

ACSI Legal Update on CODVID-19 Issues for Schools

George Tryfiates – New Guidance on CARES Act
Philip Scott – PPP Loan Certification

May 11, 2020





Disclaimer

This presentation is designed to provide accurate and authoritative information regarding the subject matter covered. It is distributed with the understanding ACSI is not engaged in rendering legal, financial or other professional services. The purpose of this presentation is educational. If legal advice or other professional assistance is required, the services of a competent professional should be sought.

Legal and Legislative Coronavirus Resources

ACSI Legal Legislative team is actively looking at issues related to the Coronavirus COVID-19 outbreak that impact Christian education. This page is designed to give you current, relevant information and is updated as new information unfolds.

Submit your question to our Legal Legislative Team

- Thomas J. Cathey, Ed.D., Director for Legal/Legislative Issues
- Philip Scott, Esq., In-House Counsel to ACSI
- George Tryfiates, Director of Government Affairs

CARES Act Guidance

- **URGENT **May 14 Deadline** - Updated 5/6/20 - Faith & Giving - [CARES Act Update](#)**
- **NEW 5/08/20 - USDE - [FAQ's about the Elementary and Secondary School Emergency Relief Fund \(ESSER Fund\)](#)**
- **NEW 5/08/20 - [Response to CARES Act Equitable Services Guidance](#)**
- 5/01/20 - Faith & Giving - [CARES Act - PPP Confusion](#)
- 5/01/20 - ACSI - [Memo Regarding USDE Issues CARES Act FAQs on Equitable Services](#)
- 4/30/20 - [USDE FAQs on Equitable Services under the CARES Act](#)
- 4/27/20 - CapinCrouse - [Accounting for Paycheck Protection Program Proceeds](#)
- 4/27/20 - ACSI - [Memo Regarding New USDE CARES Act Funding Announcement](#)
- 4/16/20 - CapinCrouse - [Webcast for Nonprofits: A First Look at PPP Loan Forgiveness](#)
- 4/13/20 - JDSupra - [PPP Loan Forgiveness: Further Guidance on the Math](#)
- 4/14/20 - CapinCrouse - [IRS Releases Guidance Regarding Deferral of Employer Payroll Taxes Under the CARES Act](#)
- 4/13/20 - USDE - [CARES Act Education Stabilization Fund](#)
- 4/10/20 - Taylor English - [Employee Retention Tax Credit Under The CARES Act: Alternative Tool for Businesses Not Utilizing The PPP](#)
- 4/08/20 - ACSI - [Memo to School Leaders on CARES Act Education Stabilization Fund](#)
- 4/08/20 - ACSI - [Sample Letter Schools Can Adapt for Their LEA](#)
- 4/08/20 - SBA - [FAQ Regarding PPP Loans](#)
- 4/07/20 - Nutter - [3 Steps \(and a Calculator\) to Help Determine Forgiveness for Your PPP Loan](#)
- 4/07/20 - SBA - [COVID-19 Economic Injury Disaster Loan Application](#)
- 4/05/20 - Key Guidance - ACSI - [CARES Act Guidance for Faith Based Schools: Additional SBA Guidance on PPP and EIDL Programs](#)
- 4/04/20 - Key Guidance - SBA - [FAQ Regarding Participation of Faith-Based Organizations in the PPP and EIDL Loan Programs](#)
- 4/05/20 - UPDATED ACSI - [The Coronavirus Aid, Relief, and Economic Security \(CARES\) Act Update](#)
- 4/06/20 - Nussbaum Speir Gleason - [The SBA Addresses Religious Liberty Concerns Around Coronavirus-Related Government Aid](#)

Tweets by @ACSILegalLegl



ACSI Legal Legl

@ACSILegalLegl

Questions are lingering on what Schools and ministry's can take the PPP loans in good faith. See the guidance from a joint taskforce of ministries ACSI is working with. May 7th deadline looming.
[community.acsi.org/coronavirusres...](#)



May 4, 2020



ACSI Legal Legl Retweeted



ACSI USA

@ACSIUSA

Press Release: ACSI Increasing Advocacy Presence in D.C.
Philip Scott to assume new role as Senior Counsel for Policy and Advocacy
[@ACSILegalLegl](#) #christianlegal #christianschool
[christiannewswire.com/news/865678374...](#)



