

CARES Equitable Services: Updates and Next Steps

Tiffany Kessler and Bonnie Graham, Brustein & Manasevit PLLC
September 2020

Welcome and Introductions



The Governor and the Commissioner of Education are working with the U.S. Department of Education (ED) during this unprecedented time to ensure all LEAs and non-public schools are served under the CARES Act as well as how to reconcile past purchases that may go above what is required under the Title I, Part A formula.

The Federal Programs and Oversight team will continue to update stakeholders as more information is available.



Timeline

National emergency declared
• March 13

CARES Act passed
• March 27

ED guidance issued
• April 30

IFR issued
• July 1

Preliminary Injunction Orders
• August 21
• August 26

Summary Judgment Order
• Sept. 4

The CARES Act



- Section 18005 provides for equitable services
 - Applies to the Elementary and Secondary School Education Relief Fund (ESSER) and the Governors Emergency Education Relief Fund (GEER)
 - Services should be provided to students and teachers in non-public schools “in the same manner as provided under section 1117 of the ESEA”
 - Subject to consultation
 - Funds must remain “under the control” of the public entity (LEA)

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ESEA Equitable Services Refresher

- Sec. 1117 of the Elementary and Secondary Education Act (as amended by the Every Student Succeeds Act)
 - “To the extent consistent with the number of eligible children identified under section 1115(c) in the school district served by a local educational agency who are enrolled in private elementary schools and secondary schools” LEAs should provide services “on an equitable basis”
- LEA must conduct consultation
- Allow teachers and families to participate “on an equitable basis,” services must be “timely” and “equitable” in comparison to “services and other benefits for public school children participating under this part”
- Services must be “secular, neutral, and non-ideological”

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ED Guidance (April 30, 2020)

- Explicitly non-binding
- Should allocate funding according to non-public schools' share of total enrollment
 - (ESEA: share of low-income students)
- Allocation should be based on schools located in the LEA
 - (ESEA: based on eligible students residing in LEA)
- Services can be offered to all students and teachers
 - (ESEA: targeted to serve low-achieving students)



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Pushback to ED Guidance

- Many states said they would follow statute, not guidance
- CCSSO letter to ED, May 5th: ED should “clarify” guidance – disproportionate amount, leads to unintended consequences
- House of Representatives (May), Senate Democrat (July) drafts for additional stimulus bills would make changes to calculation of proportionate share to explicitly align with Sec. 1117

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ED Interim Final Rule (Published July 1, 2020)

CANCELLED

- IFR → takes effect immediately, with concurrent notice and comment period
 - Specialized regulatory process used for emergencies/ urgent situations
- ED: there is a statutory ambiguity inherent in “in the same manner”
- CARES Act funds can and should serve all students and teachers (ED: this is required for equity)
- Provides LEAs with two options for calculating the proportionate share

ED Interim Final Rule

CANCELLED

- LEA can calculate share according to Title I rules (following share of low-income students) if:
 - It spends CARES Act funds in only public schools that are Title I schools
 - Ensures that this does not result in violation of Title I SnS requirement
 - Can calculate based on 2019-2020 numbers OR run a new calculation
- LEA can calculate share according to ED’s preferred allocation (based on total enrollment)
 - Can use funds in any public school (not limited to Title I schools)

The Lawsuits

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Four Lawsuits and One Summary Judgment

- Multi-state suit (Federal district court for the Northern District of California)
 - CA, MI, WI, ME, MD, DC, HI, NM, PA, NYC, San Francisco, Cleveland, Chicago
 - Complaint: Rule and Guidance is in conflict with Sec. 1117
 - *Judge issued limited preliminary injunction (applies only to plaintiffs)*
- Washington State (Federal District Court for the Western District of Washington)
 - *Judge issued a preliminary injunction prohibiting enforcement (geographic scope not clear). Waiting for ED decision re: NAACP appeal.*

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Four Lawsuits and One Summary Judgment (cont.)

