

ESSER HOT TOPICS



Julia Martin, Esq.
jmartin@bruman.com
www.bruman.com



How we imagine fall



How education administrators are experiencing this fall

Principles of Federal Grants Management

- Expenditures must be:

- **Necessary** Necessary to accomplish the purpose of the grant

- **Reasonable** Would a prudent person in similar circumstances find the purchase and cost acceptable?

- **Allocable** Is it an allowable use of funds for that specific grant?

Principles of Procurement and Disposition

- Is the bid properly/competitively priced?
 - E.g. was there a price comparison? Cost analysis? Multiple bids?
 - If piggybacking or noncompetitive procurement was used, is documentation adequate to justify?
- Is there enough time and adequate description given?
 - Was notice made with enough time to provide bids?
 - Is the description clear and accurate, describing all selection factors?
 - Does the description allow for real competition (i.e. not “Acme brand only”)
- Are the bidders selected qualified?
 - Has the suspension/debarment list been checked?
 - Are subcontractors included on bid?
 - Any other conflicts of interest?

Principles of Procurement and Disposition

- Does procurement properly note use of federal funds?
- Does procurement/ contract list all requirements that must be met?
 - E.g. Davis Bacon wage, matching funds, statement of federal interest, no lobbying or lobbying form, etc.
- Have disputes been handled in a correct and timely manner?
- Is bid paperwork being properly filed and stored, with a notice of contract award?
 - Are records maintained for an adequate period of time?

Principles of Procurement and Disposition

- Was the obligation made in a timely manner per that specific program?
- Are the expenditures allowable?
 - Is the item allocable to that program?
 - Include consideration of full lifetime of item
 - How is documentation maintained for auditors and monitors?
- Are there processes in place to ensure compliance?
 - Inventory? Audits? Payroll certification? Time and Effort?
- Is there a plan for disposition of the item, as needed?
- Have you built in enough time for closeout?
- Will liquidation be timely or is an extension needed?

What documentation do we need?

- Any and all documentation that is necessary to demonstrate compliance!
- Applies to all subgrantees and grantees in the same way
- Think about:
 - Contemporaneity → when was it written?
 - Descriptiveness → Does it name the project, source of funds, etc.?
 - Specificity → Does it say what is involved in the project, items purchased, etc.?
 - Redundancy → Are there multiple copies or ways to access?

AGENDA

- + • Program Period and Extensions
- Construction and other Rules of Note Disposition
- Oversight and Monitoring
- Transitioning out of ESSER



• PROGRAM PERIOD AND EXTENSIONS •

Obligation/ Liquidation Rules

Obligation

- Funds must be obligated within the period of performance (34 CFR 76.707)

Liquidation

- Valid obligations must be performed, accounting completed and draw downs finalized within the liquidation period.
 - SEAs must liquidate within 120 days of obligation date
 - LEAs have 90 days to liquidate

When Obligation Occurs

See: 34 CFR 76.707

If the obligation is for -	The obligation is made -
Acquisition of real or personal property	On the date on which the State or subgrantee makes a binding written commitment to acquire the property.
Personal services by an employee	When the services are performed.
Personal services by a contractor	On the date on which the State or subgrantee makes a binding written commitment to obtain the services.
Performance of work other than personal services	On the date on which the State or subgrantee makes a binding written commitment to obtain the work.
Travel	When the travel is taken.

ESF Liquidation Timeline

Program	Obligation Deadline	(Automatic) 90-day liquidation deadline (LEAs)	(Automatic) 120-day liquidation deadline (SEAs)	(Up to) 14-month liquidation extension
ESSER I	Sep. 30, 2022	Dec 31, 2022	Jan. 30, 2023	Apr. 1, 2024
ESSER II	Sep. 30, 2023	Dec 31, 2023	Jan. 29, 2024	Mar. 31, 2025
ARP ESSER	Sep. 30, 2024	Dec 31, 2024	Jan. 28, 2025	Mar. 31, 2026
GEER I	Sep. 30, 2022	Dec 31, 2022	Jan. 30, 2023	Apr. 1, 2024
GEER II	Sep. 30, 2023	Dec 31, 2023	Jan. 29, 2024	Mar. 31, 2025
CRRSA EANS	Sep. 30, 2023	Dec 31, 2023	Jan. 29, 2024	Mar. 31, 2025
ARP EANS	Sep. 30, 2024	Dec 31, 2024	Jan. 28, 2025	Mar. 31, 2026

Can Services Go Beyond The Liquidation Period?

