

Equitable Services under the CARES Act

New Hampshire Department of Education Non-Regulatory Guidance

Introduction

The CARES Act creates a \$30.75 billion Education Stabilization Fund (ESF), which is administered by the US Department of Education and divided out among states. The NH Department of Education will distribute a portion of those funds, under the Elementary and Secondary School Emergency Relief Fund (ESSER) directly to Local Educational Agencies (LEAs). Under the CARES Act, those funds are subject to equitable services provisions, as defined by the Every Student Succeeds Act (ESSA), which allow non-public schools to receive services provided by LEAs receiving ESSER funds.

Under the CARES Act Education Stabilization Fund, LEAs that receive funds “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, Division B, Title VIII, Section 18005.

On April 30, 2020, the U.S. Department of Education (“USDOE”) published [non-binding guidance](#) interpreting this statutory language against the broader backdrop of the entire CARES Act (the “April 30 Guidance”). The April 30 Guidance directed LEAs to provide equitable services to non-public school students and teachers based on the ratio of all students in the public and non-public sectors (hereinafter the “the proportional-student enrollment formula”).

Some members of Congress responded with a letter to USDOE on May 5, 2020 arguing that the plain language the CARES Act “requires LEAs to use emergency relief funds to provide equitable services based only on the number of low-income students at private schools” (the “Title I, Part A formula”).

On June 25, 2020, the USDOE announced that it had issued an Interim Final Rule (“IFR”) regarding the implementation of equitable services under the CARES Act. The IFR, which is effective immediately upon its publication in the Federal Register, includes concepts from the April 30 Guidance but also affords LEAs additional options in how equitable services may be allocated.

The NHDOE recognizes that some LEAs have expressed strong opinions regarding the equitable services allocation model required by the CARES Act and that those LEAs’ reading of the CARES Act may or may not accord with the IFR. It is not, however, within NHDOE’s authority to independently interpret that CARES Act provisions. NHDOE will follow the duly enacted, biding IFR until such time it is amended or revoked by either Congress, the USDOE, or the courts.

Allocations

The ESSER funds will be distributed by NHDOE directly to LEAs as a matching proportion to last fiscal year’s Title I funds. Under this formula, an LEA will receive a proportion of ESSER funds in direct proportion to the Title I funds they received in the last fiscal year.

LEAs are required to set aside funds to provide equitable services to participating non-public schools, though the law and the guidance from the US Department of Education seemed to offer different processes for determining the share of equitable services for non-public schools.

The US Department of Education released an interim final rule to address some confusion about section 18005(a) of Division B of the CARES Act, Pub. Law 116-136, 134 Stat. 281 (Mar. 27, 2020) with respect to the equitable services obligation owed by LEAs that receive CARES Act funds to students and teachers in non-public schools. Section 18005(a) of the CARES Act, titled “Assistance to Non-public Schools,” requires an LEA to “provide equitable services in the same manner as provided under section 1117 of the ESEA of 1965 [Elementary and Secondary Education Act of 1965 (ESEA)] to students and teachers in non-public schools, as determined in consultation with representatives of non-public schools.” Section 18005(b) lodges control of funds for the services and assistance mandated in section 18005 (a) in a “public agency.”

“An LEA that spends funds from a CARES Act program *only* on students and teachers in Title I schools may determine the proportional share on the basis of enrollment or by either using the LEA’s Title I proportional share for the 2019-2020 school year or by using the number of students from low-income families in participating non-public schools compared to the total number of students from low-income families in Title I and participating non-public schools in the LEA. All other LEAs must determine the proportional share based on enrollment in public and participating non-public schools.”

This ruling offers LEAs an operational choice in their budgeting of funds. The first choice for LEAs is simply whether or not the funds from the CARES-ESSER act will be used for all of their schools and students, regardless of Title IA (low-income) status. If the LEA chooses to use its funds across all schools and students, the share for equitable participation follows and will be set-aside for private schools according to the Title VIII formula.

If, on the other hand, the LEA selects to spend funds to support only its Title IA schools or students, the share for equitable participation follows and will be set-aside for private schools according to the Title IA formula.

