no longer in effect. It is unclear at this point whether ED will appeal. The information below has been updated to reflect guidance provided by the Office of the Attorney General of the State of Tennessee, Herbert Slatery, III.

**1. Does the requirement to provide equitable services to students and teachers in non-public schools apply to the ESSER Fund?**

Yes. A local educational agency (LEA) that receives funds under the Elementary and Secondary School Emergency Relief Fund (ESSER Fund) (CARES Act § 18003) must provide equitable services to students and teachers in eligible non-public schools in the same manner as provided under the Elementary and Secondary Education Act of 1965 (ESEA) § 1117 (CARES Act § 18005(a)).

**2. What steps did LEAs need to take to initially offer ESSER Fund equitable services to non-public schools?**

Initially, each LEA should have reached out to all eligible non-public schools, including both those that have historically participated in equitable services and those that have not. Please note that the previous decision of a non-public school not to participate in equitable services does not impact its eligibility to participate in the ESSER Fund.

Similar to how an LEA provides equitable services under ESEA, an LEA is responsible for initiating the consultation process. LEAs must contact all eligible non-public school officials to notify them of the opportunity for their students and teachers to obtain equitable services under the ESSER Fund.

Through this initial contact, the LEA can explain the services available under the ESSER Fund and how non-public school students and teachers can participate. To support LEAs with communicating the equitable services ESSER Fund opportunity, a suite of resources is available in [ePlan > TDOE Resources > CARES Act/ESSER Fund > Equitable Services Packet](#).

**3. How should the LEA carry out the ESSER Fund consultation during the COVID-19 pandemic?**

If non-public school officials indicate that they intend to participate in equitable services for their students and teachers, the LEA must consult with those officials during the design and development of the LEA's programs and before the LEA makes any decision that affects the opportunity of non-public school students and teachers to participate in the activities funded under the ESSER Fund. If a non-public school declines to participate in the ESSER Fund programs or does not respond to an LEA's good-faith effort to make contact, the LEA has no further responsibility to provide equitable services to students or teachers in that school. The LEA, however, must be able to demonstrate that it made a good-faith effort to contact all the eligible non-public schools in the LEA.

LEAs should establish procedures around communication for the required consultation process with non-public school representatives or officials throughout a closure when necessitated by a disaster. For example, the LEA may establish an emergency call tree to share any needed information between the LEA and non-public schools. Additionally, LEAs may conduct consultation meetings—traditionally held in person—over the phone or virtually. Note that LEAs must still maintain proper documentation of all

meetings and interactions with non-public school officials. If a non-public school has limited electronic capabilities or access, the LEA will need to utilize a multitude of methods to communicate with non-public schools including email, certified mail, and in-person visits.

**4. *What if the non-public school does not accept Title services from the LEA but wants to accept the ESSER Fund?***

LEAs must offer to provide equitable services under the ESSER Fund to students and teachers in all eligible non-public schools, even if a non-public school has not previously participated under Title I, Part A or Title VIII of the ESEA.

**5. *Are all students and teachers in a non-public school eligible to receive equitable services under the ESSER Fund programs?***

Yes. All students and teachers in a non-public school are eligible to receive equitable services under the ESSER Fund. In other words, each non-public school's proportionate share may be used to serve all of its students and teachers, not just those who would qualify under Title I, Part A.

**6. *Must an LEA or another public agency maintain control of the ESSER Fund allocation used to provide equitable services?***

Yes. Control of funds for services and assistance provided to non-public school students and teachers under the ESSER Fund and control of materials, equipment, and property purchased with such funds, must be maintained with the LEA, and the LEA must administer such funds, materials, equipment, and property. In other words, no funds may go directly to a non-public school. In addition, services for non-public school students and teachers must be provided by a public agency directly or through contract with another public or private entity (CARES Act § 18005(b)).

