Schuyler Community Schools
SAA Weekly Meeting
Monday, May 11, 2020 9:00 AM
Schuyler Community Schools Board Room
120 West 20th Street
Schuyler, NE 68661

I. Discussion Items

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Elementary and Secondary School Emergency Relief Fund

Frequently Asked Questions about the Elementary and Secondary School Emergency Relief Fund (ESSER Fund)

PURPOSE OF THIS DOCUMENT

The purpose of this document is to answer Frequently Asked Questions related to the Elementary and Secondary School Emergency Relief Fund (ESSER Fund). Under the ESSER Fund, established as part of the Education Stabilization Fund in the CARES Act,[1] State educational agencies (SEAs) will award subgrants to local educational agencies (LEAs) to address the impact that the Novel Coronavirus Disease 2019 (COVID-19) has had, and continues to have, on elementary and secondary schools across the Nation.

This Frequently Asked Questions document seeks to answer questions that are not easily understood from a plain reading of Section 18003 and other parts of the CARES Act or the ESSER Fund Certification and Agreement (C&A). It was developed in direct response to questions that the Department has received from SEA and LEA grant administrators implementing the ESSER Fund program.

Disclaimer

Other than statutory and regulatory requirements included in the document, such as those pursuant to the authorizing statute and other applicable laws and regulations, the contents of this document do not have the force and effect of law and are not meant to bind the public in any way. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies. In addition, it does not create or confer any rights for or on any person.

The U.S. Department of Education (Department) may provide additional or updated information, as necessary, on the Department's website at: https://oese.ed.gov/offices/education-stabilization-fund/elementary-secondary-school-emergency-relief-fund/.

If you have questions that are not answered in this document, please e-mail ESSERF@ed.gov.

[1] The Coronavirus Aid, Relief, and Economic Security Act (CARES Act), Public Law 116-136, 134 Stat. 281 (Mar. 27, 2020). All citations in this document are to the CARES Act, unless otherwise indicated. The provisions of the CARES Act relevant to the ESSER Fund and other Department of Education programs are available on the Department's website at https://oese.ed.gov/offices/education-stabilizationfund/.

1. Who applies to the Department for ESSER formula funds?

Only SEAs in the 50 States, Puerto Rico, and the District of Columbia apply directly to the Department for ESSER Funds. An SEA is the agency primarily responsible for the State supervision of public elementary schools and secondary schools.[2] For example, an SEA may be called the [State name] Department of Education or the [State name] Office of Public Instruction.

The Bureau of Indian Education and the Outlying Areas are not eligible to receive ESSER formula funds. Congress provided a separate set aside in the Education Stabilization Fund to provide funds to those entities.

2. How do school districts or other entities access ESSER formula funds?

School districts (LEAs) must apply to the relevant SEA. Every SEA must use at least 90 percent of its ESSER Fund grant to make subgrants to LEAs by formula based on FY 2019 Title I, Part A allocations. (For more information on allocating funds to LEAs, see the Technical Appendix.)

3. What happens to the other 10 percent of ESSER funds?

An SEA may retain 10 percent or less of its ESSER Fund grant (the "SEA Reserve"), to address emergency needs resulting from COVID-19 through subgrants and contracts. As described below, from the SEA Reserve, the SEA can also use one-half of one percent of its total grant for administrative costs.

4. Who is eligible to receive ESSER funds from the SEA Reserve?

A wide range of entities, including LEAs and organizations serving students and families, may be a "subrecipient" of funds from the SEA Reserve. A "subrecipient" includes any entity that receives a subgrant or contract consistent with applicable State and Federal subgrant and procurement standards. Entities interested in learning more about an SEA's intended use of its reserve should contact the SEA.

5. May an SEA reserve ESSER funds for administrative costs?

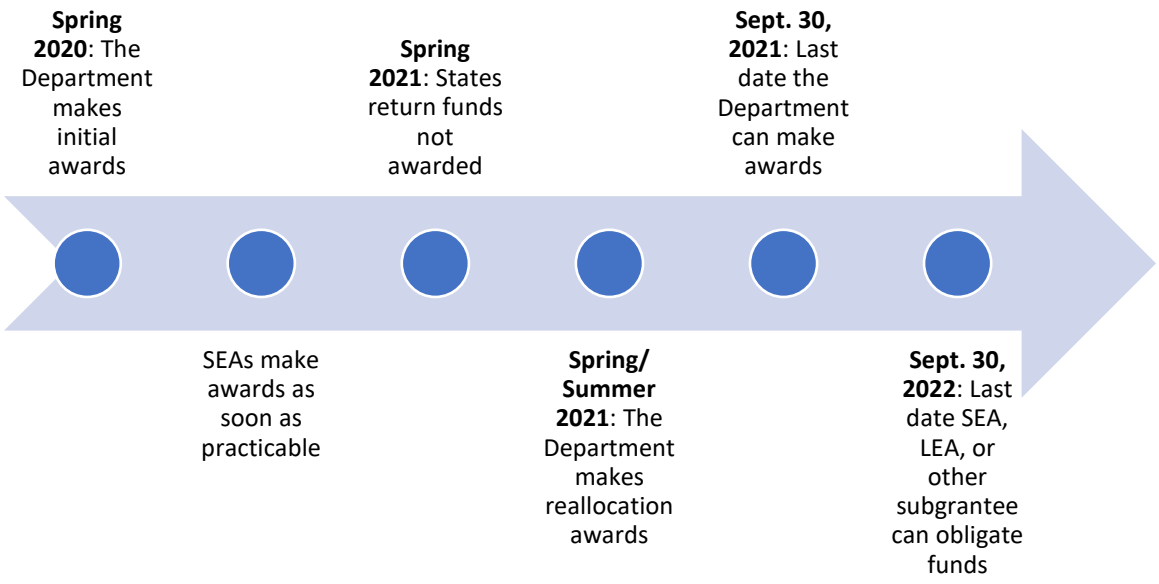
Yes. An SEA may reserve ½ of 1 percent or less of its total ESSER allocation for administrative costs, including both direct and indirect administrative costs. This reservation must come from the SEA Reserve and is not subject to the requirement that funds be "awarded" within one year. Funds for administrative costs remain available to the SEA for obligation through September 30, 2022.

6. Are ESSER funds a supplement to an LEA's ESEA Title I, Part A grant award?

No. The ESSER Fund is a separate Federal program. ESSER funds must be awarded and tracked separately from Title I, Part A funds.

[2] The definition of SEA is from ESEA section 8101(49).

7. What is the overall timeline for using ESSER funds?



8. Is there a deadline by which an SEA must award ESSER funds to subrecipients?

Yes. SEAs must award ESSER formula subgrants to LEAs within one year of receiving the State allocation. An SEA must also make awards with its SEA Reserve within one year of receiving the State allocation. Any funds that the SEA fails to award by the one-year deadline must be returned to the Department for reallocation consistent with the CARES Act.

9. How long are ESSER funds available for obligation by subrecipients?

ESSER funds are available for obligation by LEAs and other subrecipients through September 30, 2022, which includes the Tydings period (General Education Provisions Act §421(b)(1)).

10. What is the difference between "awarding" and "obligating" funds?

An SEA awards funds when it makes a subgrant to an LEA or, in the case of the SEA Reserve, when it enters into a subgrant or contract with a subrecipient. ESSER funds are obligated when the subrecipient commits those funds to specific purposes consistent with 34 C.F.R. § 76.707. If an SEA awards a contract from the SEA reserve, that is an obligation. In contrast, subgranting funds to an LEA or other subrecipient is not an obligation; rather, these funds are not obligated until the LEA or other subrecipient commits the funds to specific purposes.

11. Is a charter school eligible to receive ESSER formula funds?

A charter school that is an LEA, as defined in section 8101(30) of the ESEA, may receive an ESSER formula subgrant like any other LEA. A new or significantly expanded charter school LEA in the 2020-2021 school year is eligible to receive an ESSER formula subgrant in accordance with ESEA section 4306 and 34 CFR §76.792. (For more information on allocating funds to new charter schools, see the Technical Appendix.) A charter school that is not an LEA may not receive a formula subgrant, but it may receive support under ESSER through the LEA of which it is a part.

12. If an LEA did not receive an FY 2019 Title I, Part A subgrant for school year 2019-2020, is it eligible to receive ESSER formula funds?

No, the LEA is not eligible to receive a formula subgrant. The only exception is a new charter school LEA that did not exist in the 2019-2020 school year or a charter school LEA whose significant expansion makes it eligible for Title I, Part A funds in the 2020-2021 school year (see question 11 and the Technical Appendix). However, any LEA may receive ESSER funds from an SEA's Reserve, including those LEAs that are not eligible for a formula subgrant under the ESSER Fund.

13. Must an LEA submit a local application to the SEA in order to receive ESSER formula funds?

Yes. An LEA must file a local application with the SEA in order to receive an ESSER formula subgrant.[3] For information about what an SEA must include in its local application for an ESSER formula subgrant, please refer to the ESSER Fund Certification and Agreement.

14. May an SEA restrict or limit LEA uses of ESSER formula funds?

No. The ESSER Fund provides a broad, permissive list of allowable LEA activities in Section 18003(d). SEAs do not have the authority to limit the uses of ESSER formula funds.

