



**STATE OF SOUTH CAROLINA**  
**DEPARTMENT OF EDUCATION**

**MOLLY M. SPEARMAN**  
*STATE SUPERINTENDENT OF EDUCATION*

**MEMORANDUM**

**TO:** District Superintendents

**FROM:** John R. Payne  
Deputy Superintendent, Division of Federal Programs and Accountability

**DATE:** September 22 2020

**RE:** ESSER Equitable Services Updated Guidance

On Friday, September 4, 2020, a federal court judge ruled that Secretary of Education Betsy DeVos and the United States Department of Education (USED) violated the Coronavirus Aid, Relief and Economic Security (CARES) Act in issuing a [rule](#) directing public schools to allocate a portion of their CARES funding to private schools. This ruling applies to all states and districts subgrantees (including state-operated programs) and to the CARES Act Elementary and Secondary School Emergency Relief (ESSER) funds.

The ruling in [NAACP v. DeVos](#) indicates that the proportionate share established for equitable services required under CARES Act need not comply with the final rule established by the USED; rather that districts should comply with [Section 1117](#)<sup>1</sup> of the Elementary and Secondary Education Act (ESEA), as reauthorized by the Every Student Succeeds Act (ESSA) when determining the proportionate amount for equitable services. As a result of the judge's order related to the matter, the SCDE provides the following guidance.

The initial guidance provided by the USED required that the proportionate share for equitable services be based on the enrollment of the district and the participating, nonprofit private schools. The subsequent [final rule](#) indicated that districts could determine the proportionate share based on enrollment, or could base the amount on Title I status as outlined in Section 1117 of the ESEA if the district limited its budgeting and expenditures of ESSER funds solely on Title I schools. Because the ESSER funds are emergency relief funds, the SCDE intentionally moved swiftly to provide subgrants to districts so as to provide financial relief caused by the COVID-19 pandemic.

Districts may be in one of several stages with respect to their meaningful consultation and provision of equitable services to participating, nonprofit private schools.

1. *Districts that determined and have expended the proportionate share based on enrollment.* For districts that have completed meaningful consultation, established a proportionate share based on enrollment, and have expended all funds, no other action is required at this time. Districts may not recoup goods or services already provided, excepting assets that are inventoried such as laptops. Districts have discretion in determining whether or not to recall assets such as laptops, but must ensure that the proportionate amount is based on any qualifying students in participating, nonprofit private schools as outlined in Section 1115(c) and 1117 of the ESEA.
2. *Districts that determined and have not yet expended all of the proportionate share based on enrollment.* Districts that have completed meaningful consultation, established a proportionate share based on enrollment, but have not expended all funds, may elect to reconvene the participating, nonprofit private schools and adjust the proportionate share based on Title I status. If the district finds in its readjustment that it has met its obligation for equitable services by reaching or exceeding the proportionate share, no other steps need to be taken. If a district has not yet reached the re-adjusted proportionate share, the district should engage in a meaningful consultation with private school representatives on how the remaining services will be provided directly or indirectly through a third-party vendor. If needed, a district may revise its ESSER budget and submit an [ESSER Spending Plan Amendment](#).
3. *Districts that have not yet determined the proportionate share.* For any district that has yet to engage in meaningful consultation with representatives of participating, nonprofit private schools, districts should determine the proportionate amount based on the methodology outlined in Section 1117 of the ESEA.
4. *Districts that determined and have expended the proportionate share based on Title I status.* For districts that determined the proportionate share based on Title I status (as outlined in Section 1117 of the ESEA), no additional action is required with respect to the provision of equitable services, as long as the district has ensured that any qualifying child at the private school is included in the calculation methodology. Districts that determined proportionate share based on Title I status are no longer obligated to expend ESSER funds solely on Title I schools, therefore districts should consider whether or not it needs to revise its ESSER budget and submit an [ESSER Spending Plan Amendment](#) given the increased flexibility.

Please be advised to carefully review the children covered by Section 1115(c) of the ESEA, as those subgroups of children apply to private schools, which are entitled to equitable services. Those subgroups include children who are economically disadvantaged, children with disabilities, migrant children, or English learners. Furthermore, please be reminded that no funds may go directly to the private school; and that the district must provide directly, or through a

third-party, the equitable services determined in the meaningful consultation with representatives of the participating, nonprofit private schools within the district's jurisdiction.

In addition, if your district needs to reconvene with representatives from the participating, nonprofit private schools, please revise and submit a new [Non-Public School Consultation](#) Form to [scesser@ed.sc.gov](mailto:scesser@ed.sc.gov). Any Spending Plan Amendments must be submitted to [scesser@ed.sc.gov](mailto:scesser@ed.sc.gov) for approval prior to rebudgeting funds in the SCDE's Grants Accounting Processing System (GAPS).

If you have any questions regarding this, please e-mail [scesser@ed.sc.gov](mailto:scesser@ed.sc.gov). Additional resources related to ESSER funds may be found online at SCDE's [main ESSER web page](#)

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<sup>i</sup> See page 79 for Section 1117; see page 70 for Section 1115(c).