**7. *UPDATE: What does it mean that the IFR was "vacated"?***

As previously noted, on Sept. 4, 2020, the U.S. District Court for the District of Columbia issued an opinion and an order vacating the interim final rule (IFR) on equitable services provisions for eligible non-public schools under the Coronavirus Aid, Relief, and Economic Security (CARES) Act. The decision vacates the IFR in its entirety, leaving no IFR in place for ED to enforce in any jurisdiction. It is unclear at this point whether ED will appeal.

**8. *UPDATE: Based on recent legal developments, how should the proportionate share for participating non-public schools be calculated?***

The Attorney General of Tennessee requests that LEAs put into an escrow account the difference between the amount generated by the proportional-student enrollment formula and the Title I, Part A formula. To do so, LEAs should take the following steps:

- Conduct meaningful consultation with participating non-public schools to discuss the possible change in allocation and to determine the method that will be used to calculate the Title I, Part A proportionate share.
- Calculate the proportionate share according to the Title I, Part A formula, utilizing the Title I, Part A formula worksheet provided in the *Related Documents* section of the ESSER Fund application. (See questions 12-16 below for additional information.)
- Budget the difference between the amount generated by the proportional-student enrollment formula and the Title I, Part A formula in **72130-599** in the LEA's ESSER Fund application. (See question 17 below for more information).
- Provide equitable services to participating non-public school students and teachers utilizing the funds

from the proportionate share calculated from the Title I, Part A formula.

**9. UPDATE: Based on this updated information, will LEAs need to conduct additional consultation meetings with participating non-public schools?**

Yes. Additional consultation meetings should be held with all participating non-public schools to discuss the most recent legal developments and associated impact on the proportionate share and available services. The consultation process should also include collaboration and discussion of the method and sources of data used to determine the number of children from low-income families in participating school attendance areas who attend non-public schools.

To document the consultation process focused on this matter, LEAs should utilize the updated ESSER Fund Non-Public School Agreement form ([ePlan > TDOE Resources > CARES Act/ESSER Fund > Equitable Services Packet](#)). The due date for this agreement has been extended from Oct. 1, 2020 to **Nov. 1, 2020**. Please upload completed agreements to the *Related Documents* section of the ESSER Fund application in ePlan.

**10. UPDATE: Will LEAs consult with every non-public school which is geographically located within the LEA?**

Consultation requirements follow the current Title I, Part A requirements. LEAs should consult with the following:

- Participating non-public schools that are geographically located within the LEA.
- Participating non-public schools that enroll children from Title I attendance boundaries within the LEA (geographically outside of the LEA). However, many LEAs choose to transfer funding to a lead LEA for Title I, Part A purposes (if there are multiple LEAs that have children enrolled in a specific non-public school). LEAs may utilize that same process for the CARES Act funding.

**12. UPDATE: Do LEAs need to consult with non-public schools who are not currently participating in ESSER Fund equitable services?**

No. For the purposes of this re-calculation process, LEAs should only consult with non-public schools that are already participating in ESSER Fund equitable services.

**13. The non-public schools located within the LEA have never participated in equitable services under Title I, Part A. What are the possible methods for calculating the number of eligible non-public school students?**

- **Method 1:** Use the same poverty measure used to count eligible public school students. For example, if the LEA uses free and reduced-price lunch (FRPL) program participation as its data source and the non-public school participates in the FRPL program, the data should be used to count eligible non-public school students. ED's guidance states an LEA also may use a comparable data source, such as Temporary Assistance for Needy Families (TANF) or a tuition scholarship program, which uses a similar income eligibility threshold.
- **Method 2:** Conduct a survey of enrolled non-public school families to obtain comparable data. Non-public school officials may survey enrolled families to obtain income data which may be applied to the threshold used to determine FRPL eligibility. Data should be extrapolated if not all non-public school families respond to the survey. The survey must, to the extent possible, protect the identity of families of non-public school students.
- **Method 3:** Use proportionality to apply the low-income percentage of public school children to the number of non-public school children in each attendance area. For example, if 50 percent of the

public school students residing in a given attendance area are from low-income families, then 50 percent of non-public school students residing in the same area may be assumed to be from low-income families.