15. How much flexibility does an LEA have in determining the activities to support with ESSER funds?

The ESSER Fund provides LEAs considerable flexibility in determining how best to use ESSER funds (see Section 18003(d)). For example, LEAs may use ESSER funds for personal protective equipment (PPE), cleaning and sanitizing materials, and similar supplies necessary to maintain school operations during and after the COVID-19 pandemic. Since learning can and should continue, the Department encourages LEAs to target ESSER funding on activities that will support remote learning for all students, especially disadvantaged or at-risk students, and their teachers.

[3] For further information, please see 34 C.F.R. § 76.301.

16. Are an LEA's ESSER formula funds subject to the requirements of Title I, Part A of the ESEA (or other Federal education program requirements), if an LEA uses ESSER formula funds for an allowable activity under such program?

No. Although an LEA receives ESSER formula funds via the Title I, Part A formula, ESSER formula funds are not Title I, Part A funds and are not subject to Title I, Part A requirements. The CARES Act authorizes a broad array of potential uses of ESSER formula funds under a number of Federal education statutes; no associated statutory requirements of any of those programs apply to ESSER funds.

17. May an LEA use its ESSER formula funds to support any school in the district, regardless of a school's Title I, Part A status?

Yes. The CARES Act does not define how an LEA distributes funds to schools An LEA may support any school in the district or it may target funds based on poverty, indication of school needs, or other targeting measures.

18. Is there any difference in the amount of funds, or allowable uses of funds, for a school that implements a schoolwide program under Title I, Part A as compared to a school that provides targeted support under Title I, Part A?

No. The requirements of Title I, Part A do not apply to ESSER funds. An LEA may support any of its schools using ESSER funds for any allowable activities under 18003(d) without regard to Title I eligibility, program type, or funding.

19. Are LEAs required to provide equitable services to nonpublic schools with ESSER funds?

Yes. Please see the document "Providing Equitable Services to Students and Teachers in Non-Public Schools under the CARES Act Programs" for more information.

20. Are ESSER funds subject to a supplanting prohibition?

No. The ESSER Fund does not contain a supplanting prohibition. As a result, ESSER funds may take the place of State or local funds for allowable activities. However, the program does contain a Maintenance of Effort (MOE) requirement, which is designed to keep States from substantially reducing their support for K-12 education.[4]

[4] For further information, please see Section 18008 of the CARES Act. The Department will separately address the MOE requirement in a separate set of Frequently Asked Questions.

21. May an SEA or LEA use ESSER funds for allowable costs incurred prior to receiving grant funds?

Yes. An SEA and LEA may use ESSER funds for any allowable expenditure incurred on or after March 13, 2020, the date the President declared the national emergency due to COVID-19.

22. Should SEAs and LEAs anticipate monitoring or auditing of ESSER funds?

Yes. The Department will monitor the use of ESSER funds. In addition, ESSER funds are subject to audit requirements under the Single Audit Act and to review by the Government Accountability Office. The Department's Office of the Inspector General may audit program implementation, as may any other federal agency, commission, or department in the lawful exercise of its jurisdiction and authority.

TECHNICAL APPENDIX: MAKING ESSER FORMULA SUBGRANTS TO LEAS

This technical appendix has been prepared for the benefit of State administrators who are tasked with making formula subgrants to LEAs under the ESSER Fund.

ESSER Requirement

A State educational agency (SEA) must allocate at least 90 percent of its total ESSER Fund grant by formula to LEAs. The SEA must determine each LEA's ESSER allocation in proportion to the amount of funds the LEA received under Title I, Part A of the Elementary and Secondary Education Act of 1965 (ESEA) in the most recent fiscal year. (Section 18003(c) of the CARES Act).

Title I, Part A Subgrants to LEAs

For the purpose of allocating ESSER funds to LEAs, the following points regarding Title I, Part A subgrants apply:

- Federal fiscal year (FY) 2019 Title I, Part A subgrants that were awarded by each SEA to LEAs for the 2019-2020 school year are the most recent Title I, Part A funds on which an SEA bases ESSER Fund subgrants. Therefore, with the exception of Step 6 below relating to new or significantly expanded charter school LEAs in school year 2020-2021, an SEA has the data needed to calculate ESSER LEA allocations because the SEA has already determined the FY 2019 Title I, Part A LEA subgrant amounts.

- FY 2019 Title I, Part A subgrants are those that each SEA determined under Subpart 2 of Title I, Part A: that is, the aggregate of basic grants, concentration grants, targeted grants and education finance incentive grants for which each LEA was eligible after the SEA adjusted, in accordance with the regulations in 34 C.F.R. §§ 200.70-200.75[5] and § 200.100,[6] the LEA allocations on the Census list calculated by the Department.[7]

- The following <u>are not part of</u> FY 2019 Title I, Part A LEA subgrant amounts an SEA uses to calculate ESSER LEA allocations:
    - FY 2017 or 2018 carryover funds.
    - Funds reallocated to an LEA by the SEA under ESEA section 1126(c).
    - Funds an LEA received under ESEA section 1003 for school improvement.

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[5] The regulations in 34 C.F.R. §§ 200.70-200.75 address adjusting for LEAs that are not on the Census list (such as charter school LEAs), applying the hold harmless after adjusting for LEAs that are not on the Census list, alternative allocations for LEAs under 20,000 total population, and special procedures for calculating concentration grants in small States [available at: https://www.ecfr.gov/cgi-bin/text-idx?SID=ea8f771199b0aa9a1f068857ea552084&mc=true&node=sg34.1.200_169.sg5&rgn=div7].

[6] The regulations in 34 C.F.R. § 200.100 address an SEA's reservation of funds for school improvement under ESEA section 1003, including application of the special rule in section 1003(h); funds for State administration under ESEA section 1004; and funds for direct student services under ESEA section 1003A [https://www.ecfr.gov/cgi-bin/text-idx?SID=ea8f771199b0aa9a1f068857ea552084&mc=true&node=se34.1.200_1100&rgn=div8].

[7] Additional information on the SEA adjustment process to determine LEA Title I, Part A subgrants is provided on pages 2-10 in the Department's nonregulatory guidance on ESSA fiscal changes [available at: https://www2.ed.gov/policy/elsec/leg/essa/essaguidance160477.pdf].

- Funds an LEA received under ESEA section 1003A for direct student services.
- Funds an LEA received to carry out Title I, Part D, Subpart 2 (i.e., funds generated by children in local institutions for delinquent children).
- Reductions to an LEA's FY 2019 Title I, Part A subgrant due to a failure to meet the ESEA's maintenance of effort requirements in the preceding fiscal year and at least once in the five immediately preceding fiscal years.
- Any adjustments from FY 2018 that an SEA made to FY 2019 Title I, Part A subgrant amounts.
- FY 2019 Title I, Part A funds that an LEA declined.

Steps to Calculate ESSER Subgrants to LEAs

These steps describe the procedures an SEA follows to calculate the ESSER LEA allocations. An SEA can complete Steps 1 through 5 in order to make ESSER subgrants to existing eligible LEAs; the SEA completes Step 6 once it has determined whether any new charter school LEAs have opened for school year 2020-2021 or any existing charter school LEAs have significantly expanded for school year 2020-2021 (e.g., during the fall of 2020). (See ESEA section 4306). An example follows each step, with a combined example for Steps 2 and 3.

Please note that an SEA must complete these steps, including Step 6, and make subgrants to LEAs within one year of an SEA's receipt of ESSER funds; any funds not awarded to LEAs by that deadline must be returned to the Department for reallocation to other States. (See section 18003(f) of the CARES Act).

Step 1: The SEA determines the total amount of ESSER funds it has available to allocate to LEAs through the ESSER formula by:

- Determining the amount, if any, of ESSER funds it will retain for the SEA reserve (a maximum of 10 percent of its total ESSER Fund grant, including funds for State administration).
- Subtracting the SEA reserve amount from the SEA's total ESSER allocation to determine the total amount available for LEA subgrants; and
- If a State has charter school LEAs, subtracting from the total amount of ESSER funds available for LEA subgrants a reasonable amount to retain for new charter school LEAs or charter school LEAs that will significantly expand in school year 2020-2021 consistent with ESEA section 4306. (Temporarily retaining funds from the total amount of ESSER funds available for LEA subgrants for new charter school LEAs or charter school LEAs that will significantly expand in school year 2020-2021 will reduce the likelihood that an SEA will have to reduce the ESSER subgrants of other LEAs once the SEA has the data to calculate the ESSER subgrant of such charter school LEAs. See Step 6b.)

Example of Step 1

Row	Category	Amount
Row 1	SEA's ESSER Allocation	$80,000,000
Row 2	SEA Reserve *(10 percent of Row 1)*	$8,000,000
Row 3	Amount of ESSER funds for LEA subgrants *(Row 1 minus Row 2)*	$72,000,000
Row 4	Funds retained for new/significantly expanded charter school LEA subgrants	$1,000,000
Row 5	**Total amount available to allocate to LEAs** *(Row 3 minus Row 4)*	**$71,000,000**

Step 2: The SEA identifies each LEA's FY 2019 Title I, Part A subgrant amount (as described above under "Title I, Part A Subgrants to LEAs").

Step 3: The SEA adds the FY 2019 Title I, Part A LEA subgrants to determine the total amount of FY 2019 Title I, Part A subgrants.

