Ohio | Department of Education

CCIP Note # 448

Re: CARES Act Interim Rule Updates and Recommendations and ESSER Equitable Services Training
Date: September 25, 2020
To: Public School District and Community Schools Superintendents, Treasurers, and Consolidated Application Contacts; Nonpublic Principals and Superintendents

CARES Act Equitable Services Update

On September 9, 2020, the U.S. Department of Education (USED) made it known that the Interim Final Rule (IFR) that was published on July 1, 2020 is no longer in effect. This means that Local Educational Agencies (LEAs) receiving CARES Act funds, including ESSER and GEER funds, must provide equitable services to eligible nonpublic schools consistent with ESEA 1117. The USED announcement was made after various legal challenges and court rulings. At this time, it is still unknown if the USED will appeal the court rulings and there has been no guidance provided by the USED on how to address the impact of this change to LEAs.

This CCIP Note is intended to provide LEAs with instructions on how to calculate CARES Act equitable service amounts under ESEA 1117 and provide recommendations for addressing the potential scenarios until there is more clarity from the USED on this matter. It important to emphasize that the scenarios and recommendations below do not represent a legal interpretation by the Ohio Department of Education (Department) and may be inconsistent with the USED of federal audit determinations in the future. It simply is the Department's best thinking during these unique circumstances as we understand there are many questions on how to meet the LEA responsibility to provide nonpublic equitable services. As such, the Department strongly encourages LEAs to consult with their internal legal counsels to determine what is the best approach to take for the individual district circumstances.

ESEA Section 1117

According to the USED, the Interim Final Rule is no longer in effect and LEAs must provide CARES Act equitable services consistent with ESEA 1117. In general, this means that the LEAs must calculate equitable service levels for the eligible nonpublic schools inside or outside of the district boundaries using low-income data of the students who would have attended a Title I served school in the LEA.

> ***Special Instructions**: Instructions on how to gather the public and nonpublic low-income data and a helpful spreadsheet to assist with calculation of the equitable services amounts will be added to the CCIP and the application by the end of the month of September. In the meantime, these documents may be found at the following links. Calculations Spreadsheet – Link Here. Instructions – Link Here. The Department will be adding these links and instructions to the district's ESSER Application in the CCIP under the Nonpublic Equitable Services budget details page. The district should consult with the eligible nonpublic schools, update the new spreadsheet and upload it to the ESSER application when available, make any necessary adjustments to the budget details in the ESSER application and resubmit the application for approval. The scenarios and recommendations below are intended to help the districts with determining if adjustments are warranted.*

Risk-Based Scenarios/Questions and Recommendations

The Department recognizes the challenges this recent announcement may cause. When a rule is rescinded in the middle of implementation, it is difficult to understand exactly what to do in certain scenarios. Prior to the IFR, the Department recommended that LEAs set aside the higher amounts of both the low-income approach and enrollment approach and spend no more than the lowest amount of the equitable service set aside. When the IFR

went into effect, LEAs had options on how to calculate and provide equitable services, which in some cases were inconsistent with ESEA 1117. Since the IFR is no longer in effect, all LEAs must now follow ESEA 1117 which leads to several questions in which there is not always a clear answer. Given the unknowns, we are providing the following example scenarios with recommendations to consider. It needs to be emphasized that these recommendations do not represent a legal advice and may not satisfy the expectations of future USED of federal audit determinations. It simply is the Department's best thinking during these unique circumstances. As such, the Department strongly encourages LEAs to consult with their legal counsel to determine what is best for the LEA's individual circumstance to comply with the requirement to provide equitable services to nonpublic schools:

Scenario 1

Our LEA provided equitable services to nonpublic schools during the period of the IFR that now is not allowable under Chapter 1117. Are we allowed to and should we request reimbursement from those nonpublic schools by withholding auxiliary payments?

Recommendation:

The Ohio Department of Education (Department) does not know what ultimately will be required, if anything, of LEAs and nonpublic schools who received allowable services during the IFR but are not eligible under Chapter 1117. At this point, the US Department of Education (USED) has said that the LEAs are required to follow ESEA 1117. For non-eligible schools under Chapter 1117, the Department recommends the LEA immediately halt any payment for services not already rendered, including reviewing terms of contracts for future services. However, for services that have already been rendered, the Department recommends a pause to the LEAs on any attempt to reclaim funds, such as by withholding auxiliary services, until the USED provides direction. We understand this approach may mean that the eligible nonpublic schools under Chapter 1117 would not receive all their service levels without the LEA withholding more of its ESSER allocation for equitable services. In this case, we recommend the LEA set aside additional ESSER funds to the amount needed for each eligible nonpublic school under Chapter 1117 but pausing the services that would result in a higher level of spending over the total amount of equitable service levels at the LEA until the USED provides direction on how to remedy the situation. We understand that this may cause a delay in eligible nonpublic schools receiving their full service levels, however, it is important to remember that the ESSER funds have a period of availability until September 30, 2022. The LEA and nonpublic schools should engage in consultation and recognize that this process should provide enough time for proper planning and implementation pending final direction.

