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November 12, 2019

Via email to adeinbox@azed.gov and Hand Delivery

Superintendent Kathy Hoffman
Arizona Department of Education
1535 West Jefferson Street
Phoenix, AZ 85007

Hon. Mark Brnovich
Arizona Attorney General
2005 North Central Avenue
Phoenix, AZ 85004-2926

**Re: Notice of Claim under A.R.S. § 12-821.01
Failure to provide ESA Q2 Funding**

Dear Superintendent Hoffman and Attorney General Brnovich:

This letter constitutes a formal notice of claim under A.R.S. § 12-821.01 to the Arizona Department of Education based on ADE's failure to fund Empowerment Scholarship Accounts (ESAs) for the second quarter of the 2019-2020 school year. This Notice of Claim is filed on behalf of Parent K.K., who is required to spend money to provide educational services because her child's ESA account was not funded on the timeline guaranteed by her contract.¹

What follows is a summary of the facts and law that apply to this claim. In accord with A.R.S. § 12-821.01, the specific dollar amount for which the claim may be settled is \$1,939.20.

I. Nature of the Claim

Arizona's ESA program is a vital resource for students who are not served well in the public-school system. Students who receive ESAs also receive a broad set of options that they can choose to improve their education. As stated on the ESA Program's website,

¹ Information about K.K.'s identity will be provided upon request, but only her initials are provided here to protect the confidentiality of student information.

“[f]unded by the state, tailored by the applicant, and individualized for the student—the ESA program provides a unique opportunity to prepare Arizona students to succeed in school and life.”²

But students only have those educational opportunities when the State fulfills its ministerial duty to timely fund ESA accounts. Under A.R.S. § 15-2403(F), ADE must “make quarterly transfers of the amount calculated pursuant to section 15-2402, subsection C to the treasurer for deposit into the empowerment scholarship account of each qualified student.” This has not happened.

Under the plain language of families’ ESA contracts, ADE commits to releasing ESA funds between October 15 and October 30 for the second quarter. In addition to K.K.’s family, there are more than 120 families that have not received these funds in violation of their ESA contracts. These families are now having to pay out-of-pocket for private school and other expenses that are supposed to be covered by their ESA funds.

II. Factual Background

K.K. is a military-qualifying parent who entered into an ESA Contract on June 19, 2019 on behalf of her son for the 2019–2020 school year.³ The Contract requires each ESA Holder to use ESA funds solely for the student’s education and for certain approved expenses that are outlined in the Contract. The Holder is also required to submit Quarterly Expense Reports that detail how ESA funds were used. K.K. submitted a timely expense report for the first quarter of the 2019–2020 school year. K.K.’s expense report was approved by ADE on October 29, 2019.⁴

On July 17, 2019, the ESA Director held a meeting with ESA parents. According to minutes from that meeting, Ms. Escobar explained that “Quarter 2 will not be funded if [the] Quarter 1 expense report is not submitted and approved.”⁵ ADE has failed, however, to ensure that it has adequate staff and procedures to ensure the timely review and approval of expense reports. As a result, families like K.K.’s have not received their Second Quarter funding through no fault of their own. K.K. was reassured by a Compliance Specialist in the ESA Program that “[t]he ESA team is on track to review all reports submitted on time (by September 30th)” and “[a]ccounts with reports approved

² See ESA Program—Frequently Asked Questions, *available at* <https://www.azed.gov/esa/frequently-asked-questions/>.

³ K.K.’s Application ID number is 12021. A copy of the contract will be provided upon request.

⁴ October 29, 2019 at 9:17 AM email from ADE Notifications (svc-adenotifications@azed.gov), Subject: ESA Application - Expense Report Approved Quarter 1 (2019 - 2020). A copy of the email will be provided upon request.

⁵ The meeting minutes are attached hereto as **Exhibit A**.

during this time will receive on time funding, as funding has been requested from October 15th–30th.⁶ K.K. submitted a timely expense report, it was approved by ADE, but she has received no deposit for the second quarter now 12 days after the deadline.

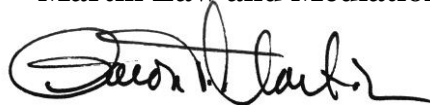
Although the Compliance Specialist also stated that the ESA team was “working toward” compliance with the families’ contracts, this is not sufficient. ADE has not met its contractual obligations. And ADE’s breach is shifting the cost for expenses for tutors, subscriptions, and services that are supposed to be covered by ESA funding onto K.K., who must either pay out of pocket or discontinue these educational services. The ADE’s failure to promptly pay is especially problematic because ESA families *must* use their bank cards for any educational expenses; ADE will not reimburse any out-of-pocket expenses.⁷ The late deposit is problematic for subscriptions and services that bill on a monthly or quarterly basis, especially for those that often serve ESA families and build their billing model on the ESA payment cycle. Moreover, K.K.’s injury is ongoing. As the school year continues, K.K.’s damages will only increase as they spend more money out-of-pocket on necessary services.