Example of Step 2 and Step 3

Step	LEA operating in school year 2019-2020	FY 2019 Title I, Part A subgrant amount
2	LEA 1	$10,904,500
2	LEA 2	$13,694,277
2	LEA 3 (charter LEA)	$257,479
2	LEA 4 (charter LEA)	$332,050
2	LEA 5	$5,771,821
2	LEA 6	$0
2	LEA 7	$3,765,959
2	LEA 8	$26,852,135
2	LEA 9	$2,449,979
2	LEA 10	$25,971,800
3	**Total**	**$90,000,000**

Step 4: The SEA divides each LEA's Title I, Part A subgrant amount (Step 2) by the total amount of FY 2019 Title I, Part A subgrants (Step 3) to determine the proportion of the ESSER formula funds that each LEA receives.

Example of Step 4

LEA operating in school year 2019-2020	**LEA's FY 2019 Title I, Part A subgrant amount** *(From Step 2)*	**Total amount of FY 2019 Title I, Part A LEA subgrants** *(From Step 3)*	**Proportion of the ESSER formula funds that the LEA receives** *(Step 2 divided by Step 3)*
LEA 1	$10,904,500	$90,000,000	0.1212
LEA 2	$13,694,277	$90,000,000	0.1522
LEA 3 (charter LEA)	$257,479	$90,000,000	0.0029
LEA 4 (charter LEA)	$332,050	$90,000,000	0.0037
LEA 5	$5,771,821	$90,000,000	0.0641
LEA 6	$0	$90,000,000	0.0000
LEA 7	$3,765,959	$90,000,000	0.0418
LEA 8	$26,852,135	$90,000,000	0.2984
LEA 9	$2,449,979	$90,000,000	0.0272
LEA 10	$25,971,800	$90,000,000	0.2886

Step 5: The SEA multiplies the proportion identified in Step 4 by the portion of its ESSER funds that it will immediately distribute by formula as determined in Step 1 to calculate each LEA's ESSER subgrant.

Example of Step 5

LEA operating in school year 2019-2020	**Proportion of the ESSER formula funds that the LEA receives** *(From Step 4)*	**Total amount of ESSER funds available to allocate to LEAs** *(from Step 1)*	**ESSER LEA subgrant** *(Amount determined in Step 1 multiplied by Step 4)*
LEA 1	0.1212	$71,000,000	$8,602,439
LEA 2	0.1522	$71,000,000	$10,803,263
LEA 3 (charter LEA)	0.0029	$71,000,000	$203,122
LEA 4 (charter LEA)	0.0037	$71,000,000	$261,951
LEA 5	0.0641	$71,000,000	$4,553,325
LEA 6	0.0000	$71,000,000	$0
LEA 7	0.0418	$71,000,000	$2,970,923
LEA 8	0.2984	$71,000,000	$21,183,351
LEA 9	0.0272	$71,000,000	$1,932,761
LEA 10	0.2886	$71,000,000	$20,488,865
Total			**$71,000,000**

Step 6: The SEA recalculates the ESSER LEA allocations after it determines whether there are any new charter school LEAs or any existing charter school LEAs that significantly expanded for school year 2020-2021 in accordance with the definition of "significant expansion of enrollment" in 34 C.F.R. § 76.787.[8]

Step 6a (applies only if for school year 2020-2021 there are no new charter school LEAs or charter school LEAs that significantly expanded in a State): The SEA allocates the amount it retained under Step 1 for potential new charter school LEAs to the LEAs to which it made ESSER subgrant allocations in proportion to those amounts.

Example of Step 6a

Column 1	*Column 2*	*Column 3*	*Column 4*	*Column 5*	*Column 6*
LEA operating in school year 2019-2020	**Proportion of ESSER formula funds that the LEA receives** *(From Step 4)*	**Initial ESSER LEA subgrant** *(From Step 5)*	**Amount SEA retained for new or significantly expanded charter LEAs** *(from Step 1)*	**ESSER LEA allocation of retained amount** *(Column 4 multiplied by Column 2)*	**Revised ESSER LEA subgrant** *(Column 3 plus Column 5)*
LEA 1	0.1212	$8,602,439	$1,000,000	$121,161	$8,723,600
LEA 2	0.1522	$10,803,263	$1,000,000	$152,159	$10,955,422
LEA 3 (charter LEA)	0.0029	$203,122	$1,000,000	$2,861	$205,983
LEA 4 (charter LEA)	0.0037	$261,951	$1,000,000	$3,689	$265,640
LEA 5	0.0641	$4,553,325	$1,000,000	$64,131	$4,617,456
LEA 6	0.0000	$0	$1,000,000	$0	$0
LEA 7	0.0418	$2,970,923	$1,000,000	$41,844	$3,012,767
LEA 8	0.2984	$21,183,351	$1,000,000	$298,357	$21,481,708
LEA 9	0.0272	$1,932,761	$1,000,000	$27,222	$1,959,983
LEA 10	0.2886	$20,488,865	$1,000,000	$288,576	$20,777,441
Total		**$71,000,000**		**$1,000,000**	**$72,000,000**

Step 6b (applies only if for school year 2020-2021 there are new charter school LEAs or charter school LEAs that significantly expanded in a State): The SEA recalculates its ESSER LEA allocations based on the total amount available for LEA subgrants in order to determine the ESSER subgrant amounts for a new charter school LEA or a significantly expanded charter school LEA and makes any necessary adjustments to the ESSER LEA subgrants that the SEA already awarded based on the calculations described in Steps 1 through 5.

[8] An SEA will implement Step 6 after the SEA determines whether there are any new charter school LEAs or charter school LEAs that significantly expanded for school year 2020-2021 based on receiving written notification from a charter school LEA at least 120 days prior to the date the school is scheduled to open or significantly expand. (See 34 C.F.R § 76.788). Thus, this step likely will not occur until fall 2020. It must occur within one year of the SEA's receipt of ESSER funds or the SEA must return the funds to the Department for reallocation to other States.

As background, for a newly opened charter school LEA or a charter school LEA that significantly expands for school year 2020-2021, an SEA does not have an actual FY 2019 Title I, Part A subgrant amount for the LEA that reflects either status. ESEA section 4306(a), however, requires, with respect to any funds that the Department allocates to States on a formula basis (including the ESSER fund), a State to:

> [T]ake such measures as are necessary to ensure that every charter school receives the Federal funding for which the charter school is eligible not later than [five] months after the charter school first opens, notwithstanding the fact that the identity and characteristics of the students enrolling in that charter school are not fully and completely determined until that charter school actually opens. The measures similarly shall ensure that every charter school expanding its enrollment in any subsequent year of operation receives the Federal funding for which the charter school is eligible not later than [five] months after such expansion.

In order to comply with ESEA section 4306(a), an SEA must determine an ESSER LEA subgrant allocation for a new or significantly expanded charter school in school year 2020-2021 by deriving what the charter school LEA's FY 2019 Title I, Part A allocation would have been based on the characteristics of the charter school LEA's students in school year 2020-2021. As detailed in the next paragraph, an SEA already derives this amount for calculating FY 2020 Title I, Part A allocations to comply with ESEA section 4306(c).

Independent of the CARES Act, as part of calculating a new or significantly expanded charter school LEA's FY 2020 Title I, Part A allocation, ESEA section 4306(c) requires an SEA, for purposes of implementing the Title I, Part A hold-harmless protections in ESEA sections 1122(c) and 1125A(f)(3) for a newly opened or significantly expanded charter school LEA, to derive a hold-harmless base under each Title I, Part A formula for FY 2019 that reflects the new or significantly expanded enrollment of the charter school LEA.[9] Therefore, in order to calculate the ESSER allocation of a new or significantly expanded charter school LEA, an SEA will consider such an LEA's FY 2019 Title I, Part A allocation as the sum of its hold harmless base under each Title I, Part A formula that the SEA calculates for FY 2020 Title I, Part A allocations in accordance with ESEA section 4306(c). An example of calculating the ESSER allocation for a new or significantly expanded charter school LEA and adjusting the ESSER subgrants an SEA already made (as shown in Steps 1-5) follows on the next page.

[9] For more information on ESEA section 4306(c) see pages 4-7 in the Department's nonregulatory guidance on ESSA fiscal changes [available at: https://www2.ed.gov/policy/elsec/leg/essa/essaguidance160477.pdf].

Example of Step 6b

Column 1	*Column 2*	*Column 3*	*Column 4*	*Column 5*	*Column 6*	*Column 7*
LEA	**Initial ESSER LEA subgrant** *(From Step 5)*	**FY 2019 Title I, Part A subgrant amount or ESEA Section 4306(c) FY 2019 derived Title I, Part A hold harmless base***	**LEA proportion of Column 3 total** (*Column 3 LEA amount divided by Column 3 total)*	**Total amount for LEA subgrants** *(from Step 1)*	**Revised ESSER LEA subgrant** *(Column 5 multiplied by Column 4)*	**Difference between revised ESSER LEA subgrant and initial subgrant** *(Column 6 minus Column 2)*
LEA 1	$8,602,439	$10,904,500	0.1209	$72,000,000	$8,704,257	$101,818
LEA 2	$10,803,263	$13,694,277	0.1518	$72,000,000	$10,931,130	$127,867
LEA 3 ***(significantly expanded charter LEA in school year 2020-2021)***	$203,122	***$357,479****	0.0040	$72,000,000	$285,349	$82,227
LEA 4 (charter LEA)	$261,951	$332,050	0.0037	$72,000,000	$265,051	$3,100
LEA 5	$4,553,325	$5,771,821	0.0640	$72,000,000	$4,607,219	$53,894
LEA 6	$0	$0	0.0000	$72,000,000	$0	$0
LEA 7	$2,970,923	$3,765,959	0.0418	$72,000,000	$3,006,087	$35,164
LEA 8	$21,183,351	$26,852,135	0.2977	$72,000,000	$21,434,077	$250,726
LEA 9	$1,932,761	$2,449,979	0.0272	$72,000,000	$1,955,637	$22,876
LEA 10	$20,488,865	$25,971,800	0.2879	$72,000,000	$20,731,370	$242,505
***LEA 11** (new charter LEA in school year 2020-2021)*	$0	***$100,000****	0.0011	$72,000,000	$79,823	$79,823
Total	**$71,000,000**	**$90,200,000****			**$72,000,000**	**$1,000,000**

*Figure is the derived FY 2019 Title I, Part A hold harmless base that the SEA calculates in accordance with ESEA section 4306(c) for a charter school LEA that opens or significantly expands for school year 2020-2021.