Scenario 2

Our LEA provided services to nonpublic buildings within the district that are not entitled to equitable services under ESEA 1117 and have remaining service amounts budgeted for those nonpublic schools. How should we proceed?

Recommendation:

It is unknown at this time if the USED will require a reimbursement for the services that were provided to ineligible nonpublic schools under ESEA 1117 but were allowable under the IFR. The Department recommends that the LEA review their terms of any contracts or obligations provided to ineligible buildings and if permitted under the contract to cease payment on any obligations and services that have not been rendered. In addition, we *recommend the LEA set aside additional ESSER funds to the amount needed for each eligible nonpublic school under Chapter 1117 but pausing the services that would result in a higher level of spending over the total amount of equitable service levels at the LEA until the USED provides direction on how to remedy the situation. We understand that this may cause a delay in eligible nonpublic schools receiving their full service levels, however, it is important to remember that the ESSER funds have a period of availability until September 30, 2022. The LEA and nonpublic schools should engage in consultation and recognize that this process should provide enough time for proper planning and implementation pending final direction.* We recommend the LEA review their data and calculate an amount for the eligible nonpublic school buildings inside-or-outside of the district (according to low-income students who would have attended a participating Title I served building within the district). The LEA should continue to consult with the nonpublic schools and determine if the amount of equitable services provided

up to this point needs any adjustment, and if so, the LEA should revise their budget within the CCIP for Department approval.

Scenario 3
Our district has an obligation to provide equitable services under ESEA 1117 but did not have any obligation under IFR since we do not have any nonpublic schools within the district. Before the IFR was rescinded, our district spent our entire ESSER allocation. How are we to proceed?
Recommendation
Since the beginning of the ESSER program, the Ohio Department of Education provided direction for LEAs to set aside the higher of the low-income approach and enrollment approach and spend no more than the lower of the two levels. In the case where the district had an obligation under the low-income approach but no obligation under the enrollment approach, the district should have continued to set aside an equitable service reservation for the low- income approach. In the scenario described above, where the district exhausted all of its ESSER allocation, this would have only occurred during the short period of time from when the IFR became final to the time the IFR was rescinded, if the district followed the Department's guidance from the onset. Under the assumption that the entire LEA allocation was spent in this timeframe, we recommend the following:

- Prepare documentation and evidence that shows the LEA's entire ESSER allocation was spent during that window of time, (July 1, 2020-the date the IFR was published in the Federal Register to September 9, 2020-the date the USED published that the IFR was no longer effective), and
- Since eligible nonpublic schools are entitled to services under ESEA 1117, we recommend the LEA set aside local general funds to satisfy the total amount of the equitable services levels for the ESSER funds required under ESEA 1117.
- Engage in consultation with the impacted nonpublic schools and explain the situation. If the LEA believes it should delay in providing services to the nonpublic schools until there is direction from the Ohio Department of Education or the USED to require the LEA to provide the services with its local funds (since the entire ESSER allocation was spent), the LEA is recommended to remind the nonpublic schools that the period of availability is until September 30, 2022 and therefore the LEA feels confident that a resolution will be reached and/or that services to the nonpublic schools will be provided within the period of availability.

Scenario 4:
Our LEA followed the instructions from the Ohio Department of Education by budgeting the higher amount of both low-income and enrollment in the calculation of the nonpublic equitable service amounts for each school building. Up until this point, we only provided services to nonpublic schools consistent with the Title I equitable service requirements (ESEA 1117) but the IFR would have afforded the nonpublic schools with more service levels if we used the enrollment calculation. How should we proceed?
Recommendation:
In this scenario, the LEA should not have much of an adjustment, if any, since they did not provide any services to ineligible nonpublic schools and provided services within the set aside levels the Department recommended at the time. We recommend the LEA review their data and calculate an amount for the eligible nonpublic school buildings inside-or-outside of the district (according to low-income students who would have attended a participating Title I served building within the district). The LEA should continue to consult with the nonpublic schools and determine if the amount of equitable services provided up to this point needs any adjustment, and if so, the LEA should revise their budget within the CCIP for Department approval.

General Questions
If you have any questions, please contact Chantelle Carter at chantelle.carter@education.ohio.gov.

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Nonpublic Equitable Services under ESSER Training

The Office of Federal Programs (OFP) has reserved a date in October for a training on Nonpublic Equitable Services under ESSER. The information will be relevant to both public districts and nonpublic school leaders.

The session will be held on **Thursday, October 8th from 10:00 AM – 11:30 AM**.

Registration
Please register in STARS V2.0, which can be accessed through your OH|ID Account. To find a session that works with your schedule, we recommend searching any of the following fields:

Event Name: Equitable Services under ESSER
Keywords**:** nonpublic, ESSER, federal programs

Session Format
In light of the current COVID-19 related circumstances and to best provide support, this session will be held remotely. Attendees will be able to join using the Teams meeting link shared in the STARS event. At the time of the session, please use the link to join the meeting. Registrants can submit questions prior to the session using the survey link provided in the STARS event.