

AOE Testimony: Questions on JFO Grant #3011 - ESSER

Testimony To: Legislative Joint Fiscal Committee, Vermont General Assembly

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Thank you for the opportunity to clarify our earlier comments to the Joint Fiscal Committee. It may be helpful for members of the committee to review the [Agency's guidance to SU/SDs](#). There seems to be some confusion about the context in which SU/SDs choose what was discussed as "option 1" and "option 2" during the Agency's last presentation to JFC. We apologize for any confusion that we caused and hope to clarify in this document so that we can have a productive conversation with you at the committee's next meeting.

We would like to make some initial comments about ESSER funds generally and the sub-issue of equitable services specifically before addressing your written questions.

ESSER Grants and Allowable Uses

The amount of ESSER funds to be granted to each SU/SD is a fixed amount. That amount is calculated based on the percentage of Title I funds each SU/SD received in FY2020 as compared to the total Title I funds. Whether an SU/SD chooses "Option 1" or "Option 2" for meeting its obligation to provide equitable services has no impact on the SU/SD's share of ESSER funds.

Each SU/SD has sole discretion by federal law in deciding how to spend ESSER funds, as long as the uses are within the 12 categories outlined in sec. 18003(d) of the CARES Act. The allowable uses are broad and are targeted at expenses that are common across SU/SDs, such as purchase and distribution of PPE, training in sanitation protocols, planning for remote delivery of education, purchase of education technology and professional development for staff. The Agency has published [planning guidance](#) that describes the most common expense items with information about which funding streams, including ESSER, are available to support the costs.

Equitable Services to Non-Public Schools

Sec. 18005(a) of the CARES Act states that each LEA receiving ESSER funds "shall provide equitable services in the same manner as provided under section 1117 of the ESEA of 1965 to students and teachers in non-public schools, as determined in consultation with representatives of non-public schools." After passage of the CARES Act, USDOE issued non-regulatory guidance that directed equitable services amounts to be calculated by LEAs based on the total enrollment of students in non-public schools. This guidance was surprising and concerning to the Agency and our fellow SEAs. Calculation of equitable services is a routine task for LEAs who receive Title I funds. The normal method of calculating this subset of funds uses the

number of low-income students in non-public schools, not total enrollment. The impact of the USDOE guidance was to increase the amount of ESSER funds that SU/SDs have to spend providing equitable services, and leaves fewer dollars for the SU/SDs to flexibly spend.

As a result of the pushback from SEAs and national advocacy organizations, USDOE formalized its initial guidance as a binding rule. In its interim final rule (IFR), SU/SDs must choose between two options for determining how many of its ESSER dollars must be spent on equitable services.

1. Option 1 - an SU/SD may choose to use ESSER funds in all its public schools, including its Title I schools.
 - a. The amount dedicated to equitable services is based on the enrollments of non-public schools that choose to participate as a percentage of the total enrollment of all the public and participating non-public schools.
 - b. Supplement versus supplant requirements do not apply.
2. Option 2 - the SU/SD chooses to use all its ESSER funds in only its Title I public schools.
 - a. Supplement versus supplanting requirements must be followed.
 - b. The amount dedicated to equitable services may be based on:
 - i. enrollments in both the LEA's public schools and the participating non-public schools within the LEAs geographic boundaries as in Option 1,
 - ii. the amount calculated for equitable services the LEA used in FY2020, or
 - iii. a new count of low-income students, aged 5-17, at both participating non-public schools and the SU/SD's Title I public schools.

Regardless of which option an SU/SD chooses, the proportional share dollars remain in the control of the public entity, the SU/SD. The SU/SD may provide equitable services to students and teachers in participating non-public schools by providing services directly or by contracting for services.

As noted in the Committee meeting, litigation has been brought by other states to ensure proportional share for equitable services is based on poverty counts, not enrollments. AOE has made the recommendation to SU/SDs that if they choose Option 1 (proportional share based on enrollment), they calculate the dollars for participating approved independent schools both by poverty counts and enrollments, use the dollars based on poverty counts for equitable services, and set aside the difference between the two methods as a reserve until the litigation is settled.

Responses to Questions from Representative Fagan:

1. Can these funds be accessed by private schools? If yes to first question, how do you envision a private school with children behind in reading, math, etc. accessing these funds or the help these funds are meant to provide in order to help our children?
 - a. Answer: Each public SU/SD has an obligation to consult with the private schools within its geographic boundaries about whether the private school would like to participate in services that will be provided by the public SU/SD for the benefit of students and teachers in the private schools. These services are known as "equitable services." The amount of the SU/SD's ESSER allocation that must be

devoted to these activities is called “proportional share.” The dollars set aside for equitable services must remain in the control of the public SU/SD – they are not sub-granted to the private schools. However, the SU/SD must either directly run programming for the benefit of private school students/staff or contract with a third party to make programming and services available to students/staff in private schools. Yes, a new tutoring program or reading program, etc., could be provided to fulfill the SU/SD’s obligation to offer equitable services. There are many possible uses, and the SU/SD is required to take into account input from the private schools before it makes a plan to use the funds.