- COPAA Suit (United States District Court for the District of Maryland)
 - *Stayed pending ED's decision re: NAACP appeal.*
 - Suit brought by Council of Parent Advocates and Attorneys on behalf of students
 - Filed a Motion for Summary Judgment

Four Lawsuits and One Summary Judgment (cont.)

- NAACP suit (Federal District Court for the District of Columbia)
 - Complaint: rule is “as immoral as it is illegal,” creates impermissible “post-acceptance restrictions”
 - *Judge issued a final order granting preliminary injunction/summary judgment on the merits. Awaiting ED decision re: NAACP appeal.*
 - **Vacates rule nationwide, final decision** (but subject to appeal)
- ED Decision on whether to Appeal Expected no later than **October 15**

What do these orders tell us?



- Three federal judges have consistently agreed (so far) that:
 - There is an imminent, tangible harm to the plaintiffs and the students they represent stemming from the rule
 - Congress intended funding to follow the Title I allocation, including in equitable services
 - There is no “ambiguity” in the phrase “in the same manner as,” despite ED’s assertions
 - Because there is no ambiguity or explicit authority, ED lacks the ability to regulate on these issues (this is a tentative decision in the WA and multi-state cases)

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What does the Summary Judgment Order mean for other cases?

- ED has not said whether it will appeal, or whether it will pursue favorable judgment in other cases
- Several possibilities
 - Courts may decide that NAACP case controls
 - Courts may decide the cases on the merits consistent with NAACP (in which case, no change)
 - Courts may decide the cases differently from NAACP → circuit split
 - ED may appeal to a federal court of appeals
- WA court: staying proceedings for 30 days to give ED time to decide whether it will appeal

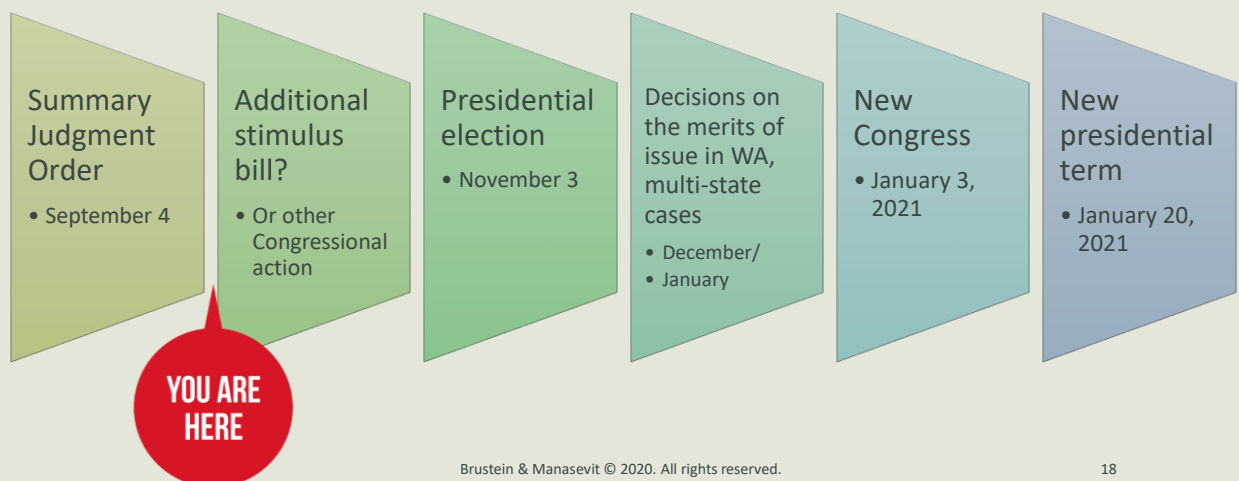
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What does the Summary Judgment mean for funds already expended?

- Most likely: funds already obligated under rule before date of injunction are considered to be properly expended
- Once district has notice of rule being vacated, will be obligated to take steps as soon as reasonably possible to halt obligations and re-work allocation methodology
- Pending more guidance from ED!

What does the timeline look like from here?



So what do we do now?