- Generally, no. Now.... yes?
- A cost is allocable to a Federal award or cost objective if the goods or services involved are chargeable or assignable in accordance with relative benefits received. 200.405
 - Incurred specifically for the award;
 - Benefits both award and other work and can be distributed in proportions that may be approximated using reasonable methods; and
 - Necessary to the overall operation of the entity and assignable to the award in accordance with this Part.

Can only charge in proportion to the value received by the program

ESSER Guidance (Dec. 2022)

- E-2: Although funds must be obligated by September 30, 2023, grant activities carried out through a valid obligation of funds may continue beyond that date.
- E-3: Generally, it is not good stewardship or prudent business practice to prepay for services that will extend many years into the future.
 - However, under limited circumstances where a grantee or subgrantee timely obligates ESSER or GEER funds, ESSER- or GEER-funded activities may continue for a reasonable time beyond the liquidation period (including an approved late liquidation period).

How long can services go on?

- E-3: Factors impacting how long ESSER- or GEER-funded activities may extend past the liquidation period include:
 - Whether the funds were properly obligated and liquidated in a timely manner;
 - Whether the activities would be allowed to extend beyond the liquidation period under applicable State and local procurement rules;
 - Whether the extended activities constitute a reasonable and necessary use of Federal funds; and
 - Whether prudent business practices (2 CFR § 200.404(b) & (d)) and internal controls (which generally limit prepayment) would support the continued activities for the length of time proposed.
- Because ESSER and GEER are State-administered programs, the SEA or Governor determines whether activities extending past the liquidation period are allowable under the circumstances.

How long can services go on? (cont.)

Example:

- An SEA may determine that it is reasonable and necessary under 2 CFR §§ 200.403-200.404 for an LEA to enter into a multi-year software licensing contract with a vendor during the period of availability of ARP ESSER funds and to pay for the entirety of the software license within the liquidation period. However, under the contract, the vendor would continue to provide the services (i.e., software and technical support) for some time after the funds had been liquidated.
 - *But for how long????*

How long can services go on? (cont.)

- Under no circumstances may services extend beyond the date on which funds revert to the U.S. Department of Treasury (31 USC § 1552), which occurs four years after the obligation deadlines referenced in FAQs E-1, E-2, and E-3.
- → Known as “Treasury Sweep”



ED Doubles Down (Guidance June 26, 2023)

- “States have expressed concerns about possible audit findings”

The LEA should document factors such as (at the time you enter into the contract):

- the per-month cost of the multi-year contract is less than the cost of a shorter-term contract;
- the software license will be needed throughout the period of the contract;
- the LEA is allowed to enter into the contract extending beyond the obligation and liquidation period under State and local procurement rules; and
- prudent business practices and internal controls support entering into the contract.

However...

Guidance June 26, 2023 (cont.)

It is possible that the Department would sustain an audit finding that services continuing beyond the obligation and liquidation period are unallowable if,

- the duration that the services extended was lengthy or unreasonable;
- the cost is not reasonable or necessary;
- State law, internal controls, or prudent business practices would not support the continuation of the services; or
- the contemporaneous documentation from the time does not support the decision to use ESSER, GEER, or EANS funds for services that extend beyond the obligation and liquidation period

The Department will continue to ensure auditors are aware of this guidance. For example, the Department has included a reference to this issue in the fiscal year 2023 compliance supplement. The Department is available to speak to State or other auditors with questions.

How do we document the justification for the extension of services?