**Figure does not equal the actual total of FY 2019 Title I, Part A subgrants from Step 2 due to the SEA's deriving hold harmless bases for the new and significantly expanded charter school LEAs, as required by ESEA section 4306(c).

NEBRASKA
DEPARTMENT OF EDUCATION

The Individuals with Disabilities Education Act (IDEA)

92 NAC 51 (Rule 51)

Extended School Year (ESY) Services

August 2018

SPED
SPECIAL EDUCATION

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FORWARD

Extended School Year (ESY) is a term used to define special education and related services provided for children with disabilities during periods when school is not in session.

In March 1999, requirements for ESY services were included for the first time in federal regulations implementing the 1997 amendments to the Individuals with Disabilities Education Act (IDEA). Those requirements state:

§300.106 Extended school year services.

(a) General.

(1) Each public agency shall ensure that extended school year services are available as necessary to provide FAPE, consistent with paragraph (a)(2) of this section.

(2) Extended school year services must be provided only if a child's IEP team determines, on an individual basis, in accordance with §§300.320-300.324, that the services are necessary for the provision of FAPE to the child.

(3) In implementing the requirements of this section, a public agency may not---

(i) Limit extended school year services to particular categories of disability; or

(ii) Unilaterally limit the type, amount, or duration of those services.

(b) Definition. As used in this section, the term extended school year services means special education and related services that--

(1) Are provided to a child with a disability—

(i) Beyond the normal school year of the public agency;

(ii) In accordance with the child's IEP; and

(iii) At no cost to the parents of the child; and

(2) Meet the standards of the SEA. (Authority: 20 U.S.C. 1412(a)(1))

The United States Department of Education did not set standards for ESY, but rather assigned each state the task of ensuring that the right to ESY services is based on a child's entitlement to a Free Appropriate Public Education (FAPE).

Nebraska Public Schools are committed to providing all children with disabilities a Free Appropriate Public Education. With that commitment in mind, this Technical Assistance (TA) document was developed to serve as a guide for parents and educators across the state to assist them in making decisions regarding the provisions for extended school year services.

DEFINITION OF TERMS

Extended School Year (ESY) Services – Special education and related services provided for children with disabilities during periods when school is not in session.

FAPE – Free Appropriate Public Education

IDEA – Individuals with Disabilities Education Act

IEP – Individual Education Program

OSERS – Office of Special Education and Rehabilitative Services

OSEP – Office of Special Education Programs

Critical Life Skills – Means academic, social, functional, and behavioral skills that:

- Are linked to the IEP goals; and
- Are critical to the student's school and community functioning

Examples of types of critical life skills:

- Skills designed to increase the student's independence from caretakers
- Skills required across a variety of environments
- Skills or behaviors that increase the student's independence in the school or community
- Skills designed to allow the student to move to or remain in a less restrictive environment
- Skills that permit the student to decrease or eliminate behaviors that interfere with the student's functioning at school or in the community
- Skills essential for the student's maintenance of academics, behavior, communication, or self-sufficiency and independence

Regression – Substantial loss of any critical life skills. Some degree of loss in skills typically occurs with all children during normal school breaks and would not be considered substantial. The inability of the student to maintain an acquired skill in an identified goal area of concern when special education instruction or related services in an IEP goal area are interrupted and require and unreasonable amount of time for recoupment.

Recoupment (Recovery) – The ability to recover a loss of skills in a reasonable time following a normal school break. Reasonable recoupment rates vary among individuals based on individual learning styles and rates.

Degree of Progress – The IEP team must review the child's progress on any IEP objectives targeting critical life skills, and determine whether, without ESY, the child's degree of progress on those IEP objectives is likely to prevent the child from receiving some benefit from his or her educational program during the regular school year.

Emerging Skills or Breakthrough Opportunities – The IEP team determines whether any IEP objectives targeting critical life skills (see definition of critical life skills above) are at a breakthrough point and whether the interruption of instruction of the critical life skills caused by the school break is likely to prevent the child from receiving some benefit from his or her educational program during the regular school year.

Interfering Behaviors – The IEP team determines whether any IEP objectives targeting interfering behaviors, such as stereotypic, ritualistic, aggressive, or self-injurious behavior(s) have prevented the child from receiving some benefit from his or her educational program during the previous school year, or whether the interruption of programming which addresses the interfering behavior(s) is likely to prevent the child from receiving some benefit from his or her educational program during the next school year.

Nature and Severity of the Disability – The IEP team determines whether the nature and severity of the disability is such that the interruption of the instruction of critical life skills caused by the school break is likely to prevent the child from receiving some benefit from his or her educational program during the regular school year.

Special Circumstances – The IEP team determines whether special circumstances are such that the interruption of instruction of the critical life skills caused by the school break is likely to prevent the child from receiving some benefit from his or her educational program during the regular school year.

Some Benefit – An improvement in meeting the critical life skills objective as determined by the child's progress towards meeting the objective criteria as written in the IEP for the current school year. Some benefit is determined by the professional judgment of the members of the IEP team.

ELIGIBILITY FOR ESY SERVICES

The purpose of an extended school year is to prevent or slow severe skill regression caused by an interruption of special education services during extended periods when school is not in session. It is not to enhance the present levels of educational performance exhibited by children with disabilities at the end of the regular school year. The need for extended school year services is based on a construct of skill regression and a child's limited capacity for recoupment. An extended school year may be provided only when it is determined that a child might regress in a critical skill area to such an extent that recoupment of the skill loss would require an unusually long period of time to recoup or make it unlikely or impossible to recoup the present level of educational performance. Within the categories marked by a severe disability, it is not appropriate to assume that a significant regression/recoupment factor exists. Some children with severe disabilities may consistently demonstrate a limited array of skills, but **not** demonstrate a significant regression/recoupment factor in any of the skills. Therefore, these children would not be appropriate candidates for ESY services.

All children with disabilities who have a current IEP must be considered for ESY services at least annually. A school district may not limit ESY services to particular categories of disability, or unilaterally limit the type, amount, or duration of those services. A child's involvement in ESY services one year does not automatically guarantee services in following years. Similarly, the fact that no ESY services were provided in a prior year does not mean ESY services are not needed in the current year. These requirements apply to all children with a disability between the ages of three (3) through the age in which the child remains eligible for special education services. When it is determined that a child is in need of extended school year services, it will be provided as a related service at no cost to the parents, and must be provided under the auspices of an IEP.

The IEP team determines the need for ESY services. The team consists of the parent(s) of the child, the child if appropriate, the general education teacher(s), the special education teacher(s) and related service providers, an administrator or school district representative, and others as appropriate. Each person fulfills an important role by sharing critical information about the child and his or her unique needs. As part of the IEP process, the team must determine if a child needs a program of special education and related services extending beyond the normal school year. In such a child, restricting services to a standard number of school days per year would not allow development of an education program that is truly individualized.

Not all children with disabilities need ESY services nor do the provisions of ESY mean the child needs such services each year. Children with disabilities, like their peers without disabilities, benefit from breaks in a school schedule. Breaks in formal programming allow most children to generalize school-learned skills and behaviors to their home and community settings.

The critical question that each IEP team must ask is **"Will the learning that occurred during the regular school year be significantly jeopardized if ESY services are not provided?"**

Reasons why ESY services may be needed vary from child to child. Some children may suffer severe losses of social, behavioral, academic, communication, or self-sufficiency skills during interruptions in instruction. This is particularly true during long holiday breaks and summer vacations. The losses suffered may be so extensive that when school resumes, excessive amounts of time are needed to recover (recoup) lost skills, as compared to typical same-age peers. In determining significant regression and limited recoupment, it is important to consider the distinction between generalization and maintenance. A loss of skills over time could be due to failure to maintain performance or failure to generalize acquired skills to new settings. Many children do not automatically generalize acquired skills to environmental conditions outside those under which the initial learning took place. A child may experience losses because he or she reaches a critical learning stage at the end of the school year. He or she may need ESY services to avoid permanent loss of a learning opportunity. For other children, skills that support continued placement in the least restrictive environment (LRE) can be maintained only by ESY services. The IEP team will use regression/recoupment criteria in determining the need for ESY services, while considering a broad range of other factors, including category of disability, severity of disability, parent's ability to provide an educational structure at home, and the child's rate of progress. Court cases also include the following factors to be considered in the determination of need for ESY services: 1) the child's behavioral and physical problems; 2) the availability of alternative resources; 3) the ability of the child to interact with non-disabled children; 4) the areas of curriculum that need continuous education; and 5) the child's vocational needs.