OFFICE OF Elementary & Secondary Education



September 9, 2020 CARES Act Update

On July 1, 2020, the U.S. Department of Education (Department) published an Interim Final Rule (IFR) regarding equitable services under the Coronavirus Aid, Relief, and Economic Security (CARES) Act. (The rule is available at: <https://www.govinfo.gov/content/pkg/FR-2020-07-01/pdf/2020-14224.pdf>). On September 4, 2020, in *NAACP v. DeVos*, the U.S. District Court for the District of Columbia issued an opinion and an order vacating the IFR. Accordingly, the IFR is no longer in effect.

So what do we do now? (cont.)

- Follow the language of the statute (CARES and ESEA), not the regulation
 - You can use portions of the April guidance with caution
- Advise LEAs/schools that this may still change if ED wins any of the other cases, or if there is an appeal
- May wait for guidance from ED on how to proceed (or decision on appeal)

How do I calculate the proportionate share?

- Calculate a new percentage according to procedure in Sec. 1117
 - Based on non-profit private schools who wish to participate, open prior to March 13, 2020
 - Poverty data determined through consultation (FRPL, direct certs, survey, etc.)
 - Children to be counted are the same as those in 1117: low-income students residing in eligible school attendance areas
- Apply Title I 19-20 percentage?
- Apply Title I 20-21 percentage?



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How do I calculate the proportionate share? (cont.)

Determining the number of low-income children at private schools:

- (1) Use the same measure of poverty as in public schools (e.g., FRPL)
- (2) Use comparable poverty data from a survey, allowing survey results to be extrapolated
- (3) Use comparable poverty data from a different source, so long as the income threshold in both sources is generally the same
- (4) Proportionality. An LEA may apply the low-income percentage of each participating TI public school area to derive the number of private school children from low-income families. (e.g., if 60% poverty in the public schools, and 100 students residing in the area attend private school, then 60 would count as low-income)

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But, I already calculated the proportional share and spent some of the money... now what?

- Re-run the calculation based on the total award
- Review the revised calculation against the existing calculation
 - In most circumstances, the revised set-aside amount will be *less* money available for services to private school students and teachers
- Adjust the remaining, unobligated balance and provide services to the best of your ability.
- Consult, consult, consult....

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How does the money flow?

- School-by-school allocation: Flows to participating private schools based on the number of low-income students.
 - Based on student residency – may flow to schools outside district border
- Pooling: Must have private school agreement, but allows prioritization or different allocation process between schools



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Who do I serve?

- CARES Act eligibility is all teachers and students
 - Subject to consultation, allowable uses under CARES
 - CARES Act activities are more broad than services to individual students
- Sec. 1117 requirements
 - Students must reside in participating attendance area
 - Must be low-achieving, or otherwise at risk under Sec. 1115 (c)

Who do I serve? (cont.)

- Court decisions: Focus is on the calculation of the set-aside
- Congressional Research Services:
 - “in the same manner” is the procedure / process of providing equitable services; does not limit eligibility for services in the underlying statute

Can I keep the current allocation to private schools (even if more than it would otherwise be under Sec. 1117)?

No existing authority / guidance that would permit this, but...



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What is my audit exposure?

- Keep in mind, these funds will not be audited until future years; audits are a look-back at closed periods.
- Mitigating circumstances exist if it would be unjust to compel the recovery of funds because the recipient's violation was caused by erroneous written guidance from the department. 34 CFR 81.33(b)
- To meet this standard – reliance must be reasonable.
- After the IFR is vacated, reliance may no longer be deemed “reasonable”.

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What is my audit exposure? (cont.)

- Reconvene consultation!!
- Document, document, document



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May I reimburse private schools for past purchases?

- Maybe ... non-binding “guidance” at NAESPA conference
- Timeframe: After March 13, 2020, but before consultation
- LEA must “maintain control”; reimbursements must be secular and allowable activities, adequate documentation that school received the services or goods related to those expenditures
 - E.g., cleaning and sanitizing the school
 - E.g., laptops to facilitate online learning → must transfer title to the LEA!

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Must the equitable services funding be used for supplemental costs?