- **Method 4:** Use an equated measure of income that correlates to the measure used to count public school children. For example, by determining the percentage of public school children eligible for TANF who are also eligible for FRPL, an LEA may assume that an equal percentage of TANF-eligible non-public school students would also qualify for FRPL.

**13. UPDATE: Is there a particular method for calculating the number of eligible non-public school students that is recommended for non-public schools who have never participated in equitable services before?**

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. The department **strongly recommends that LEAs calculate the number of eligible non-public school students based on proportionality** (*Method 3* above) for non-public schools who have never participated in equitable services before. LEAs can use the proportionality method to quickly achieve the equity required under ESEA § 1117(a)(3), as collecting poverty data from non-public schools and families would most likely cause a delay in services.

**14. UPDATE: How does an LEA determine the proportionate share using proportionality (Method 3 above)?**

To derive the number of non-public school children from low-income families, an LEA may apply the low-income percentage of each participating Title I public school attendance area to the number of non-public school children who reside in that school attendance area. To do this, an LEA will need the addresses, grade levels, and ages of those students attending non-public schools.

For example, an LEA may determine that 60 percent of the families in a particular public school attendance area qualify as low-income. The LEA would apply the percentage from the public school attendance area to the number of non-public school children residing in that public school attendance area. So, if the number of non-public school children residing in the public school attendance area is 50, then 60 percent of those 50 children (i.e., 30 children) are considered to be from low-income families. The LEA calculates the per-pupil amount based on this number (i.e., 30 children).

**15. UPDATE: The non-public schools located within the LEA already participate in equitable services under Title I, Part A. Can the LEA utilize low-income data that has already been collected for 2019-20 ESEA equitable services?**

Yes. LEAs may use available 2019-20 or 2020-21 non-public school low-income data to calculate the proportionate share for the ESSER Fund.

**16. UPDATE: After an LEA has determined the proportional share of funds for equitable services under the ESSER Fund program, how does it then determine the amount of funds available for services to students and teachers in individual non-public schools?**

For the Title I, Part A formula, the LEA must first determine the overall proportion of children from low-income families who reside in participating public school attendance areas who attend public and non-public schools. Using the proportion of children from low-income families who attend non-public schools, the LEA would determine the amount of funds available for equitable services based on the proportionate share of the LEA’s total ESSER Fund allocation.

Calculation worksheets for both the proportional-student enrollment formula and the Title I, Part A formula are included in the *Related Sections* page of the ESSER Fund application. LEAs must ensure that

they have both worksheets completed and uploaded within their ESSER Fund application (see question 17 below for more information).

**17. UPDATE: What changes need to be made to the LEA's ESSER Fund application in ePlan?**

LEAs should take the following steps to revise their ESSER Fund application by **Nov. 1, 2020**:

- i. Hold **consultation** meetings with all participating non-public schools as described in question 10 above.
- ii. **Calculate the Title I, Part A formula proportionate share** using the Title I, Part A formula worksheet found in the *Related Documents* section of the application.
- iii. **Upload the completed Title I, Part A formula worksheet** to the *Related Documents* section of the application.
  - Do **not** remove or delete the original total enrollment calculation worksheet that was uploaded upon first submission of the LEA's application.
- iv. On the **Equitable Services page** of the application, please edit the information in the first narrative box to include details focused on the most recent consultation process. Include in the information the adjusted allocation based on the Title I, Part A formula. This amount should align with the amount on the Title I, Part A formula calculation worksheet. No other changes should be made on this page.
  - Do **not** edit the amount listed in the "Total Non-Public Share" box.
  - See the example response on the following page.
- v. **Budget** the difference between the amount generated by the proportional-student enrollment formula and the Title I, Part A formula in **72130-599** in the LEA's ESSER Fund application (unspent funds only).
  - Within the budget narrative, identify these expenses as "Equitable Services Escrow".
  - Utilize the "Non-Public School" budget tag to label all non-public school expenses.
  - See the example on the following page.
- vi. Make other adjustments to the budget as necessary.
- vii. Complete and **upload the updated ESSER Fund Non-Public School Agreement** to the *Related Document* section of the application by **Nov. 1, 2020**.
- viii. LEAs should continue to provide equitable services to participating non-public schools utilizing the proportionate share calculated through the **Title I, Part A formula only**. Funds placed in an escrow account as described above should be held until further guidance is provided.