Determination of the need for ESY services cannot be based on a formula, as formulas lack the individualization that ensures children with disabilities have appropriate educational planning to accommodate their unique needs. Case law supports the conclusion that the determination of need for ESY services cannot be based on a policy that prohibits or inhibits full consideration of the individual needs of each child with a disability.

In addition to the valuable information already being gathered to determine progress toward annual goals and short-term objectives, a child's IEP team should address the following points in determining the need for ESY services:

- Consider information from a variety of sources.
- Measurement should be sensitive to small changes that may occur during short breaks in services.
- Measurement information should be gathered during the child's performance after long week-ends, vacations, and previous summer breaks.
- Consider both prior experience with regression/recoupment and predictive information.

ESY SERVICES

The IEP team must consider the need for ESY services at the annual IEP meeting. However, under some circumstances, the need for ESY services and the characteristics of those services may not be known at the time of the annual IEP meeting. In that case, the team can identify the date it will reconvene to determine the need and ESY services to be provided. The regulations do not specify how many days in advance of the end of the school year that team determinations must be finalized; however, the team meeting to discuss ESY services should be conducted early enough to allow for appropriate planning. Any team member, including the parent(s), can request a new IEP meeting to reconsider ESY needs or the extent of ESY services.

ESY services are intended to minimize the effects of significant regression. Therefore, it is reasonable for ESY services to concentrate on areas at risk for significant regression. Because of this focus, ESY services may differ markedly from the services provided to a child during the school term. Services would logically be modified in a way to enhance generalization and maintenance of skills. As with any IEP, the needs of the child dictate the program rather than any available program dictating the services to be provided to the child.

Individualized ESY services could be provided in a traditional classroom setting; however, the location and nature of service delivery can vary with the needs of the child.

Other appropriate service delivery options could include:

- school-based programs that vary in length of schedule (e.g., two weeks, six weeks, ten weeks),
- grouping of children with similar goals and objectives,
- intra-school cooperative programs,
- a cooperative program with another agency,
- limited child contact, perhaps 3-4 times during the summer to prevent regression,
- a week of intensive review just prior to the beginning of the school year
- multi-school shared programs,
- contractual arrangements,
- community based programs, and
- transition opportunities.

Some children may need services provided in the home or at an alternative location. Some children might benefit if the school provides training to the parent in advance of long breaks in regular school schedules. The teacher and parent could work together, with materials sent home and progress periodically

monitored by the teacher. Such home consultations prior to the vacation and at intervals during the vacation, if needed, could provide support and instruction to parents in preventing regression. It offers the additional benefit of increased opportunities for practice and generalization across settings. However, a school cannot simply choose to delegate its responsibilities for providing ESY services to the parents. The option of home consultation would depend upon availability of parents, their desire to assist, the complexity of their child's needs, and other factors specific to the child's needs.

For other children, depending upon the nature of the skill to be maintained, a summer camp, recreational program, or a district's optional summer school program could provide opportunities for maintenance of skills.

QUESTIONS AND ANSWERS

Can schools refuse to consider extended school year services?
Schools cannot refuse to consider extended school year (ESY) services. The Individuals with Disabilities Education Act (IDEA) (300.106) requires all decisions regarding ESY to be made on the basis of individual needs of a child as documented in the IEP. Any policy that attempts to be categorical is not individualized; therefore, not in compliance with federal regulation. Examples of categorical statements include:

- "No child gets summer programming."
- "There are no related services during summer."
- "If you get summer school then you get the same thing they offer everyone else."
- "Only individuals with severe disabilities get summer services."

How often must a child be considered for ESY?
All children with disabilities must be considered for ESY services at least annually.

Must schools notify parents of the availability of extended year services? Just as the school provides notice to parents about other services (e.g. evaluations, physical therapy), the school must inform parents of the availability of extended school year services when appropriate. The burden is not on the parents to bring it up or to prove it is needed. Schools have a duty to identify needs, to evaluate those needs, to discuss them at the IEP meeting, and to offer an appropriate education based on those needs.

If a child does not meet all of his or her IEP goals and objectives during the regular school year, does this mean ESY services are required?
No. ESY services should not be granted solely on the basis of the child with disabilities not achieving one or more IEP goals or objectives. In a *Letter to Kleczka* (30 IDELR 270), OSEP stated: "Whether a child with a disability requires ESY is a decision for that child's IEP team. Nothing in federal law or the corresponding regulations requires children with disabilities who do not meet their IEP goals to participate in ESY." The critical question that each IEP team must ask regarding ESY services is "Will the learning that occurred during the regular school year be significantly jeopardized if ESY services are not provided?"

Should new goals and objectives be developed for ESY services?
No. ESY services address the maintenance of previously learned skills, as identified in the current IEP. The intent of ESY services it not to teach new skills.

How does the IEP team determine the amount of ESY services of each child?
The determination of the extent of ESY services must be made on an individual basis after a thorough review of the child's goals and objectives as documented in the IEP. The IEP team will gather data to assist in making the determination for ESY and document that data.

How does an IEP team document ESY services?
Documentation of ESY services should specify which goal(s) will be reinforced during ESY services. Documentation should describe the type of services (such as direct instruction, specific related services, consultation, or supervision), the beginning and the ending dates of services, the minutes per week of each service, service provider, and where the service will be provided.

May a child's ESY services be provided in a district's optional summer school program?
Yes. The summer school setting could offer unique and appropriate opportunities for a child to enhance generalization of skills in a setting very similar to that of the regular school year, as well as provide frequent practice for maintenance of skills. However, ESY services must be tailored to the unique needs of the child and cannot be based solely on availability of services during the summer, or on the district's summer school schedule.

Must the IEP team consider the provision of related services as ESY services?
Yes. The IEP meeting participants must consider whether the child requires related services, such as physical therapy, occupational therapy and speech therapy, in order to benefit from special education. If a related service is necessary for the child to benefit from special education either during the ESY or regular academic school schedule, that related service must be provided.

Who may provide ESY services?
It is necessary to use licensed and qualified staff for ESY services. Non-licensed staff may be used if they are trained and supervised by licensed staff. Staffing options might include supervised practicum students, supervised student teachers, supervised para-educators, or contracted/purchased services from agencies.

Is transportation provided as a part of ESY?
Transportation is a related service and must be offered if it is necessary for the child to benefit from special education. If necessary, transportation should be

added as a related service for the duration of ESY services in the event the child would need to be transported to the site where his or her ESY services are being provided.

If a regular education setting is necessary to implement an ESY IEP for an individual child, could a district be required to pay for services in a private school setting?
School districts are required to purchase private school placements in a regular education setting if they are required to implement a child's IEP. Each child's placement determination must be individualized and based upon the content of the IEP. OSEP recognizes that a child's IEP for ESY services will probably differ from the child's regular IEP, *since the purpose of the ESY program is to prevent regression and recoupment problems.* Therefore, the placement needed to implement the child's IEP for ESY services may differ from the child's placement during the regular school year.

Can decisions about ESY be determined retrospectively?
ESY services are not earned by what happened last summer. A child is entitled to them because of what might happen next summer. The issue is whether there is significant jeopardy to the learning that occurred during the regular school year if the child is not provided ESY.

Must a full continuum of placements be maintained during the summer for ESY?
In a *Letter to Myers* (16 IDELR 290), OSEP states: "Because ESY services are provided during a period of time when the full continuum of alternative placements is not normally available for any children, the United States Department of Education does not require states to ensure that a full continuum of placements is available solely for the purpose of providing ESY services.
However, IDEA does require that options on the continuum be made available to the extent necessary to implement a child's IEP."

Does receipt of ESY services one summer assure services the following summer?
No. A child's involvement in ESY services on year does not automatically guarantee services in the follow years. Similarly, the fact that no ESY services were provided in a prior year does not mean ESY services are net needed in the current year. The decision is made on an annual basis.

Must a school district provide ESY services to a student transferring in from another school district that provided ESY services?
The new school district generally must provide ESY services as comparable services to a transfer student whose IEP from the previous school district contains those services, and may not refuse to provide ESY services to that child merely because the services would be provided during the summer. While the determination of comparable services is made on an individual basis, the new school district's IEP team may not arbitrarily decrease the level of services to be

provided to the child as comparable services.

Is the IEP team required to demonstrate regression before ESY services are provided?

No. In a *Letter to Given* (39 IDELR 129), OSEP stated that a child cannot be required to fail, or be required to demonstrate a lack of progress for an entire year, simply to prove need for ESY services. If no information is available on regression, the need may be shown by professionals knowledgeable about the child and the disability. Consideration of a student's need for ESY services must include a variety of factors (e.g., progress on IEP, history of regression or lack of recoupment of a critical life skill, prediction of regression or lack of recoupment of critical life skills, loss of independence from caretakers, likelihood of more restrictive placement, break-through learning opportunity, special circumstances, etc.).

How are ESY services determined for a child turning three over the summer months?

A child who turns three during the summer, and is on an IEP, must be considered for ESY in the same manner as any other child with a disability. When a child is going to turn three during the summer, the IEP or IFSP developed 90 days prior to the third birthday must "specify the child's program upon the third birthday, including ESY, if needed by a particular child to receive FAPE. If ESY services are not needed to provide FAPE, the date of initiation of services could be the beginning of the upcoming school year." *Letter to Anonymous* (22 IDELR 980) (OSERS 1995)

What if a parent does not agree to the child receiving ESY services?