- Factors to document:

- Timely obligations
- Timely liquidations during approved periods.
- That the activities would be allowed to extend beyond the liquidation period under applicable State and local rules.
- That the activities constitute a reasonable and necessary use of Federal funds; and
- That prudent business practices would support the continued activities for the length of time proposed.

- Also helpful:

- Contractor has history of timely performance
- Discounted costs
- Relates to identified needs
- Data demonstrating success

Liquidation extension

- Obligation extension? → No. (ED FAQ E-3.c, Dec. 2022)
- Liquidation extension? Possible – up to 14 months
 - Late Liquidation FAQs 12/23/22:
<https://oese.ed.gov/files/2022/12/General-and-Technical-FAQs-for-CARES-Liquidation-Extension-Requests.pdf>
 - Late Liquidation letter 9/29/22:
<https://oese.ed.gov/files/2022/09/CARES-ESSER-and-GEER-Liquidation-Extension-Request-Letter-9.29.22.pdf>
 - States must submit a required [template spreadsheet](#)

ESF Liquidation Timeline

Program	Obligation Deadline	(Automatic) 90-day liquidation deadline (LEAs)	(Automatic) 120-day liquidation deadline (SEAs)	(Up to) 14-month liquidation extension
ESSER I	Sep. 30, 2022	Dec 31, 2022	Jan. 30, 2023	Apr. 1, 2024
ESSER II	Sep. 30, 2023	Dec 31, 2023	Jan. 29, 2024	Mar. 31, 2025
ARP ESSER	Sep. 30, 2024	Dec 31, 2024	Jan. 28, 2025	Mar. 31, 2026
GEER I	Sep. 30, 2022	Dec 31, 2022	Jan. 30, 2023	Apr. 1, 2024
GEER II	Sep. 30, 2023	Dec 31, 2023	Jan. 29, 2024	Mar. 31, 2025
CRRSA EANS	Sep. 30, 2023	Dec 31, 2023	Jan. 29, 2024	Mar. 31, 2025
ARP EANS	Sep. 30, 2024	Dec 31, 2024	Jan. 28, 2025	Mar. 31, 2026

Late Liquidation: State Template

- State may submit requests on behalf of itself and/or its LEAs
 - No firm deadline for applying
 - Verify grantees are “low-risk” (as defined by the State)
 - Ensure funds were obligated in a timely way
 - Maintain supporting documentation
 - Need a reason for applying beyond just “ran out of time”
- Beyond 14 months requires extensive ED review with “significant documentation” that will only be considered in “limited circumstances.”

Late Liquidation AND Activities Past the Project Period?

- Maybe!
- Nothing says you can't have both
- May need/want both
 - E.g. if you want to extend projects beyond liquidation period but also mitigate risk by avoiding prepayment

