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Council for American Private Education

# CAPE outlook

Voice of America's private schools

January 2021 | Number 461



## Congress Approves COVID Relief for Private Schools

After months of wrangling and negotiations, Congress passed a new round of COVID relief on December 21, 2020. The legislation, now signed into law, establishes a new \$2.75 billion Emergency Assistance to Non-Public Schools (EANS) program. Details of the EANS program are as follows:

- The governor of each state will have until February 8, 2021 to apply for that state's share of the funds.
- Each state's State Educational Agency (SEA) will administer the program.
- Each state's [allotment](#) is determined by the number of children at or below 185% of poverty attending private schools in that state.
- As far as the allotment individual private schools will receive, the law says that each SEA "shall prioritize services or assistance to non-public schools that enroll low-income students and are most impacted by the qualifying emergency." This gives SEAs considerable room for interpretation.
- The law requires SEAs to make a good faith effort to quickly process private schools' applications and to provide the assistance.
- The law spells out the variety of ways the funds can be used. Scroll down to see the entire list.
- Crucially, the bill is written such that a public agency will maintain control of funds in much the same way as occurs with existing equitable services programs. This should, in theory, insulate private schools from becoming recipients of federal financial assistance.
- The bill also allows schools to be reimbursed for certain past expenses. Depending on what is being reimbursed, such reimbursements could constitute federal financial assistance.
- **Also of great importance: private schools will not be allowed to accept aid both under this program and the new round of the Paycheck Protection Program (PPP) that the bill authorizes. Private schools will have to choose one or the other. Schools that received a PPP loan prior to December 27, 2020 will still be eligible.**

It is absolutely essential that private school advocates reach out to their governor and SEA, asking them to participate in this program. SEAs should also be encouraged to ensure that all private school students can benefit from this emergency relief. The letter from the secretary of education to governors can be [seen here](#). Talk to your [State CAPE](#)!



## President-Elect Biden Taps Miguel Cardona for Education Secretary

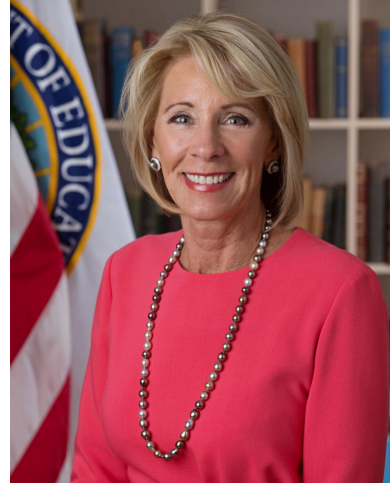
President-elect Joe Biden has [selected](#) Connecticut Education Commissioner Miguel Cardona as his nominee for US secretary of education. The president-elect had promised to appoint a public school educator to the post, and Cardona has served as a public school teacher, principal, and district administrator, in addition to his current role as Connecticut's top education official. Hearings on his nomination are not expected to begin until the end of January or perhaps later, however Mr. Cardona could begin serving as acting secretary immediately after the January 20 presidential inauguration.




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## Secretary DeVos Resigns

Betsy DeVos tendered her resignation as secretary of education effective January 8 following the riot at the United States Capitol. In a [statement](#), Bill Oberndorf, Chairman of the American Federation of Children, thanked her "for her tireless efforts and dedication to the principles that have always guided her. She consistently and selflessly put students at the forefront of the national discussion of reforming our K-12 education system, and she fought courageously to expand opportunities for lower-income and disadvantaged families in particular...Her lasting legacy will be that she substantially increased the momentum for K-12 educational choice expansion across our country."



Those of us at CAPE will always be grateful for her generosity with her time and her strong support for private schools.

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## **COVID Relief: Paycheck Protection Program Renewed**

As mentioned above, the new COVID relief bill authorizes a new round of Paycheck Protection Program loans, to the tune of \$284 billion. **The program will be phased in starting the week of January 11.**

In order to receive full loan forgiveness, the rule requiring that a borrower use at least 60% of the loan for payroll costs and not more than 40% for nonpayroll costs remains in effect.

Borrowers are eligible for a [second-draw PPP loan](#) of up to \$2 million, provided they have 300 or fewer employees and can demonstrate that their gross receipts in any 2020 quarter are at least 25% less than the same 2019 quarter.