Some parents may decide that their child does not need ESY services. In that event, a school district cannot compel a child to participate in ESY services. However, the IEP team must determine if FAPE is at issue. If FAPE is determined to be at issue, parents must be offered dispute resolution. If the IEP team determines FAPE requires ESY services, the district must notify parents of their procedural safeguards including mediation and due process procedures. When the IEP team determines the parent refusal of ESY services does not impact FAPE for the student, the parent can accept or refuse ESY services without need for due process.

Must the entire IEP be implemented during ESY services?

Only those skill areas which would suffer a decline as a result of an interruption in instruction would be addressed during ESY services.

Appendix I

Comparison of **ESY** and **Summer School** Services

Summer School Services	Extended School Year Services
Definition:	**Definition:**
An optional or permissive program provided beyond the regular school year. A school may or may not elect to operate summer classes.	Services required by (34 CFR 300) to be provided beyond the traditional school year for any child with a disability who needs special education services and/or related services in order to receive a free appropriate public education (FAPE).
Purpose:	**Purpose:**
Teaching new content or enrichment; offering recreational or academic opportunities not present during the regular school year. Children with and without disabilities benefit from additional educational opportunities.	Assuring a child's meaningful progress during the regular school year (FAPE) by maintaining learned skills and preventing loss of critical skills. If services are not provided, child's skills are temporarily or permanently lost, jeopardizing progress. ESY services are not provided for the purpose of helping children with disabilities advance in relation to their peers.
Cost:	**Cost:**
May charge fee.	Free.
Duration:	**Duration:**
Typically operated on a set schedule for a number of weeks during the summer (e.g., two, six or ten weeks) for all those who participate.	Schedule, setting, and extent of services are designed to meet the individual needs of a child in order to assure FAPE. The amount and duration of services are not determined arbitrarily by a district's summer school schedule, but by the IEP team.
Criteria:	**Criteria:**
General education setting, based on needs and interests of all children. A child's participation does not depend on a team determination of need.	Specifically designed instruction based upon a child's individual needs. IEP team determines need and extent of services to meet the unique needs of the child.

APPENDIX II

EXTENDED SCHOOL YEAR SERVICES CHECKLIST

_____ The child has been considered for ESY at least annually by the IEP team.

_____ The current IEP is the basis for ESY services.

_____ ESY is considered for all the goals/objectives listed in the IEP.

_____ There is a likelihood of *significant* regression during long interruptions of instruction and/or therapy without ESY, and the rate of probable recoupment of skills will be excessive.

_____ Other factors considered by the team:

_____ Degree of impairment
_____ Opportunities at home
_____ Physical issues
_____ Other factors identified by the team:
_____
_____
_____

_____Program interruption
_____Critical life skills
_____Interfering behaviors
_____Category of disability

_____ The team documented the need for ESY retroactively through:

_____ Historical data
_____ Observations / charting
_____ Pre/Post testing
_____ Other:
_____
_____
_____

_____ The team identified the need for ESY prospectively by:

_____ Documented opinions of team members
_____ Other:
_____
_____
_____

_____ No other services are available during the summer to prevent regression.

APPENDIX III

DETERMINATION OF ESY SERVICES

DOCUMENTATION REVIEWED

A. Current IEP, focused on the present levels of educational performance, annual goals, and short-term instructional objectives
B. Pre- and post-testing using criterion-referenced assessment procedures.
C. Parent/Teacher activities which specifically addressed the maintenance of learned skills while programming was interrupted.
D. Consideration of pertinent medical, psychological, and educational data.
E. Consideration of a data base of regression/recoupment. Data should be gathered and documented periodically during the regular school year which reflects the regression/recoupment cycle experienced following interruptions of instruction services.
F. Areas of learning which are identified as an integral part of a skill area required in order for the student to reach his/her assessed potential, such as social, motor, behavioral, academic, self-help, and communicative abilities.
G. Documented evidence showing that substantial regression caused by interruption in educational programming, together with the student's limited recoupment capacity may result in a significant delay in recoupment of critical skills.

QUESTIONS ASKED

A. What critical skills is the student working on?
   - Does the student's IEP have annual goals with skills essential for the student's maintenance of academics (for preschool children-maintenance of appropriate activities), behavior, communication, or self-sufficiency and independence?
   - Is the student working on skills that are required across a variety of environments?
   - Is the student working on decreasing behaviors that interfere with the student's functioning at school or in the community?
   - Is the student working to develop behaviors to increase the student's independence or functioning at school or in the community?
   - Is the student working on skills designed to increase the student's independence, such that if the student cannot perform the skills, assistance from another person will be necessary (e.g. daily living skills, academic skills, behavioral skills)?

B. Were any IEP goals unmet? Are there any barriers to the student meeting the IEP goals?
   - Has the student had frequent health-related absences that have impeded the student's progress on his or her IEP goals?
   - Has the student experienced behaviors that have interfered with the student's ability to progress toward achievement of his or her IEP goals?

C. What is impacting the student's rate of progress?
   - Is the student's rate of progress or lack thereof likely to prevent the student from

receiving educational benefit during the school year? (***NOTE***: lack of progress on goals and objectives is NOT a prerequisite to ESY services.)

D. Is there anything unique about the student's present level of performance or the nature or severity of the student's disability that would indicate the need for ESY services?

E. Is there historical or predictive data that the student has or will experience skill regression during an interruption of educational services or that the student has or will experience difficulty recouping lost skills?
    - Do the student's difficulties with regression and recoupment make it unlikely that the student will maintain the critical skills and behaviors relevant to the student's IEP?

F. Is there a likelihood of the student being placed in a more restrictive placement?
    - Is the student working on skills designed to allow the student to move to a less restrictive environment or to prevent placement in a more restrictive environment?

G. Are continuous or year-round services an integral part of the student's ability to acquire or retain a skill or behavior?
    - Is the student at the point of readiness for acquiring a critical skill such that an interruption of services will result in the loss or significant reduction of the student's ability to acquire the skill?

H. Are there special circumstances unique to this student's situation and not addressed by the other factors that will have an impact on the student's need for ESY services or the provision of a free appropriate public education (FAPE)?
    - Is the student at a critical point of meeting an IEP goal related to self-sufficiency and independence?
    - If a student's behaviors have previously interfered with the student's ability to acquire a critical skills, is there a window of opportunity for assisting the student to acquire that skill because the previously interfering behavior is currently under control or otherwise diminished?

APPENDIX IV

EXTENDED SCHOOL YEAR (ESY) IS:	EXTENDED SCHOOL YEAR (ESY) IS NOT:
• Based only on the individual child's specific critical skills that are key to his/her overall educational progress as determined by the IEP team. • Designed to maintain mastery of critical skills and objectives represented on the IEP and achieved during the regular school year. • Designed to maintain a reasonable readiness to begin the next year. • Based on multi-criteria and not solely on regression/recoupment. • ESY services focuses on specific critical skills where regression may occur. • Considered as a strategy for minimizing the regression of skill, thus shortening the time needed to gain back the same level of skill proficiency. • Deliverable in a variety of environments such as: a) Home with the parent teaching, and staff consulting b) School based c) School based with community activities d) Related services along or in tandem with the above.	• A mandated 12-month service for all children with disabilities. • Required for the convenience of the school or parents and, therefore, cannot serve as a day care or respite care service. • Required or intended to maximize educational opportunities for any child with a disability. • Necessary to continue instruction for all of the previous year's IEP goals. • Intended to help children with disabilities advance in relation to their peers. • Required solely when a child fails to achieve IEP goals and objectives during the school year. • To provide a child with education beyond is prescribed IEP goals and objectives.

REFERENCES

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PROVIDING EQUITABLE SERVICES TO STUDENTS AND TEACHERS IN NON-PUBLIC SCHOOLS UNDER THE CARES ACT PROGRAMS

U.S. Department of Education
Washington, D.C. 20202

April 30, 2020

Purpose of this Document

The purpose of this document is to provide information about equitable services for students and teachers in non-public schools under the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), Public Law 116-136, 134 Stat. 281 (Mar. 27, 2020). The CARES Act authorized the Education Stabilization Fund (ESF), which is a new appropriation of approximately $30.75 billion that creates funding streams for several distinct education programs that address the impact of the Novel Coronavirus Disease 2019 (COVID-19) on educational services across the Nation. Under these programs, the U.S. Department of Education (Department) will make awards to Governors, State educational agencies (SEAs), and institutions of higher education (IHEs) to help States to prevent, prepare for, and respond to the devastating effects of COVID-19. The provisions of the CARES Act relevant to the ESF and other Department programs are available on the Department's website at https://oese.ed.gov/offices/education-stabilization-fund/.

Two programs in the ESF require a local educational agency (LEA) that receives funds to provide equitable services to students and teachers in non-public schools:

- The Governor's Emergency Education Relief Fund (GEER Fund) totaling $2,953,230,000 (Section 18002 of the CARES Act).
- The Elementary and Secondary School Emergency Relief Fund (ESSER Fund) totaling $13,229,265,000 (Section 18003 of the CARES Act).

Other than statutory and regulatory requirements included in the document, such as those pursuant to the authorizing statute and other applicable laws and regulations, the contents of the guidance do not have the force and effect of law and are not meant to bind the public in any way. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies. In addition, it does not create or confer any rights for or on any person.