- No!
- E.g. May use funding to facilitate remote learning for students and teachers in private schools
 - Purchase laptops
 - Increase bandwidth
 - Provide improved cyber security or virtual classroom platform licenses
- But ...
 - LEA must maintain title to the materials, equipment and property
 - LEA must administer the contract, materials, equipment and property
 - All services, materials and equipment must be secular

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Can I use CARES funds for repairs, renovation or remodeling in a private school? (E.g., creating outdoor classrooms)

- No. LEA must maintain title to any materials, equipment and property.
- 34 CFR 76.661(c)(2) applies to CARES Act funds – requires equipment and supplies placed in a private school to be removable without remodeling.
- But – non permanent improvements, easily removed may be allowable, such as setting up a screening area in a tent; temporary partitions to assist with social distancing; or hand sanitizing stations.

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How long may equipment and supplies purchased with CARES Act funds placed in a non-public school remain there?

- During the period of performance or until the equipment and supplies are no longer needed for the purposes of the CARES Act program
 - 76.661(b); 200.313(a)(1), (c)(1) and 200.314(a)
- Once no longer needed, the LEA may continue to use the equipment or supplies in the non-public school to the extent they are needed for other allowable purposes under another federal education program (ESEA, IDEA).

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Debby Thompson | Assistant Commissioner

Division of Federal Programs and Oversight | September 2020

Next Steps for LEAs in Tennessee



First Step: Conduct Meaningful Consultation

- LEAs should conduct **meaningful consultation** with **participating non-public schools** to discuss the possible change in allocation and to determine the method and data sources that will be used to calculate the Title I, Part A proportionate share.
- 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).
 - Many LEAs choose to transfer funding to a lead LEA for Title I 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.

First Step: Conduct Meaningful Consultation

- Topics should include, but are not limited to:
 - the most recent legal developments
 - 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.
 - the impact on the proportionate share and available services
- Document the consultation process by **Nov. 1, 2020** by uploading the updated **ESSER Fund Non-Public School Agreement** to the Related Documents section of the ESSER Fund application.



Second Step: Calculate the Proportionate Share

- **Calculate** the **proportionate share** according to the Title I, Part A formula, utilizing the Title I, Part A formula calculation worksheet provided in the Related Documents section of the ESSER Fund application.
- Choose one of the **four methods** for calculating the number of eligible non-public school students.



Methods to Calculate

- **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.
- **Method 2:** Conduct a survey of enrolled non-public school families to obtain comparable data. For example, non-public school officials may survey enrolled families to obtain income data which may be applied to the threshold used to determine FRPL eligibility.



Methods to Calculate

- **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.



Methods to Calculate

- LEAs with non-public schools who also participate in Title I, Part A equitable services may use available **2019-20** non-public school low-income data to calculate the proportionate share for the ESSER Fund.



Third Step: Revise the Funding Application in ePlan

- 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.
- 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.



Revise the Funding Application in ePlan

- 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 as this indicates the total proportionate share that should still be in the budget (Title I, Part A share + funds placed in escrow).

Note: An example will be provided on the updated Q&A document in ePlan > TDOE Resources > CARES Act/ESSER Fund > Q&A Equitable Services for the CARES Act/ESSER Fund

Revise the Funding Application in ePlan

- 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.**”
- Continue to utilize the “**Non-Public School**” **budget tag** to label all non-public school expenses.
- Complete and upload the updated **ESSER Fund Non-Public School Agreement** to the Related Document section of the application by **Nov. 1, 2020.**

Fourth Step: Continue to Provide Equitable Services

- 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 should be held until further guidance is provided.



Guidance on Prior Purchases Made

- 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.