Private schools that accept a second draw of PPP will not be eligible for the Emergency Assistance to Non-Public Schools program described above.

For more information, including newly allowable uses of the loans, see this [SBA release](#).

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## **School Choice: COVID Relief Bill Says "No," Executive Order Says "Yes"**

School choice advocates were disappointed to see that the new COVID relief bill closed down the ability of governors to use Governor's Emergency Education Relief (GEER) funds for scholarships. Four states are believed to have attempted to use CARES Act GEER funds for scholarships. However, during negotiations over the new relief bill, choice opponents demanded an end to that policy as the price to be paid for the Emergency Assistance to Non-Public Schools program described above (existing scholarships will be allowed to be funded through the end of the school year, however).

A week after Congress passed the COVID bill with the no-scholarships restriction, President Trump issued an [executive order](#) that allows states to use Community Service Block Grants (CSBG) funds to provide emergency K-12 scholarships to low-income families whose children cannot access in-person learning. According to the executive order, scholarships provided with CSBG funds can be used for private school tuition, home schooling, micro schooling, learning-pod

expenses, special education services, or tutoring.

The list of the CSBG points of contact in the states can be [found here](#).

It remains to be seen whether the incoming Biden administration will continue or reverse this policy.

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## **Michigan Litigation Update**

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Private school advocates in Michigan received favorable news on two fronts in recent days.

Private schools have for years been fighting for the right to be reimbursed by the state for the expense of complying with state-imposed health and safety mandates, a challenging undertaking given that the Michigan Constitution has the strictest prohibition on public support for private education (or "Blaine Amendment") in the country. A tie on the Michigan Supreme Court has effectively [allowed those reimbursements](#) to proceed, though it is expected that the issue is not yet settled.

Meanwhile, on December 7, the Michigan CAPE (MANS -- the Michigan Association of Nonpublic Schools) [filed a lawsuit](#) in federal court claiming that a state health department order closing religious high schools is not supported by evidence of safety and violates the First Amendment right to practice religion. Ultimately, the case was dismissed as moot because the state issued a new order allowing [schools to reopen](#).

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## **Federal Court Sides with Ohio Christian Schools on In-Person Learning**

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[From the AP](#) on December 31:

"A federal appeals court Thursday provided the go-ahead for Christian schools in an Ohio county to resume holding in-person classes during the pandemic. The 6th U.S. Circuit Court of Appeals three-judge panel unanimously granted an injunction to Christian schools in the Toledo area who say their rights to religious expression have been violated by the Lucas County-Toledo Health Department's order shutting down all schools for grades 7-12. Their attorneys pointed out that the order for all schools, public, private and parochial, aimed at stopping COVID-19 spread still allowed non-religious businesses such as gyms, office buildings and a casino to remain open." According to the ruling, the health department's order, "when measured against the more favorable treatment afforded these secular actors, amounts to a prohibition of religious exercise in violation of the First Amendment."

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## **Administration Announces Regulations on Equal Treatment of Faith-Based Organizations**

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On December 14, the Department of Education [announced](#) a joint final rule with eight other agencies designed to ensure equal treatment for religious and non-religious organizations in federal programs. According to a Department release, the rule "removes requirements in prior regulations that placed unequal burdens on religious organizations, cast unwarranted suspicion on them, and were in tension with their religious liberty rights. This final rule also clarifies that religious organizations do not lose various legal protections because they participate in federal programs and activities, such as the rights to accommodations and conscience protections under the First Amendment, Religious Freedom Restoration Act, and other federal laws."

Secretary DeVos was quoted as saying, "We're continuing to ensure faith-based organizations, including faith-based institutions, do not give up their First Amendment rights as a condition of participating in taxpayer programs. We will continue to ensure faith-based educational providers are treated equally alongside their secular counterparts."

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## **Study: Private Schools May Help Mental Health**

A [study](#) by the Cato Institute's Corey DeAngelis and Western Carolina University economist Angela Dills suggests that "private schooling reduces the likelihood that individuals report having mental health issues as adults." The study was reported on in an editorial by the *Wall Street Journal* titled "School Choice: Better Than Prozac."

According to the [Journal](#), "The researchers also looked for any correlation between students who attended private school as teenagers and their mental health as adults. After controlling for socioeconomic factors, individuals who attended private schools were two percentage-points less likely to report a mental health condition when they were roughly 30 years old. 'It's likely that private schools face stronger competitive pressures to provide a safer school environment and improve mental health if they want to remain open,' Ms. Dills explains. 'Public schools, on the other hand, are more likely to be burdened with government regulations that make it difficult for them to control discipline policy and create strong school cultures.'"

