Ohio | Department of Education

CCIP Note # 450

Re: Updates on CARES Act Nonpublic Equitable Services
Date: October 21, 2020
To: Public School District and Community Schools Superintendents, Treasurers, and Consolidated Application Contacts; Nonpublic Principals and Superintendents

Updates on CARES Act Nonpublic Equitable Services
The U.S. Department of Education (USED) has decided not to appeal the ruling against the Interim Final Rule (DeVos letter 9/25/2020) and recently provided non-binding guidance (USED Guidance 10/9/2020).

What Does This Mean?
The national disagreement on how to address the nonpublic equitable services under the CARES Act has been challenging for everyone. The latest actions from the USED will require state educational agencies and, in many cases, local educational agencies (LEAs) to make some additional process determinations as well as take additional actions. It is important to understand that the recent USED guidance is non-binding. Strict adherence to the USED guidance could result in some unintended outcomes, and the Office of Federal Programs (OFP) is recommending that local educational agencies (LEAs) and nonpublic schools follow the Ohio Department of Education's (ODE) guidance articulated in this document and calculate and provide services according to ESEA Section 1117. Furthermore, ODE recommends that an LEA consults its legal counsel to determine how best to comply with the CARES Act nonpublic equitable service requirements. Below are recommendations to consider.

Action Steps to Take

1. **Review ODE guidance and USED guidance for comparison purposes:** ODE recommends the LEA compare the guidance offered by OFP and the USED and make its own determination about how best to proceed. OFP believes its guidance (this document) best reflects compliance with the intention and requirements of ESEA Section 1117. In the event of complaints or audit challenges, OFP will provide support to LEAs and nonpublic schools who follow OFP's guidance.
2. **Recalculate**: Recalculate the LEA's proportionate share of ESSER funds for equitable services under ESEA Section 1117 (using the table and instructions included in CCIP Note 448). See additional comments below.
3. **Consult with Nonpublic School Officials**: The updates to this process will require the LEA to, once again, consult with the impacted private school officials (See Question 6 of the USED Guidance). The LEA must engage in consultation with the nonpublic schools regarding this process as well as keep documentation and have readily available the decisions that are made based on the timing of the consultations and decisions given the recent change in guidance.
4. **Submit a Budget Revision**: The LEA should complete the nonpublic equitable services spreadsheet included in CCIP Note 448 (CCIP Note 448), consult with nonpublic school officials on the service levels that will be provided, and submit a budget revision in the CCIP ESSER application.

Recommended Process for Recalculation Under ESEA Section 1117

Refer to Previous Guidance: CCIP Note 448 issued on September 25 included a spreadsheet and instructions on how to gather the public and nonpublic low-income data to assist with the calculation of the district's proportionate share of equitable service amounts that are to be used for eligible nonpublic schools according to ESEA Section 1117. The USED also provided a description on how to calculate the nonpublic equitable services (Refer to Question 10 in USED Guidance 10/9/2020). *(Note: The OFP recommends that the LEA follow ESEA Section 1117 for calculating its proportionate share which uses low-income data for students residing in the LEA including those attending nonpublic schools within or outside of the LEA (Title I model). This is believed to be more*

in keeping with the intention and language of ESEA Section 1117. The USED guidance indicates that the LEA's proportionate share calculation should use the low-income counts of students enrolled in nonpublic schools within the LEA.)

After all of the resident student low-income nonpublic school data is compiled, the LEA should establish a proportionate share amount. The allocation amounts to individual nonpublic school buildings would be part of the consultation process between the nonpublic schools and the LEA. (See additional comments below.)

Providing Service Amounts

CCIP Note 448 also contained scenarios and recommendations based on the OFP's best interpretation at the time (prior to the latest USED guidance). The scenarios and recommendations in CCIP Note 448 are still applicable in most cases. It is important to understand that the calculation table (spreadsheet) provided is based on what the nonpublic schools would have received under ESEA Section 1117 and does not necessarily mean that the spreadsheet includes all nonpublic schools that may receive ESSER equitable services. According to the USED guidance, all nonpublic schools within the LEA are eligible to participate in receiving ESSER services. Furthermore, it does not necessarily mean that the nonpublic schools on the spreadsheet will receive the service levels used in calculating the LEA's proportionate share. In other words, there are other factors discussed below that could impact the amount of services provided to individual nonpublic schools. The LEA should determine, in consultation with the nonpublic schools, the service amounts for the participating schools.