Resources & Office Hours



Resources

- ePlan > TDOE Resources > CARES Act/ESSER Fund:
 - Updated Questions & Answers document
 - Updated ESSER Fund Non-public School Agreement (can also be found in the Related Documents Section of the ESSER Fund application)
- ESSER Fund Application > Related Documents
 - Equitable Services Calculation Worksheet - Title I, Part A Formula



Equitable Services Office Hours

Wed., Sept. 23, 9:00 a.m. – 10:00 a.m. (CDT)

- [Join Microsoft Teams Meeting](#)
- [+1 615-270-9704](#) United States, Nashville (Toll)
- Conference ID: 530 386 793#

Thurs., Sept. 24, 10:00 a.m. – 11:00 a.m. (CDT)

- [Join Microsoft Teams Meeting](#)
- [+1 615-270-9704](#) United States, Nashville (Toll)
- Conference ID: 305 231 784#

Fri. Sept. 25, 11:00 a.m. – 12:00 p.m. (CDT)

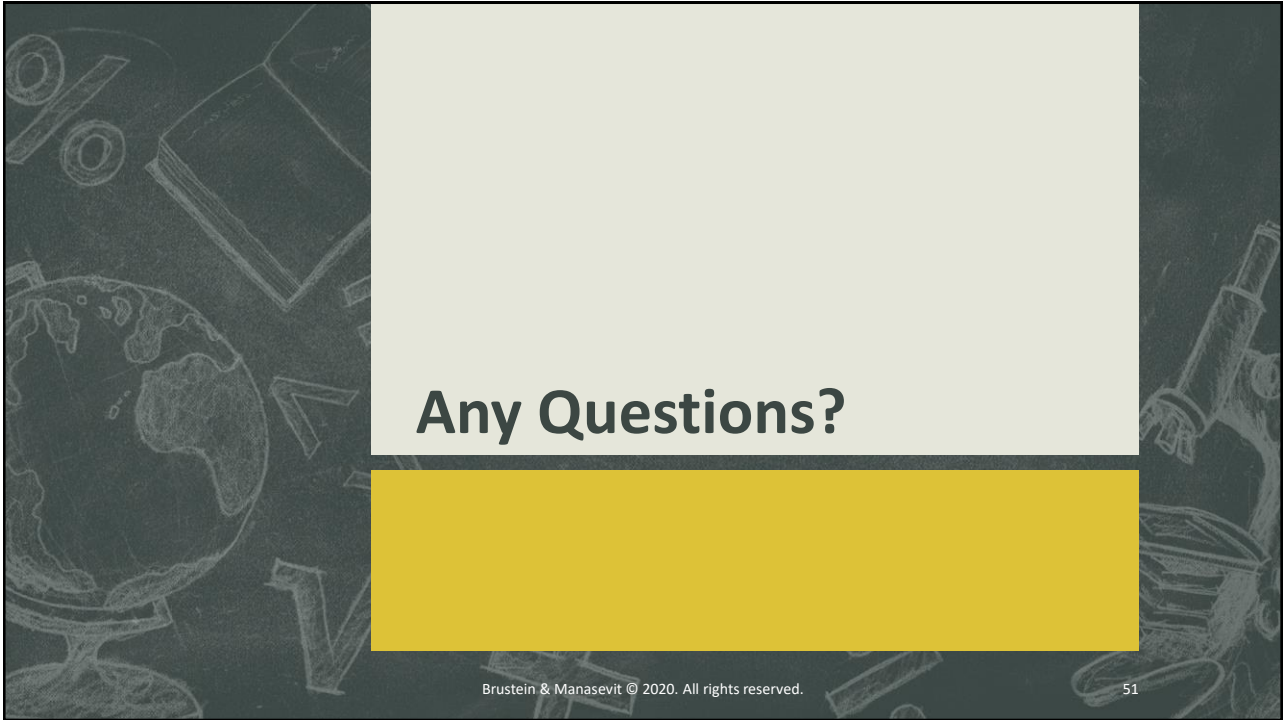
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Who can I contact with questions?

Equitable Services Questions	Danny Bounds, Danny.Bounds@tn.gov
Funding Application Questions	Brinn Obermiller, Brinn.Obermiller@tn.gov Debby Thompson, Deborah.Thompson@tn.gov





Any Questions?

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Thank You!

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The Federal Programs and Oversight team will continue to update stakeholders as more information is available.