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## **Religious Charter Schools?**

Currently, every state with charter schools forbids religious charters. However, a [recent report](#) by Notre Dame law professor Nicole Stelle Garnett proposes that "in most states, charter schools ought not to be considered, for federal constitutional purposes, 'state actors.'" As a result, "Since they are not state actors, they are effectively private schools and can be religious without running afoul of the Establishment Clause."

The report and its conversation-provoking conclusions assess the legal landscape post-*Espinoza*, the landmark decision last summer in which the Supreme Court ruled that religious schools cannot be excluded from school choice programs accessible by secular private schools.

The potential for religious charter schools is a subject private schools will need to pay careful attention to in the coming days.

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## **COVID Relief Bill: EANS Uses of Funds**

The top story of this edition of *Outlook* describes the new Emergency Assistance to Non-Public Schools (EANS) program passed by Congress. According to the law, EANS funds can be used for the following purposes:

- (A) supplies to sanitize, disinfect, and clean school facilities;
- (B) personal protective equipment;
- (C) improving ventilation systems, including windows or portable air purification systems to ensure healthy air in the non-public school;
- (D) training and professional development for staff on sanitation, the use of personal protective equipment, and minimizing

the spread of infectious diseases;

(E) physical barriers to facilitate social distancing;

(F) other materials, supplies, or equipment to implement public health protocols, including guidelines and recommendations from the Centers for Disease Control and Prevention for the reopening and operation of school facilities to effectively maintain the health and safety of students, educators, and other staff during the qualifying emergency;

(G) expanding capacity to administer coronavirus testing to effectively monitor and suppress coronavirus, to conduct surveillance and contact tracing activities, and to support other activities related to coronavirus testing for students, teachers, and staff at the non-public school;

(H) educational technology (including hardware, software, connectivity, assistive technology, and adaptive equipment) to assist students, educators, and other staff with remote or hybrid learning;

(I) redeveloping instructional plans, including curriculum development, for remote learning, hybrid learning, or to address learning loss;

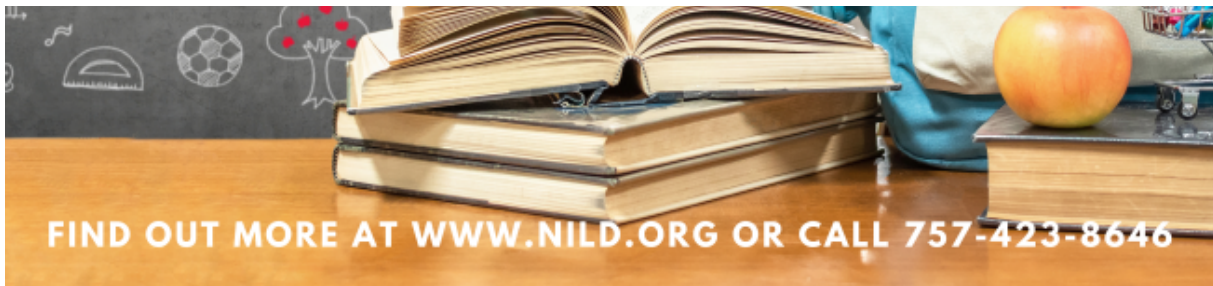
(J) leasing of sites or spaces to ensure safe social distancing to implement public health protocols;

(K) reasonable transportation costs;

(L) initiating and maintaining education and support services or assistance for remote learning, hybrid learning, or to address learning loss.

**The law also allows EANS funds to be used to reimburse schools for purchases already made** for these purposes, EXCEPT for the items listed in paragraphs C, D, I, and L -- those items are not eligible for reimbursement (with the strange caveat that portable air purification systems are an allowable reimbursable expense). Unlike new purchases, reimbursements *could* constitute federal financial assistance and thus trigger the strings that come attached to such status.





## To PPP or Not to PPP...

That is the question.