Apr 13, 2020



ACSI Legal Legl

@ACSILegalLegl

Embed

View on Twitter

Legislative Update and Outlook – May 11, 2020

- **The Senate returned to active duty May 4, 2020. The House intended to do so, but decided to hold off. The Senate continues to confirm nominees to courts, Administration positions.**
- **A Phase IV bill was being negotiated, but on Friday, May 8, director of the National Economic Council Larry Kudlow announced a “pause” on formal negotiations. Possibly to resume in late May or early June.**

ACSI Focus:

- Continuing meetings on Phase IV bill with the Hill and Administration
- Pray for our efforts – focused on broadening options for affordability; inclusion of non-public schools; and, protections against FFA
- **Joined a coalition letter setting forth policy recommendations.**

The CARES Act – Education Stabilization Fund (ESF)

The Coronavirus Aid, Relief, and Economic Security (CARES) Act

March 27, 2020

Creates Education Stabilization Fund with \$30.75 billion in three funds

- ❖ Sec. 18001 – Discretionary Fund (2% off the top)
- ❖ Sec. 18002 – Governor’s Emergency Education Relief Fund (9.8%)
- ❖ Sec. 18003 – Elementary and Secondary School Emergency Relief Fund (43.9%)
- ❖ Sec. 18004 – Higher Education Emergency Relief Fund (46.3%)
- ❖ Sec. 18005 – “how to allocate funds” / the method, not the amount.

The CARES Act – Education Stabilization Fund (ESF)

Sec. 18001 – Discretionary Funds (2% off the top) for most affected

18001(a)(1) – 0.5% for “outlying areas”

18001(a)(2) – 0.5% for Bureau of Indian Education

18001(a)(3) – 1% to States with the highest coronavirus burden

Sec. 18002 – Governor’s Emergency Education Relief Fund (9.8%)

18002(c)(1) – grants to LEAs most significantly impacted

18002(c)(2) – grants to higher education most significantly impacted

18002(c)(3) – “to provide support *to any other* institution of higher education, local educational agency, or *education-related entity within the State that the Governor deems essential* for carrying out emergency educational services to students...the provision of child care and early childhood education, social and emotional support, and the protection of education-related jobs.”

Sec. 18003 – Elementary & Secondary School Emergency Relief Fund (43.9%)

- The allocation of funds to the states is based on the same proportion each state received under Title IA in the most recent fiscal year. Same again to LEAs.
- The law authorizes twelve uses for funds.

The CARES Act – Education Stabilization Fund (ESF)

ALLOCATIONS:

- Governor's Education Emergency Relief Fund (GEERF) allocation of the 9.8% is 60% on the basis of their relative population of individuals aged 5 through 24 and 40% on the basis of their relative number of children counted under section 1124(c) of the ESEA of 1965.
- Elementary and Secondary School Emergency Relief Fund (ESSERF) allocation of the 43.9% to the SEA is based on Title IA allocation to the SEA; from the SEA to the LEA based on the Title IA allocation of the LEA.

METHOD:

Section 18005(a) – IN GENERAL.— A local educational agency receiving funds under sections 18002 or 18003 of this title 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.

The CARES Act – Education Stabilization Fund (ESF)

UPDATE (5/11/2020)

- Notices inviting applications released for GEERF (April 14) and ESSERF (April 23) and two programs under the Discretionary Fund (April 27).
- **Guidance for equitable services under GEER and ESSER Funds on April 30, 2020.**
- **Significantly, the Guidance allocates funds by the statutory formulas and requires equitable services based on the total number of students for the total amount an LEA receives.**
- Public school objections have created a firestorm.

Response to CARES Act Equitable Services Guidance

Response to CARES Act Equitable Services Guidance, May 8, 2020

On May 5, the Council of Chief State School Officers released a public letter to Secretary Betsy DeVos decrying the USDE Guidance on Equitable Services under the CARES Act because it unequivocally states all private schools may participate and all private school children should be counted in the determination of their proportionate share of funds. Some SEA officials have told private school leaders they will disregard the guidance as written, and in some cases, have decided to not release any emergency funds to non-public schools until Secretary DeVos responds to their letter.

There are no limitations in the CARES Act as to which public schools and students can participate once an LEA receives its allocation. The public school officials threatening to disregard the USDE guidance hope to vastly diminish the number of students private schools can serve in the midst of a national emergency, even while counting all public school students.

A state of affairs where all public school students are counted, while many private school students are not, cannot be characterized as equitable...