2. How does a private school purchase COVID appropriate cleaning supplies or plexiglass or whatever?
 - a. Answer: There are several funding streams that AOE can identify for covering these costs. A approved independent school could apply for reimbursement under Act 120, sec. A.50(c)(2) of 2020. These funds are available up to \$422 per publicly funded pupil and can include reimbursement for cleaning supplies and PPE. Upon consultation with private schools, (see above), an SU/SD can make the decision to use ESSER equitable services dollars to purchase cleaning supplies and/or PPE for uses in private schools. However, title to the goods purchased with ESSER equitable services dollars must remain in the public SU/SD. This most likely means that any durable PPE that is purchased must be returned to the public SU/SD after the COVID-19 emergency has passed and the PPE is no longer being used. We do believe that equitable services dollars can be used to purchase items such as masks, hand sanitizer and cleaning supplies for use in private schools.

Responses to Questions from Senator Kitchel:

It does not appear that the Agency is making any effort to influence the decision over which option for schools to select. Some of us raised the following question:

1. To what extent can the State’s \$31 million allocation under ESSER be used to reduce the FY2021 deficit (by clawing back the amount of the grant through the education payment)?
 - a. Answer: If the state reduces FY2021 education fund payments to SU/SDs, by the amount that each SU/SD was allocated in ESSER funds, the state should be careful to not violate the supplanting prohibition that may attach to certain SU/SD allocations. See the discussion of equitable services above. Other than attending to issues around supplement not supplant, the AOE is not aware of any federal prohibition against offsetting education fund payments with ESSER allocations that cover eligible expenditures.
2. Legislative Council’s reading of the guidance is that if the State chooses the low-income student option, we may be precluded from doing so because the Title I supplement-not-supplant requirement would come into play. Under the other option, only a

maintenance of effort requirement would apply if the ESSER allocation was distributed to all schools, including private schools, based on enrollment.

- a. Answer: The Interim Final Rule makes it clear that SU/SDs, not the Agency, must make the decision regarding which calculation of equitable services dollars to utilize. The Agency as SEA is not permitted to decide on behalf of SU/SDs. Where supplanting prohibitions apply, there are two levels of analysis to keep in mind. First, at the local level, SU/SDs cannot allocate money among the districts and schools within the SU/SD in a way that treats Title I schools differently than non-Title I schools. At the state level, the state must not use ESSER funds by making funding decisions that supplant the “extra” dollars available to Title I schools within SU/SDs that select the low-income option for calculating equitable services. Overall, each SU/SD has to be treated the same in any contemplated state funding decisions, regardless of whether particular SU/SD is using its ESSER funds only in Title I schools (Option 1 or Option 2).
3. For many Legislators, our priority has been to reduce the pressure on the EF through the use of ESSER funding. Are there ways to influence the local decision on which option to select through the creative use of the CRF money we have currently set aside for K-12? How does the Agency see the relationship between CRF and ESSER funding to schools?
 - a. Answer: We would like to discuss the impacts of state level funding strategies on SU/SD decision making and operations. We are generally supportive of creative uses of ESSER and CRF funds to alleviate the pressure on the education fund. Additionally, since ESSER funds have broader allowable uses than CRF funds, AOE is suggesting that SU/SDs utilize CRF funds first for all eligible costs, and then use ESSER funds.

Responses to Questions from Representative Ancel:

1. Is it possible to have the state of Vermont designated as an LEA for the purpose of the ESSER grant? In that way, the state would be able to manage the allocation of these funds equitably and in a way that could help support the Education Fund.
 - a. Answer: As a function of ESSER and the intent of Congress, we do not believe the state of Vermont (or the AOE) can be designated as an LEA or as the direct recipient of the ESSER grant. ESSER is clear that the SEA must allocate the funds to the state’s LEAs, and that LEAs have sole authority to determine how to use ESSER funds, within the requirements of the Act. 16 V.S.A. § 42 designates SU/SDs as LEAs in Vermont.
2. How will AOE communicate with and support schools so they are equally well positioned to take advantage of ESSER funds? My concern is that SUs with experienced business managers will have an advantage over other districts and that the money may not be distributed equitably.
 - a. Answer: Allocations have already been calculated and notice of allocations has been communicated to all Vermont LEAs by formula; ESSER is not a competitive grant and fund eligibility and funding amounts were not contingent on any

action by the LEA. The AOE's Education Quality Team, Consolidated Federal Programs Team and School Finance Team are all on-hand to assist all LEAs in developing their applications for use of these funds.