The USED makes it clear that after the date that the Interim Final Rule (IFR) was rescinded (September 9, 2020), the LEAs must provide ESSER equitable services according to ESEA Section 1117. However, ESSER nonpublic school service amounts under ESEA Section 1117 are dependent on how the LEA spent the ESSER funds and nonpublic equitable service reservation prior to the IFR being rescinded. The letter issued by the US Secretary on September 25, 2020 stated:

> *The Department (USED) will not take any action against States or local districts that followed the guidance and/or the IFR prior to notice of the court's decision. Going forward, districts must calculate the minimal proportional share for CARES Act equitable services according to the formula provided in Section 1117(a)(4)(A) of the ESEA of 1965. Section 1117 requires robust consultation with private schools, among other things, and we will use our enforcement authority aggressively to ensure districts comply with this and other relevant equitable services requirements.*

We interpret this to mean that LEAs who spent ESSER funds and provided equitable services in accordance with the IFR will be held harmless for the decisions made at that time but the LEA will need to ensure the equitable services are provided consistent with ESEA Section 1117 moving forward. However, since the services have already been rendered in many cases, OFP is suggesting that the LEA adjust any remaining service amounts, up to the LEA's proportionate share under ESEA Section 1117, for the participating, eligible nonpublic schools. LEAs should not attempt to recover from a nonpublic school the costs of any equitable services that may have been provided prior to the revocation of the IFR (even though the services under the IFR are no longer required.) On the other hand, LEAs that budgeted equitable service amounts for nonpublic schools that were eligible under the IFR but are not eligible under ESEA Section 1117 (and where services have yet to be rendered) should end any obligations and notify the nonpublic schools of the change and rationale.

The prior spending decisions (made during the IFR period) could impact the amount of services the nonpublic school will receive going forward. Depending on circumstances, the LEA may not be able to provide the total service amount entered on the calculation spreadsheet (included in CCIP Note 448) to the individual nonpublic building. Reasons for this include (but are not limited to) the examples below depending on the timing of those decisions:

- If the LEA already spent the entire amount of ESSER funds prior to September 9, 2020.

- If the LEA already provided the entire amount of the required LEA-level reservation (proportionate share) under ESEA Section 1117 prior to September 9, 2020.
- If the LEA already provided equitable service amounts to nonpublic schools eligible for services under the IFR but not eligible under ESEA Section 1117 prior to September 9, 2020. In this instance, the amount of those services would be subtracted from the LEA's aggregate proportionate share amount required under ESEA Section 1117, accordingly. The LEA should consult with the ESEA Section 1117 eligible nonpublic school officials and provide any remaining amounts of the LEA's proportionate share, in a ***proportional manner,*** to the eligible, participating schools until the LEA proportionate share has been reached under ESEA Section 1117.
- Visual Example:

Nonpublic School	Location	Equitable Service Amount Under Interim Final Rule (IFR)	Equitable Service Amount Under ESEA Section 1117	Actual Expenditures until Interim Final Rule was Rescinded
St. James	In-district	$20,000	$0	$10,000
St. Michael	Out-of-district	$0	$15,000	$0

In this instance, we believe the district should subtract the $10,000 from the LEA's aggregate proportionate share amount required under ESEA Section 1117. In this scenario, the district has an additional equitable service obligation of $5,000.

Note of Caution

An LEA that has already spent its ESSER funds and/or provided the total required proportionate share of equitable services under ESEA Section 1117 during the IFR period may provide its own local/state funds to any nonpublic schools that does not receive the total amount of what has been entered in the calculation spreadsheet in CCIP Note 448. However, OFP does not believe an LEA may use more of its federal ESSER allocation (above the required proportionate share amount calculated under ESEA Section 1117) to support nonpublic schools that are eligible for services. In other words, if the LEA spent more than the required proportionate share amount under ESEA Section 1117, the LEA would not be providing the full amount of ESSER funds required for the public school students and educators. The logic behind this interpretation is that LEA already met its obligation for the proportionate share requirement under ESEA Section 1117 even if some, or all, of the nonpublic equitable services were provided to nonpublic schools not eligible under ESEA Section 1117 but previously eligible under the IFR. The importance of the timing of when these spending decisions were made is paramount and should be well documented and part of the consultation with nonpublic school officials.

Support

The Ohio Department of Education's Office of Federal Programs will provide support for the LEA and nonpublic schools that followed the recommendations outlined above should there be any complaints or inquiries from federal or state auditors.

Please note that the Office of Federal Programs is attempting to streamline and minimize the time and effort needed for LEAs and nonpublic schools to accommodate this new process while also ensuring the state, LEAs and nonpublic schools meet the requirements of ESSER and minimize risks. As such, we recommend the LEA submit a budget revision and a history log note indicating that it will take the actions outlined above (including recalculating based on ESEA Section 1117, consulting with nonpublic school officials, and ensuring the nonpublic schools receive services equivalent to the LEA's proportionate share under ESEA Section 1117).

General Questions

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