III. Conclusion

ADE is in breach of its contract with K.K. and her family. Under A.R.S. § 12-821.01, the specific dollar amount for which this claim may be settled is \$1,939.20. If you need clarification about any of the issues discussed above, or any of the documents referenced, please contact us.

Sincerely yours,

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⁶ October 25, 2019 at 2:20 PM email from Chelsea Clark, Subject: RE: Ticket. A copy of the email will be provided upon request.

⁷ *Empowerment Scholarship Account Program Parent Handbook: School Year 2019-2020*, ADE (July 1, 2019), at 32.

Liberty Justice Center



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*Pro Hac Vice forthcoming upon commencement
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CC: Karla Escobar, ESA Director (ESA@azed.gov)
Victoria Bergin, Arizona Attorney General's Office (Victoria.Bergin@azag.gov)

Exhibit A

ESA Parent Committee Meeting Notes – 7/17/19

Pre-Meeting Question: How do we advise parents (as a private school, etc.) when they are panicking about their application status?

Answer: e-mail Jessie regarding specific cases.

- STO eligibility, Step-Parent Account Holders reviewed: Step-Parents will be reviewed on a case by case basis, and step parents previously denied can contact ESA
- ESA is cleaning up the response time in two weeks.
- Funding will not just be on the 15th and 30th.
- ESA notified 750 people that we are past their 45th day.
- Applications applied by June 1st will get Q1 funding if approved.
- Bank cards will arrive faster than 30 days.
- Q: What document can be given out to applicants who are waiting beyond 45 days and need to give an answer to their public school?
 - A: Contact Jessie or Karla regarding these situations.
- There were IT errors with postal contracts. If anyone did not receive theirs, contact Jessie.
- E-mail contact is preferred between ESA and account holders.
- ESA is moving to online-only:
 - HR will be a resource to meet ADA needs.
 - We will accommodate rural families.

Handbook Feedback:

- Pre-paying for services:
 - Allowed to pre-pay within the quarter.
 - If a parent pre-pays and leaves the program, they will need to repay a pro-rated amount back to the department.
 - Per Karla, pre-paying is approved up to six months.
- ESA's goals are to maintain consistency.
- KEVA planks are approved.
- Parents are requesting examples of invoices on the handbook.
- Parents can send us their suggestions for the FAQ.
- A 504 plan/evaluation does not need to specify services.
- ESA will give additional info this quarter on documents to provide for eligibility attestation.
- Send P-SD/previous recipient questions to Karla.
- After a parent places a request in writing to a district for an evaluation, they have 15 school days to respond. Per Karla, these school days do not fall in the summer.
- Karla explained a goal/idea is to keep the portal open for parents to make changes to their address, e-mail, documents, etc.
 - Jessie explained this will not be an immediate change.
- 504 plans are good for one year.
- DD STOS, we are not requiring/checking for the 90 days.

ESA Parent Committee Meeting Notes – 7/17/19

- The US Dept is a resource regarding 504 Plans.
- Bank of America may be miscoding bank cards. Jessie is asking for examples of these so we can investigate further.
- We discussed how to reconcile fraud when found on the account (if someone else used the ESA card), how to report this on the expense report.
 - Quarter 4 reports were reopened on the 8th may be affected by this and must be submitted by the 18th to avoid suspension.
- Per Karla, Quarter 2 will not be funded if Quarter 1 expense report is not submitted and approved.
- Reminders regarding expense report deadlines will still be sent out.
- Parent Comment: A parent brought up that many of ESA's outgoing communication are coming out from several different e-mail addresses. ESA is asking for examples so we can investigate.
- Q: What are the qualifications regarding D/F?
 - A: Student must be attending the school at the time of the application.
- Parent Comment: Expressed frustration/confusion over not being able to respond directly to e-mails from ESA.
- Parent Comment: How can Coverdell 530s work?
 - ESA discussed that they cannot make changes to IRS and bank requirements.
- Per Karla, in order for siblings to be eligible, the anchor sibling must be a recipient. ESA is looking into how to define 'recipient'.
- ESA will be eliminating the pupil withdrawal document step of the process.
- Parent Comment: Eagleridge
 - ESA is unable to verify why some students are enrolled part-time and others are enrolled full time, and this would be a discussion worth having between parent and school.