**Sample response for the Equitable Services page of the ESSER Fund application in ePlan:**

**Note: This is the only section that should be revised on this page.**

**Application prompt:**

Describe the consultation process between the LEA and non-public/private schools regarding the CARES Act proportionate share. Include the important dates, modes of communication, and information provided to non-public/private school representatives. (Upload supporting documents in *Related Documents* section) (CARES Act § 18003 (B))

**Example LEA Response:**

On May 8, all eligible non-public schools were informed of the opportunity to participate in the ESSER Fund via email and phone. LEA staff provided non-public schools with basic information about the grant as well as a summary of allowable expenditures and an Intent to Participate form. Information was sent via certified mail to any eligible non-public school who was not responsive to the initial email and phone call. Follow-up meetings were scheduled with all eligible non-public schools to discuss the Intent form and each school's interest in participation.

Initial consultation meetings were conducted May 25-June 5. During these meetings, the Intent to Participate form was collected and required topics were discussed, as indicated on the Affirmation of Meaningful Consultation forms. Topics included general grant requirements, how the needs of the non-public schools would be determined, how the proportionate share would be calculated, allowable expenses, procurement processes and procedures, administration, and more.

On an ongoing basis, LEA staff continue to work closely with participating non-public schools via email, phone, and virtual/in-person meetings to provide support as well as answers to questions about allowable expenses, prices of items, approved vendors, processes, etc.

Submitted Intent and Affirmation forms from participating non-public schools are uploaded on the *Related Documents* page.

*Update:*

During the week of September 28, additional consultation meetings were held with all participating non-public schools to discuss the changes in non-public school allocations caused by recent legal developments. Discussions were held around the best method and data sources to utilize when calculating the proportionate share based on the Title I formula. Based on these discussions, the LEA and all non-public schools agree that calculating the proportionate share based on proportionality will be the most efficient and equitable method. Based on this method, the adjusted allocation is **\$5,678.36**. See the Title I, Part A formula calculation worksheet and non-public school agreement forms uploaded to the *Related Documents* section.

**Example Budget Detail:**

Account Number: 72130 – Other Student Support	<b>Narrative Description:</b> Equitable Services Escrow - \$3,111.20 is being held for ESSER Fund equitable services.
Line Item Number: 599 – Other Changes	
Focus Area: Other Approved Activities	
School Type: Non-Public Schools	

**18. UPDATE: How should an LEA proceed if they have already made purchases for participating non-public schools based on the proportional-student enrollment?**

The department is aware that many LEAs have already obligated funds and made non-public school purchases from the ESSER Fund based on previous guidance provided by ED through the IFR. There is a strong argument to be made that funds already expended would be allowable given the reasonable reliance on the regulation in place at the time. However, that would only apply to funds expended prior to Sept. 9, 2020. At this time, the department is reviewing guidance from ED and the Attorney General of Tennessee on how to reconcile past purchases that may go above what is required under the Title I, Part A formula. LEAs should continue to provide equitable services to participating non-public schools utilizing the proportionate share calculated through the Title I, Part A formula only. Funds placed in an escrow account as described above should be held until further guidance is provided.

**19. Who can I contact with questions?**

Equitable Services Questions	<a href="mailto:Danny.Bounds@tn.gov">Danny.Bounds@tn.gov</a>
Funding Application Questions	<a href="mailto:Brinn.Obermiller@tn.gov">Brinn.Obermiller@tn.gov</a> <a href="mailto:Deborah.Thompson@tn.gov">Deborah.Thompson@tn.gov</a>