Response to CARES Act Equitable Services Guidance

Key Points:

- Opponents of the equitable services guidance interpret this language to mean that the **entirety** of Section 1117 should apply to the CARES Act equitable services provisions, especially the Title I residency and poverty criteria used to allocate funds.
- However, the guidance correctly interprets “*shall provide equitable services in the same manner*” as pointing to only a piece of Section 1117, namely, the matter of what constitutes the provision of equitable services. **After all, Sections 18002 and 18003 have their own formulae for allocation of funds, whereas Section 18005 is silent on allocation of funds.**
- The debate is largely over Sec. 18003 (ESSER) b/c governors have wide discretion over Sec. 18002 (GEER).
- Section 18003 (ESSER) allocates funds to the states and local education agencies through a Title I allocation but is silent on how the funds are to be allocated to the school and student level.
- Section 1117 of ESEA is not mentioned in the allocation language in Section 18003.

Response to CARES Act Equitable Services Guidance

Key Points, *continued...*

- USDE acted appropriately in recognizing that the CARES Act is not a Title I program. **Many of the uses of funds authorized by ESSER are not compatible with Title I's specific student needs requirements and can only properly be carried out schoolwide**, meaning outside the scope of Section 1117.
- Ultimately, Section 18005 of the CARES Act invokes the “manner” aspect of Section 1117, not the “allocation” aspect. The “allocation” aspect of Section 1117 is not invoked because Sections 18002 and Sections 18003 address allocation themselves. Moreover, the “allocation” aspect is fundamentally incompatible with the uses of funds authorized by ESSER.

Response to CARES Act Equitable Services Guidance

Highlights of USDE Guidance on CARES Act Equitable Services:

- All public schools and non-public schools whose local educational agency (LEA) receives an allocation under the two CARES Act programs are eligible to participate in the ESF, even if a non-public school has not previously participated in ESEA or IDEA.
- All students and teachers in a non-public school are eligible to receive equitable services under these two CARES Act programs, without regard to family income, residency, or eligibility based on low achievement.
- LEAs are required to reserve funds for equitable services based on the number of students in private schools that choose to participate.
- Private schools are not limited to the same uses of funds chosen by LEAs for their own schools.
- Nonpublic schools can pool funds.
- Since the CARES Act is not a Title I program, private schools do not need to tie requests to specific student needs, but instead can use the funds for general school needs.

Three Talking Points about USDE Guidance

1) ESF is a new relief fund in response to the declaration of a national emergency.

- The Senate Appropriations Committee described the Education Stabilization Fund as “flexible funding that will get out the door quickly and go directly to states, local school districts, and institutions of higher education to help schools, students, teachers, and families with immediate needs.”
- The ESF is not a Title I program: it is a new emergency relief program in response to the COVID-19 pandemic. This is true for both the GEER and ESSER funds.
- Nonetheless, political activists representing public school administrators are now threatening to refuse to count potentially millions of non-public school children for emergency relief.

Three Talking Points about USDE Guidance

2) Children in neither public nor private schools have ever had to “qualify” for emergency federal aid because, in an emergency, aid is directed to children impacted by that emergency.

- During a national emergency, all impacted children are counted for federal relief programs. All children and teachers in all schools in America have been affected by the coronavirus pandemic.
- Congress did not require children to demonstrate need under Title I to receive RESTART funds after Hurricane Maria or Katrina. All schools and students impacted by the federal emergency were served equally.
- If Congress intended the funds to be used at the school and student level based on Title I requirements, public and non-public schools would be required to demonstrate specific student need under Title I to have access to emergency funds. There is no precedent for this in an emergency situation.

Three Talking Points about USDE Guidance

3) Requiring *only* non-public schools or students to implement Title I program requirements in order to be counted or qualify for services under the CARES Act contradicts the *letter* and the *spirit* of the law.

- The CARES Act distributes ESSER funds to states and LEAs using a Title I allocation. The law is silent as to how the LEA must allocate the money to public or private schools. Once the funds arrive at the LEA, the law makes no requirement of a Title I allocation at the school or student level.
- Congress did not intend under the CARES Act for a school to have to demonstrate that a specific student has a need to have his or her desk cleaned and sanitized for coronavirus prevention.
- Congress did not intend only Title I *schools* or only the *desks* of Title I students to be cleaned.
- Schools cannot help prevent the spread of coronavirus by targeting cleaning funds towards just some of the students in a school. A strict Title I approach down to the student level makes no practical sense.

Three Talking Points about USDE Guidance

Continued... 3) Requiring *only* non-public schools or students to implement Title I program requirements in order to be counted or qualify for services under the CARES Act contradicts the *letter* and the *spirit* of the law. Continued...