The Department will provide additional or updated information as necessary on the Department's COVID-19 webpage: https://www.ed.gov/coronavirus. If you have questions that are not answered in this document, please e-mail COVID-19@ed.gov.

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Providing Equitable Services to Students and Teachers in Non-Public Schools under the CARES Act Programs

1. Does the requirement to provide equitable services to students and teachers in non-public schools apply to any programs under the CARES Act?

Yes. The CARES Act establishes two new funds to which equitable services requirements apply. Specifically, a local educational agency (LEA) that receives funds under either the Governor's Emergency Education Relief Fund (GEER Fund) (section 18002 of the CARES Act) or the Elementary and Secondary School Emergency Relief Fund (ESSER Fund) (section 18003 of the CARES Act) ("CARES Act programs" for purposes of this document) to provide equitable services to students and teachers in non-public schools in the same manner as provided under section 1117 of the Elementary and Secondary Education Act of 1965 (ESEA). (Section 18005(a) of the CARES Act).

An institution of higher education or education-related entity that receives funds under the GEER Fund is not required to provide equitable services to students and teachers in non-public schools.

2. What is a "non-public school" under the CARES Act programs?

A "non-public school" means a non-public elementary or secondary school that (A) is accredited, licensed, or otherwise operates in accordance with State law; and (B) was in existence prior to the date of the qualifying emergency for the CARES Act programs. For purposes of this definition, the date of the qualifying emergency is March 13, 2020. (Section 18007(6) of the CARES Act).

3. Is a for-profit non-public school eligible to receive equitable services for its students and teachers under the CARES Act programs?

No. A for-profit non-public school is not eligible to receive equitable services for its students and teachers under the CARES Act programs. Section 18007(6) of the CARES Act defines a "non-public school" as a non-public elementary or secondary school. Section 18007(8) of the CARES Act incorporates the definitions in ESEA section 8101 for any terms not defined in the CARES Act. ESEA section 8101(19) and (45) defines "elementary school" and "secondary school," respectively, and specifies that they must be non-profit.

4. Which LEA is responsible for providing equitable services to non-public school students and teachers under the CARES Act programs?

The Department has determined that, under the CARES Act programs, the LEA in which a non-public school is located is responsible for providing equitable services to students and teachers in the school, as it is under most ESEA programs that require an LEA to provide equitable services. Outside of Title I, Part A, the responsibility typically falls on the LEA in which a non-public school is located because equitable services are generally available

to all students or teachers in the non-public school in the LEA and the LEA in which the school is located is closest and best able to meet the needs of students and teachers.

Title I, Part A of the ESEA is different; ESEA section 1117 sets forth a student residency requirement, rather than a school location requirement, for receipt of equitable services under Title I, Part A. Only low-achieving students who live in a participating Title I public school attendance area are eligible for services and, therefore, the LEA where students reside is responsible for providing equitable services. The CARES Act programs have no such residency requirement for eligibility for services. Rather, the CARES Act programs provide LEAs full discretion, unless funds are targeted for a specific purpose or population of public and non-public school students by the Governor under the GEER Fund or by an SEA through the SEA reserve under the ESSER Fund (see section 18003(e) of the CARES Act), to use CARES Act funds to provide educational services to students in public and non-public schools in the LEA through a broad range of allowable activities. Thus, providing equitable services with CARES Act funds is similar to other ESEA programs where equitable services are provided by the LEA in which a non-public school is located.

5. Must an LEA or another public agency maintain control of CARES Act funds used to provide equitable services?

Yes. Control of funds for services and assistance provided to non-public school students and teachers under the CARES Act programs, and title to materials, equipment and property purchased with such funds, must be in a public agency, and a public agency must administer such funds, materials, equipment, and property. In other words, no funds may go directly to a non-public school. 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. (Section 18005(b) of the CARES Act).

6. Who is responsible for initiating the consultation process and how should it begin?

Similar to how an LEA provides equitable services under the ESEA, an LEA is responsible for initiating the consultation process. It must contact officials in all non-public schools in the LEA to notify them of the opportunity for their students and teachers to obtain equitable services under the CARES Act programs. Through this initial contact, the LEA can explain the services available under the CARES Act programs and how non-public school students and teachers can participate. If non-public school officials have not been contacted, they may contact the LEA or the State ombudsman to inquire about equitable services under the CARES Act programs.

If non-public school officials want equitable services for their students and teachers, the LEA must consult with those officials during the design and development of the LEA's programs and before the LEA makes any decision that affects the opportunity of non-public school students and teachers to participate in the activities funded under the CARES Act programs. If a non-public school declines to participate in the CARES Act programs or does not respond to an LEA's good-faith effort to make contact, the LEA has no further responsibility to provide equitable services to students or teachers in that school. The LEA, however, must be able to demonstrate that it made a good faith effort to contact all the non-public schools in the LEA.

7. How does an LEA that receives funds under the CARES Act programs provide equitable services "in the same manner as provided under section 1117 of the ESEA"?

An LEA that receives funds under the CARES Act programs must provide equitable services to students and teachers in a non-public school in the same manner as provided under section 1117 of the ESEA, as determined in consultation with representatives of non-public schools. (Section 18005(a) of the CARES Act). This requirement, on its face, necessitates that the Department interpret how the requirements of section 1117 apply to the CARES Act programs, given that an LEA under the CARES Act programs may serve all non-public school students and teachers without regard to family income, residency, or eligibility based on low achievement. Unless the requirements of section 1117 would limit equitable services under the CARES Act programs, we conclude they apply as outlined below.

We have interpreted "in the same manner as under section 1117" in light of the significantly broader eligibility and uses of funds authorized under the CARES Act as compared to Title I, Part A, reasonably reconciling differences. In doing so, we gave meaning to section 1117(a)(3), which requires educational services and other benefits for students in non-public schools to be equitable in comparison to those for public school students. The services that an LEA may provide under the CARES Act programs are clearly available to *all* public school students and teachers, not only low-achieving students and their teachers as under Title I, Part A. Similarly, there is no limitation on residence in a participating Title I public school attendance area for services provided in public schools under the CARES Act programs. For CARES Act services to be equitable in comparison to public school students and teachers, it follows that the same principles must apply in providing equitable services to non-public school students and teachers.

The following describes how the provisions of ESEA section 1117 apply, reconciled, when necessary, to meet the purposes of the CARES Act programs:

- 1117(a)(1) – Under Title I, Part A, an LEA must provide equitable services to low-achieving students as defined in ESEA section 1115(c) who reside in a participating Title I public school attendance area and attend a non-public school and their teachers. Under the CARES Act programs, an LEA may provide equitable services with CARES Act funds to any students and teachers in non-public schools, unless limited by a Governor under section 18002 of the CARES Act or an SEA through the SEA's reserve under section 18003(e) of the CARES Act. (See Questions #8 and #9).
- 1117(a)(2) – Under both Title I, Part A and the CARES Act programs, an LEA must provide equitable services and other benefits, including materials and equipment, that are secular, neutral, and nonideological.
- 1117(a)(3)(A) – Under both Title I, Part A and the CARES Act programs, an LEA must provide services and other benefits for non-public school students and teachers in a timely manner that are equitable in comparison to the services and benefits provided for public school students and teachers.

- 1117(a)(3)(B) – Under Title I, Part A, an SEA must designate an ombudsman to monitor and enforce the equitable services requirements. An SEA must use the ombudsman also to monitor and enforce the requirements of the CARES Act programs that an LEA provide equitable services to students and teachers in non-public schools.
- 1117(a)(4)(A) – Under both Title I, Part A and the CARES Act programs, an LEA must determine the proportional share available to provide equitable services to students and teachers in non-public schools based on the total amount of funds an LEA receives prior to any allowable expenditures or transfers. Under the CARES Act programs, the LEA calculates the proportional share based on the number of children enrolled in each non-public school whose students or teachers participate in the CARES Act programs compared to the number of students enrolled in public schools in the LEA. The LEA makes this determination under each CARES Act program separately. (See Question #10).
- 1117(a)(4)(B) – Under Title I, Part A, an LEA must obligate funds available for equitable services in the fiscal year for which the funds are received by the LEA. An LEA must obligate CARES Act funds for equitable services in the fiscal years for which those funds are intended for services to address the impact of COVID-19.
- 1117(a)(4)(C) – Under both Title I, Part A and the CARES Act programs, an SEA must provide notice in a timely manner to appropriate non-public school officials in the State of the allocation of funds for educational services and other benefits that each LEA has determined are available for non-public school students and teachers.
- 1117(b)(1) – Under both Title I, Part A and the CARES Act programs, an LEA must consult with appropriate non-public school officials during the design and development of the LEA's activities on relevant issues such as those contained in this section of Title I, Part A. The LEA and non-public school officials shall both have the goal of reaching agreement on how to provide equitable and effective services and the LEA must transmit the results of that agreement to the ombudsman.
- 1117(b)(2) – Under both Title I, Part A and the CARES Act programs, if an LEA disagrees with the views of non-public school officials during consultation, the LEA must provide in writing to the non-public school officials the reasons why the LEA disagrees.
- 1117(b)(3) – Under both Title I, Part A and the CARES Act programs, consultation must occur before an LEA makes any decision that affects the opportunities of non-public students and teachers to receive equitable services. Meetings between the LEA and non-public school officials need not occur in person if they cannot be conducted due to closed schools or social distancing rules. In this case, the Department recommends LEAs and non-public school officials consult remotely.
- 1117(b)(4) – Under both Title I, Part A and the CARES Act programs, consultation must include discussion of service delivery mechanisms an LEA may use to provide equitable services.
- 1117(b)(5) – Under both Title I, Part A and the CARES Act programs, an LEA must maintain and provide to the SEA written affirmation signed by non-public

school officials that timely and meaningful consultation has occurred and, if non-public school officials do not provide such affirmation, the LEA must forward to the SEA the documentation that such consultation has, or attempts at such consultation have, taken place.