Private schools have a choice to make: do they take a second draw of PPP, or do they accept assistance from the new Emergency Assistance to Non-Public Schools (EANS) program described above? They are not allowed to take both (though a PPP loan received before December 27, 2020 does not disqualify a school from EANS). Some considerations:

### Eligibility

Applicants for a second-draw PPP loan must demonstrate that their gross receipts in any 2020 quarter are at least 25% less than the same 2019 quarter. This requirement alone may make the "PPP or EANS" choice for them in the case of certain schools.

On the other hand, with respect to EANS, the law requires SEAs to prioritize private schools that enroll low-income students and are most impacted by COVID. How each state interprets this will vary, so how a private school's SEA implements this language in allocating funds to the school level will be an important consideration.

### Uses of Funds

The expenses that EANS funds can be used for are listed above, they are basically COVID related.

PPP can be used for payroll costs, including benefits, as well as mortgage interest, rent, utilities, and a few other items.

### Status as a Recipient of Federal Financial Assistance

This one is complicated. Disclaimer: nothing here constitutes legal advice. It is best that you talk to your lawyer about this particular consideration. That said, a few thoughts:

EANS is designed to be similar to equitable services in that there is public control of funds. Just as with equitable services the Local Educational Agency (LEA) maintains control of the funds and property, thus shielding the private school from status as a recipient of public funds, so EANS is supposed to work in similar fashion. That's the theory anyway. There are no guarantees, but the arrangement has worked with equitable services programs.

The situation here with respect to PPP is murkier depending on what kind of school you are and what you spend the money on. PPP recipients are considered to be recipients of federal funds, that much seems pretty clear. However, it is widely believed that such status only lasts the length of the loan, though there is some speculation that using the loan for something that pertains to property, like mortgage interest, *could* make recipient status endure after the life of the loan. Also, the Small Business Administration issued guidance indicating that religious organizations would be exempt from some of the "strings" that come attached to federal assistance, but the precise nature of those exemptions isn't perfectly clear, and a new Administration with a potentially different perspective on these issues is soon to take charge. In any event, whatever an agency says is still able to be tested in court.

All things considered, there may be more risk of being considered a recipient of federal financial assistance under PPP than EANS, but many independent and religious schools have taken PPP, surmising that by spending the money quickly on items like salary, the risk is manageable.

Talk to your lawyer.

### Timing

PPP restarts the week of January 11 and runs through March.

EANS has a less certain timetable. Governors have until February 8 to apply for the EANS funds. The US Department of Education has 15 days after receiving an application to approve it. After a state receives the funds, it has 30 days to make an application available to private schools in that state. The SEA then has 30 days after receiving a school's application to approve or deny it. So, much will depend on whether an SEA wants to play ball or wants to slow-walk the process. Under the law, EANS funds that haven't been obligated within 6 months of the state receiving the funds will be moved out of EANS to the GEER fund for use at the governor's discretion.

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There is a \$2 million cap on second draw PPP loans.

On EANS, how an SEA implements the requirement to prioritize private schools that enroll low-income students and are most impacted by COVID will do much to determine how much relief each individual school receives. Politics may well rear its ugly head here. Talk to your State CAPE!

## *Private Education: Good for Students, Good for Families, Good for America*

### **CAPE member organizations:**

Agudath Israel of America

Association of Christian Schools International

Association of Christian Teachers and Schools

Association of Waldorf Schools of N.A.

Christian Schools International

Council of Islamic Schools in North America

Council on Educational Standards and Accountability

Evangelical Lutheran Church in America

Friends Council on Education

Islamic Schools League of America

Jesuit Schools Network

Lutheran Church–Missouri Synod

National Association of Episcopal Schools

National Association of Independent Schools

National Catholic Educational Association

National Christian School Association

Office for Lasallian Education  
Christian Brothers Conference

Oral Roberts University  
Educational Fellowship

Seventh-day Adventist  
Board of Education

United States Conference of  
Catholic Bishops

Wisconsin Evangelical Lutheran  
Synod Schools

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Affiliated State Organizations a coalition of national associations serving private schools K-12

**Executive Director:**  
Michael Schuttloffel

Outlook is published monthly (**September to June**) by CAPE.  
ISSN 0271-145

1300 Pennsylvania Ave, NW  
#190-433  
Washington, DC 20004  
Tel: 844-883-CAPE

[www.capenet.org](http://www.capenet.org)



**Michael Schuttloffel**  
*Executive Director*  
**Phone:** 844-883-CAPE  
**Website:** [www.capenet.org](http://www.capenet.org)