- Many of the authorized uses of funds for ESSER are school or system wide and not tied to an individual child's need, and therefore incompatible with a Title I approach.
- In fact, Title I, as part of ESEA, is one of the twelve categories of acceptable uses of funds. The existence of the eleven other categories is clear evidence that ESSER funds are intended to be used beyond the scope of Title I.
- It would be unreasonable and plainly inequitable to restrict private schools to a Title I count and approach while public schools are allowed to use ESF funds free of Title I restrictions.
- All schools should have the resources to keep their children safe and healthy, and to maintain continuity in their students' education, during the pandemic, as was Congress' intent in the CARES Act.

The CARES Act – Education Stabilization Fund (ESF)

Online Resources

[Response to CARES Act Equitable Services Guidance](#)

[ACSI Memo Regarding USDE Issues CARES Act FAQs on Equitable Services](#)

US Department of Education Websites

[USDE FAQs on Equitable Services under the CARES Act](#)

[USDE FAQs \(ESSER Fund\)](#)

Education Stabilization Fund (ESF) webpage:

<https://oese.ed.gov/offices/Education-Stabilization-Fund/>

USDE Coronavirus webpage: <https://www.ed.gov/coronavirus>

PPP Certification

- Loans \$2 million and above will be audited. Below will be “spot checked”.
- New May 14th deadline “safe harbor” to return PPP loans if you feel you don’t qualify.
- SBA committed to provide additional guidance before the 14th deadline on helping loan applicants determine if they qualify or not.

PPP Certification

- Standards and certifications that apply are the ones that existed when you applied for your loan.
- Certification – “Current economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.”
 - “Current” – 8 weeks?, now to June 30?, 12 months?, Feb 15 to Dec 31?
- What if the SBA finds you didn’t qualify
 - Repay the loan now or you don’t qualify for the forgiveness.
 - If they find “bad faith” then could potentially treat it as criminal – fines or worse.
(a heavy burden for SBA here)

PPP Certification

- April 23 – new guidance in Treasury FAQs #31 and #37.
 - FAQ #31 - *borrowers must make this certification in good faith, taking into account their current business activity and their ability to access other sources of liquidity sufficient to support their ongoing operations in a manner that is not significantly detrimental to the business.*
 - “Current business activity”
 - Access to “Liquidity” – reserves, access to cash, may include lines of credit.
 - Should not include donor intent restricted funds.
 - Liquidity not “significantly detrimental”
 - Unclear, what kind of loan terms would be considered significantly detrimental?

PPP Certification

Defending your Decision

1. Describe your organization's situation at the time of your loan application.

- Show your due diligence to sign in good faith. Document that leadership/board had conversations to discuss the school's position.
- Document the impact of forced closures by state
 - impact on ee programing, impact on secondary income (programs, fees, etc), document increased cost to do distance educ., withdraws/tuition due
- Point back to your future forecasting in #3.

PPP Certification

Defending your Decision

2. Identify all sources of available cash, including unrestricted reserves and untapped credit facilities.

- Current reserves of cash that is not donor restricted
- Access to lines of credit or credit worthiness, if known

PPP Certification

Defending your Decision

3. Forecast your future operations, with and without the PPP loan, through June 30, 2020 and through December 31, 2020.

- Future forecast the impact for Summer and next school year
 - Projected enrollment impact now and next year
 - Summer camp income impact
 - Expected impact of social distancing/new safety standards (increased cost and staffing)
 - Expectation of cost associated with continued distance learning offerings.
 - If able, point to current trends, plans and surveys.
 - What the movement is doing, is my state talking about closures into next year, what if closures into next year

PPP Certification

Defending your Decision

4. Compare current-year activity through the date of application with prior-year activity for the same period.

- Changes in services and cash flow
- New systems or cost of systems to meet same or similar level of educational delivery.

PPP Certification

Defending your Decision

5. Identify other considerations.

- What you will or would likely do with staff if not for the PPP loans. Were there discussion or a plan for furloughs/layoffs? Did you rehire folks b/c of PPP?
 - Remember, the PPP loans are intended to keep people employed and businesses in existence so make that case of how the PPP loan helps that.
- Retaining missional, well trained educators is important and significant consideration.
 - Difficulty of finding new staff on a widespread basis, emphasis on how much of the school's community and appeal is based on its staff – not interchangeable cogs,
- If you decided not to take the full PPP loan amount, other steps to mitigate the impact of COVID
- Future contract obligations or other plans already in the works that have financial impact.