- 1117(b)(6) – Under both Title I, Part A and the CARES Act programs, non-public school officials have a right to file a complaint with the SEA; the SEA must provide services directly or through contracts if requested to do so by non-public school officials and the SEA determines that the LEA did not meet applicable requirements.
- 1117(c)(1) – Under Title I, Part A, to determine the proportional share, an LEA must calculate the number of children, ages 5 through 17, who are from low-income families and reside in a participating Title I public school attendance area. Because an LEA determines the proportional share based on enrollment in public and non-public schools under the CARES Act programs, the LEA need not collect poverty data from non-public schools (see Question #10 for information on determining the proportional share of CARES Act funds the LEA must reserve to provide equitable services to non-public school students and teachers).
- 1117(c)(2) – Under Title I, Part A, non-public school officials may file a complaint with the SEA if they dispute the count of children from low-income families. Because an LEA need not collect poverty data to determine the proportional share available for equitable services under the CARES Act programs, there would be no reason for non-public school officials to file a complaint regarding poverty data with the SEA.
- 1117(d) – Under Title I, Part A, control of funds and title to materials, equipment, and property must be in public agency. With respect to the CARES Act programs, this provision is superseded by section 18005(b) of the CARES Act, which also requires public control of funds. (See Question #5).

8. Must an LEA offer to provide equitable services under the CARES Act programs to students and teachers in all non-public schools located in the LEA, even if a non-public school has not previously participated in equitable services under Title I, Part A or Title VIII of the ESEA?

Yes. An LEA must offer to provide equitable services under the CARES Act programs to students and teachers in all non-public schools located in the LEA, even if a non-public school has not previously participated under Title I, Part A or Title VIII of the ESEA.

9. Are all students and teachers in a non-public school eligible to receive equitable services under the CARES Act programs?

Yes. All students and teachers in a non-public school are eligible to receive equitable services under the CARES Act programs, unless a Governor (under the GEER Fund) or an SEA (through the SEA reserve under the ESSER Fund) targets funds for a specific purpose or population of public and non-public school students. Unlike Title I, Part A, equitable services under the CARES Act programs are not based on residence in a participating Title

I public school attendance area and are also not limited only to low-achieving students and their teachers.

10. How does an LEA determine the proportional share of funds that must be reserved to provide equitable services to non-public school students and teachers under the CARES Act programs?

A. What is the base amount on which the proportional share is determined?

Under ESEA section 1117(a)(4)(A)(ii), an LEA must determine the proportional share available for equitable services from the total amount of Title I, Part A funds it receives prior to reserving funds for allowable expenditures such as administrative costs or districtwide expenditures, and before making allocations to participating public schools. Because section 18005(a) of the CARES Act requires an LEA to provide equitable services under the CARES Act programs "in the same manner as provided under section 1117," an LEA must use the total allocation it receives under each CARES Act program to determine the proportional share available for equitable services before reserving funds for other purposes.

B. What data does an LEA use to determine the proportional share?

An LEA uses enrollment data in non-public schools whose students and teachers will participate under the CARES Act programs compared to enrollment in public schools in the LEA to determine the proportional share. Under the CARES Act programs, services are available for all students—public and non-public—without regard to poverty, low achievement, or residence in a participating Title I public school attendance area. An LEA that receives CARES Act funds uses those funds to provide educational services to students in both public and non-public schools through a broad range of allowable activities. Using enrollment to determine the proportional share from which to provide equitable services will contribute to the equitable treatment of children and teachers within the statutory universe of permissible uses for CARES Act dollars by allowing all students and teachers in a non-public school to receive services that are equitable compared to those available to all public school students and teachers. (See ESEA section 1117(a)(3)).

C. How does an LEA calculate the proportional share?

To calculate the proportional share for equitable services under the CARES Act programs, an LEA determines the overall number of children who are enrolled in public schools and non-public schools in the LEA that wish to participate under one or both CARES Act programs. Using the proportion of students who are enrolled in participating non-public schools, the LEA determines the amount of funds available for equitable services based on that proportional share of the LEA's total allocation under each CARES Act program separately. For example, an LEA receiving $100,000 under the GEER Fund and $900,000 under the ESSER Fund, and with 1,350 public school students and 150 non-public school students, would determine the proportional share as follows:

EXAMPLE – DETERMINING THE PROPORTIONAL SHARE			
	Public	**Non-Public***	**Total**
Enrollment	1,350	150	1,500
Proportion	90%	10%	100%
Proportional Share GEER Fund	$90,000	$10,000	$100,000
Proportional Share ESSER Fund	$810,000	$90,000	$900,000

*Non-public schools participating under the CARES Act programs.

11. After an LEA has determined the proportional share of funds for equitable services under each CARES Act program, how does it then determine the amount of funds available for services to students and teachers in individual non-public schools?

For consultation purposes, in order to determine what equitable services to provide to students and teachers in a given non-public school, an LEA, after reserving funds that are reasonable and necessary for administering equitable services under the CARES Act programs, would divide the remainder of the proportional share of funds available for equitable services by the total enrollment in non-public schools whose students and teachers will participate in each of the CARES Act programs to obtain a per-pupil amount. The LEA would then multiply that per-pupil amount by the enrollment in an individual non-public school to determine the amount of services the LEA can provide to students and teachers in that school. With agreement between the LEA and appropriate non-public school officials, the LEA may pool funds among a group of non-public schools and provide equitable services to students and teachers in non-public schools within the pool based on need without regard to how the funds were generated. (See ESEA section 1117(b)(1)(J)(i)).

12. Do the requirements in 34 C.F.R. § 200.66 apply to equitable services under the CARES Act programs?

No. The requirements in 34 C.F.R. § 200.66 do not apply to equitable services under the CARES Act programs. 34 C.F.R. § 200.66 is a Title I, Part A regulation that requires an LEA to provide Title I, Part A services that (1) supplement, and in no case supplant, the services that would, in the absence of Title I, Part A services, be available to participating non-public school students; and (2) only meet the needs of participating non-public school students and not the needs of the non-public school or the general needs of children in the non-public school. These provisions are necessary in the Title I, Part A context because equitable services must be supplemental to what non-public students otherwise receive and may only be provided to low-achieving students who reside in a participating Title I public school attendance area and attend a non-public school.

Equitable services under the CARES Act programs are much broader than under Title I, Part A. Equitable services under the CARES Act programs, by definition, may benefit a non-public school, such as purchasing supplies to sanitize and clean the facility, or all students in a non-public school, such as any activity authorized under the ESEA. Unlike Title I, they are not based on residence in a participating Title I public school attendance

area or limited only to low-achieving students. Moreover, the CARES Act does not have a supplement not supplant requirement.

13. Is a non-public school whose students and teachers receive equitable services under the CARES Act programs a "recipient of Federal financial assistance"?

No. A non-public school whose students and teachers receive equitable services under the CARES Act programs is not a "recipient of Federal financial assistance." A public agency must control and administer the CARES Act funds; in other words, no funds may go directly to a non-public school. (See Question #5). Thus, a non-public school is not a recipient of Federal financial assistance by virtue of its students and teachers receiving equitable services from an LEA under a CARES Act program. As a result, certain Federal requirements that apply to a recipient of Federal financial assistance are not directly applicable to a non-public school whose students or teachers receive equitable services under the CARES Act programs, unless the school otherwise receives Federal financial assistance for other purposes.

14. What services and benefits under the CARES Act programs are available to non-public school students and teachers?

In general, the services and benefits available to non-public school students and teachers are the same as those available to public school students and teachers. Specifically, the ESSER funds that flow to LEAs by formula may be used for a broad range of allowable activities. (See section 18003(d) of the CARES Act). The ESSER funds that an SEA may reserve for State purposes may also be used for a broad range of activities to address issues responding to COVID-19, unless the SEA decides to target them for a specific purpose or population of public and non-public school students. For example, an SEA could target the SEA reserve to provide technology to support distance learning for public and non-public school students from low-income families. (See section 18003(e) of the CARES Act). Similarly, a Governor may target GEER funds that it makes available to an LEA for a specific purpose or population of public and non-public school students. (See section 18002(c)(1) or (3) of the CARES Act).

In sum, equitable services permitted under sections 18002(c)(1) or (3), as applicable, and 18003(d) of the CARES Act must be available to best meet the needs of non-public school students and teachers, as determined through timely and meaningful consultation and consistent with any specific purposes established by a Governor under the GEER Fund or SEA through the SEA reserve under the ESSER Fund, regardless of the specific uses determined by the LEA to meet its own students' and teachers' particular needs.

As noted in Question #5, the control of any services or assistance provided to students and teachers in a non-public school, and title to materials, equipment, and property purchased with CARES Act funds, must be in a public agency and a public agency must administer those funds, materials, equipment, and property. A public entity must provide those services either directly or through a contract with a public or private entity.