Information on the specific allocations to each LEA will be published by the NH Department of Education and funds will be available directly through Grants Management System.

IMPORTANT NOTE: As with all equitable services, the funds are held by the LEA and at no point are funds distributed directly to a non-public school. The LEA is directly responsible for the management and spending of all funds for services provided directly to the non-public school. Likewise, any equipment that is purchased for a non-public school must remain the property of the LEA in title and be inventoried as such.

The Role of an LEA vs. a Non-Public School Official

Ultimately, the LEA is responsible for planning, designing, and implementing the program and may not delegate that responsibility to the nonpublic schools or their officials. As a result, nonpublic school officials who want services for their eligible students should be aware of their roles in the consultation process to ensure that programs designed by the LEA effectively meet the needs of their participating children, their teachers, and their families. Roles for the nonpublic school officials are:

- Participating in consultation;
- Providing lists of addresses and grades of low-income families;
- Suggesting ideas, program designs, and modifications that meet the needs of their eligible children, their teachers, and their families; and
- Providing a dedicated space, if appropriate.

If the nonpublic school official does not believe that the LEA engaged in timely and meaningful consultation, or that the LEA did not give due consideration to the views of the nonpublic school official, or disputes the low-income data on nonpublic school children, or for any other reason does not believe that the nonpublic school children are receiving fair and equitable Title I services, the nonpublic school official may file a complaint with the SEA.

Consultation

The consultation process between the LEA and non-public school officials should result in a program designed to meet the education needs of the non-public school. Consultation must include meetings between LEA officials and appropriate non-public school officials and must occur *before* the LEA officials make any decision that affects the opportunity for non-public schoolchildren to participate. In addition, consultation must occur in a timely and meaningful manner during the design, development, and implementation of the program. Ultimately, the LEA officials make the final decisions regarding provision of services after consultation has occurred.

Consultation topics must include at a minimum:

- How the LEA will identify the needs of the non-public school.

The public and non-public school officials must discuss the current needs of the non-public school as it relates to any of the relevant, allowable federal programs and any additional COVID-19 related needs.

- What services the LEA will offer to eligible nonpublic schools.

The LEA must design and implement services offered by the LEA that address the needs of eligible non-public schools.

- How, where, and by whom the LEA will provide services.

The options available for service delivery, including how, where, and by whom, must be discussed.

- How the LEA will academically assess the services.

Prior to program implementation, it is important to determine how the program will be assessed and to establish benchmarks for determining the effectiveness of the program.

- Determining the poverty count cooperatively by public and nonpublic school officials.

Nonpublic school officials should know how the poverty data are collected and the number of nonpublic school children from low-income families who reside in Title I public school attendance areas.

- How and when the LEA will make decisions about the delivery of services to eligible children.

This includes a thorough consideration of the views of the nonpublic school officials on the provision of services through a contract with a potential third-party provider.

- How LEA officials must provide in writing to the nonpublic school officials an analysis of the reasons why the LEA has chosen not to use a contractor, if applicable.

To ensure that the views of the nonpublic school officials regarding provision of services by a third-party provider are adequately considered, the LEA must provide a written explanation to the nonpublic school officials if the LEA declines the nonpublic school officials' request for a third-party provider.

Written Affirmation

Finally, an LEA must obtain a written affirmation signed by the official of each participating nonpublic school, or a representative of those schools, that the required consultation process has occurred. A signature on an affirmation form signifies that the nonpublic school official is satisfied that an equitable program has been designed to meet the school's needs and has a reasonable promise of being effectively implemented. The written affirmation form must be maintained in LEA records and be provided to the state educational agency (SEA). If nonpublic school officials do not provide the written affirmation within a reasonable period of time, the LEA must forward documentation to the SEA that the required consultation has occurred.

