

## Equitable Services Calculations for ESSER Funds

### Background

On June 25, 2020, the United States Department of Education (USED) [announced](#) an interim final rule related to Section 18005 of the CARES Act which governs the manner in which LEAs who receive CARES ESSER funding must calculate the share of equitable services the LEA will provide to students and teachers in nonpublic schools. USED's interim final rule became effective and binding on LEAs on July 1, 2020, the date of [publication in the Federal Register](#). The USED rule significantly broadens how equitable services are calculated as compared to what is required under Title I of the ESEA and would considerably limit SU/SDs' flexibility in administering these federal funds.

[Section 18005 of the CARES Act](#) directs LEAs to "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." USED's rule interprets Section 18005, specifically how an LEA should calculate equitable services "in the same manner" as section 1117 of the ESEA, commonly called "Title I."

The Agency of Education (AOE) believes that the USED's original guidance and subsequent rule is inconsistent with the plain meaning of Section 18005 of the CARES Act and the intent of Congress. This view is shared by many other state agencies, the Council of Chief State School Officers (CCSSO) and members of Congress who have urged USED to reconsider this aspect of its CARES Act implementation. AOE is monitoring both potential action by the courts and legislation in Congress that might impact enforcement of the USED rule. However, LEAs should be aware that the rule is binding at this time.

### The USED Interim Final Rule

The USED rule gives LEAs two options for calculating the share of ESSER funds that should be allocated to equitable services. One option is based on USED's original interpretation of the CARES Act. This "total enrollment" calculation is based on the total enrollment of all participating non-public schools in an LEA. This interpretation of the CARES Act is being challenged by AOE and other states, because Title I allocations for equitable services are based on the number of low-income students in participating non-public schools, not total enrollment. If an SU/SD chooses this option, ESSER funds may be used across any/all of the SU/SD's schools.

The second option afforded to LEAs in the USED rule is in response to the concern from many state agencies and LEAs about the original USED interpretation described above. Under the second option, an LEA may base its equitable services calculation on the number of low-income students in participating non-public schools, but the LEA must then use all CARES Act ESSER funds in only the LEA's Title I schools. If using the second, "Title I only", option, the LEA must also comply with the "supplement not supplant" provision in Section 1118(b) of the ESEA. This

means that the LEA may not direct other state and local funds away from Title I schools in light of the additional ESSER funds directed to Title I schools.

The USED rule requires each LEA to decide which of its two equitable services options to implement. Because the USED rule is subject to legal challenge and/or Congressional action, AOE is providing a non-binding recommendation that SU/SDs determine, using one of the two calculation options, the amount that the SU/SD might allocate to equitable services under the USED rule, and to set aside the difference between that amount and the amount that would be allocated under AOE's interpretation, until the final outcome of the USED rule is determined.

## **Calculation of Equitable Services**

Because the USED rule is binding, AOE has determined that it is appropriate for SU/SDs to comply with the USED rule in calculating equitable services amounts, but that an SU/SD may elect to set part of that amount aside, in recognition that the USED rule is subject to change, as described above.

Accordingly, our SU/SD grant application will calculate equitable services funding pursuant to the two options represented in the USED rule. However, for informational purposes, we have also included a calculation of the equitable services funding in accordance with AOE's interpretation of the CARES Act, using the number of low-income students attending non-public schools within the LEA, rather than total enrollment in these schools. When using the application, an SU/SD should first choose which of the two USED calculations it will implement. Then, an SU/SD may evaluate the difference between that amount and the amount that would be set aside if the SU/SD followed AOE's interpretation of the CARES Act. We encourage SU/SDs to engage their legal counsel in a discussion of whether it is appropriate to reserve or set aside the difference between the two calculated amounts for the purposes of equitable services while any legal action or legislation is pending at the federal level. In many cases, the sum in question will not be large, relative to the SU/SD's full allocation of ESSER funds. In other cases, the difference is more substantial and will greatly impact the SU/SD's use of ESSER funds. The AOE anticipates that most SU/SDs will choose to set aside the funds in question until more information is known.

When more information is available regarding the federal disposition to this issue, the AOE will provide additional guidance. SU/SDs may also wish to consult with legal counsel to ensure you are aware of any potential risk of litigation related to this approach.

## **Additional Equitable Services Considerations**

Under the CARES Act, the obligation to provide equitable services to students and teachers in non-public schools includes a responsibility for an SU/SD to reach out to all qualifying non-public schools within the physical boundaries of the SU/SD for consultation on the use of equitable services funds.

Note that the limitation of responsibility to non-public schools within the SU/SD's physical boundaries differs slightly from the traditional Title I formula. Under ESEA, when engaging in

consultation and determining equitable shares, an LEA that receives Title I funds must consult with non-public schools attended by its low-income students who reside in eligible attendance areas of its schools receiving Title I funds, whether within or outside the boundaries of the LEA. In interpreting Title I as applied through Section 18005 of the CARES Act, however, AOE finds that using the physical boundaries criteria, rather than the residential criteria, is appropriate, in keeping with USED guidance.

Additionally, a qualifying non-public school under the CARES Act means a not-for-profit elementary or secondary school that is either approved or recognized by the state and was in operation on the qualifying date of the emergency, March 13, 2020. The SU/SD should be able to demonstrate that it made a good faith effort to contact each qualifying non-public school within its physical boundaries and inform the school of the opportunity for its students and teachers to receive equitable services.

Finally, section 18005(b) of the CARES Act and guidance from USED are both clear that any funds used to provide equitable services remain in the control of the SU/SD and are not directly distributed to non-public schools. Control of funds for services and assistance provided to non-public school students and teachers, and title to materials, equipment and property purchased with such funds, must remain either with the SU/SD or with a school district within the SU/SD. 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.