Allowability

The CARES Act funds may be used for any reasonable and allocable fund request that is allowable under the following programs:

- the ESEA of 1965 (Titles I, II, III, IV, IC Migrant, ID Neglected and Delinquent, 21st Century Community Learning Centers, and Rural and Low Income Schools Grant)
- Individuals with Disabilities Education Act (IDEA)
- Adult Education and Family Literacy Act (20 U.S.C. 1400 et seq.)
- Carl D. Perkins Career and Technical Education
- McKinney-Vento Homeless Assistance Act

- Coordination of preparedness and response efforts of local educational agencies with State, local, Tribal, and territorial public health departments, and other relevant agencies, to improve coordinated responses among such entities to prevent, prepare for, and respond to coronavirus

Frequently Asked Questions

Non-Public School (NPS) CARES Act Guidance

Sec.. 18005 (a). IN GENERAL - A local education agency receiving funds under section 18002 and 18003 of this title (The CARES Act) 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.

(b) PUBLIC CONTROL OF FUNDS - The control of funds for the services and assistance provided to a non-public school under subsection (a), and title to materials, equipment, and property purchased with such funds, shall be in public agency and a public agency shall administer funds, materials, equipment, and property and shall provide such services (or may contract for the provisions of such services with a public or private entity).

Education Stabilization Relief Fund (18003)

1. How will the CARES Act affect our annual initial and on-going spring consultation?

LEAs will need to consult with nonpublic schools regarding the CARES Act regarding whether the nonpublic school (NPS) would like to participate and how to budget the equitable services. The proportionate share that the nonpublic school will receive through equitable services will be based upon the same proportionate share of the regular Title I, A allocation. The nonpublic school will not have to provide any additional data to participate in CARES funding other than providing budget preferences to the LEAs, as the LEAs can utilize the data from the 2019-2020 Title I, A consultation process. Consultation for the CARES Act funding will not impact other required consultations, such as the annual initial and on-going consultation required for Title I, A and other covered programs under Title VIII.

2. Will every NPS have to consult with the LEA, in which they are geographically located?

Yes, non-public schools will participate with the public school district where they are geographically located.

3. Will the same rules of consultation apply to the CARES Act, such as timely, meaningful, and on-going consultation as well as LEA having ultimate say on decisions?

Yes.

4. What if I don't accept Title services from the LEA, but as a NPS, I do want to accept the CARES Act funding?

The NPS can choose to accept CARES Act funding even if it turned down Title I, A equitable services for the 19-20 school year. The non-public school should notify the public school district that they intend to participate if the public school has not already reached out.

5. How does the LEA calculate the equitable share for NPSs for the CARES Act?

The LEA will calculate the equitable services share of funds to set aside based upon the proportion of students in each school (public and non-public). The funds are reserved based upon the percentage of students out of the total student population in the geographic boundaries of the LEA. See the above guidance for an example of how the fund shares are calculated. Additionally, the grant funds are administered through the NH Department of Education's Grant Management System, which includes a calculator for determining equitable services based upon the student enrollment data collected by the Department.

6. Can a NPS, which annually declines Title Services, consult directly with the state for CARES Act funding?

Generally, no. The NPS needs to consult with the LEA in which it is geographically located.

7. How is this information being relayed to those schools with limited electronic access?

The LEA will need to utilize a multitude of methods to communicate with NPSs, including email, certified mail, and in-person visits.

8. What are allowable costs under the CARES Act funding?

Any activity authorized by

- the ESEA of 1965 (Titles I, II, III, IV, IC Migrant, ID Neglected and Delinquent, 21st Century Community Learning Centers, and Rural and Low Income Schools Grant)
- Individuals with Disabilities Education Act (IDEA)
- Adult Education and Family Literacy Act (20 U.S.C. 1400 et seq.)
- Carl D. Perkins Career and Technical Education
- McKinney-Vento Homeless Assistance Act
- Coordination of preparedness and response efforts of local educational agencies with State, local, Tribal, and territorial public health departments, and other relevant agencies, to improve coordinated responses among such entities to prevent, prepare for, and respond to coronavirus

For more information, you can reach out directly to

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Attached below is the guidance for Equitable Services under the CARES Act released by the United States Department of Education. It is included here along with the guidance from the NH Department of Education for additional clarification.