OTHER REQUIREMENTS OF NOTE

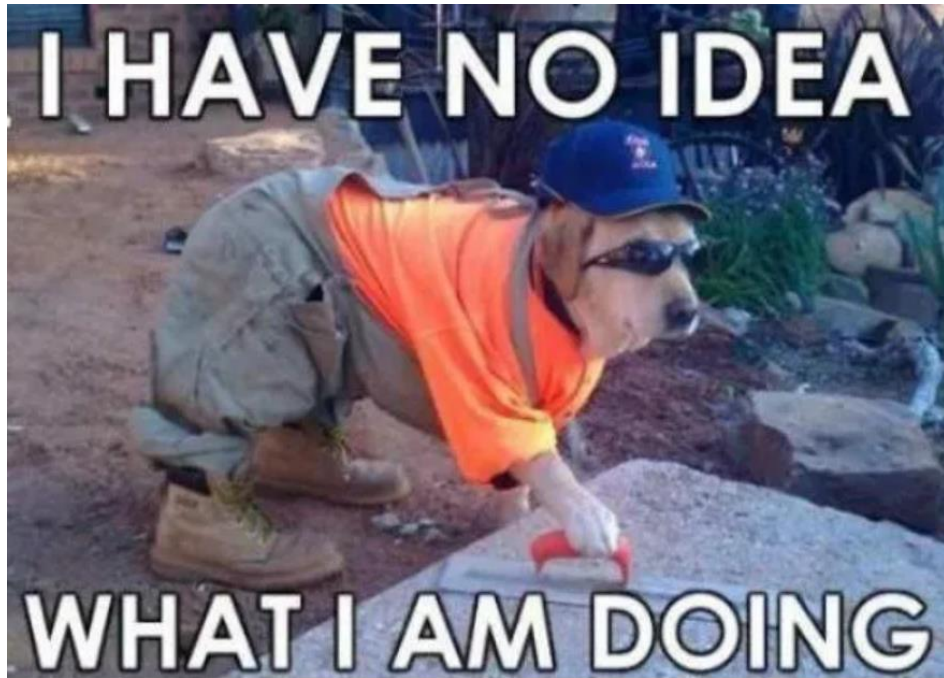
Davis-Bacon

- All projects over \$2,000 financed in any part by federal funds must meet all Davis-Bacon prevailing wage requirements and include language in the contracts that all contractors or subcontractors must pay wages that are not less than those established for the locality of the project (prevailing wage rates).
- Includes minor remodeling, renovation, repair, and/or construction of public buildings or public works
- Administered by Department of Labor's Wage and Hour Division
 - But subject to interpretation and additional administrative requirements by cognizant agency

What is the “Prevailing wage?”

- The wage the DOL has determined is appropriate for the local area, based on publicly available tables
- “Wage” is the combination of the basic hourly rate and any fringe benefits listed in a Davis-Bacon wage determination.
- Prevailing wages, including fringe benefits, must be:
 - Paid on all hours worked on the site of the work
 - Based on job duties performed (e.g. can pay electrician as mechanic if that’s the work they do)
 - Apprentices/trainees may be paid less *if they are in an apprenticeship program registered with the Department of Labor*

Who bears responsibility for Davis-Bacon?



- Contracting agencies (SEA or LEA) must:
 - Ensure contract includes Davis-Bacon provisions where applicable and determine prevailing wage schedule applicable
 - Ensure payroll records are received and align with prevailing wage
 - Confirm poster is visible on work site
 - Confirm those making less than prevailing wage are in qualified apprenticeship programs

What must contractors do?

- Contractors and subcontractors must:
 - Pay covered workers weekly
 - If contractor pays biweekly? DOL: “To be in compliance, they have to change payment practices at least in this scope.”
 - Submit weekly certified payroll records to the contracting agency.
 - Post the applicable Davis-Bacon wage determination with the [Davis-Bacon poster \(WH-1321\)](#) on the job site in a prominent and accessible place where they can be easily seen by the workers.



What to do if noncompliance is identified?

- If payroll is not being provided:
 - Can withhold payments to contractor until the certified weekly payroll are provided
 - Must include written statement of compliance to be certified
- If not included in contract:
 - Retroactively amend contract and pay back wages

What if noncompliance is identified after project is over?

- If contract fails to include Davis-Bacon requirements
 - Incorporate retroactively to the beginning of the contract
 - If payroll is filed correctly, ensure records are completed and append a statement outlining circumstances
 - As long as workers were paid at least DBA wages, DOL does not customary use a monetary penalty
 - ED may impose requirements that LEA improve contract practices (or other)

What if noncompliance is identified after project is over?

- If contractor fails to pay Davis-Bacon wages
 - LEA should work with them to figure out how to correct practices
 - Payments can be withheld until issues rectified, and can be terminated for significant noncompliance
 - Contractor should pay back wages to workers – there is no statute of limitations
 - Grantee should hold any remaining funds for direct payment – takes precedent over all other costs
- If contractor fails to pay prevailing wage in violation of contract in a way that is “egregious,” can be debarred

Consequences from ED to LEAs



- Likely:
 - Require updating of internal policies and procedures
 - Retroactively update current contracts
 - Determine scope of issue
 - Require LEA to allocate additional funds for payment of DBA wages
- Possible:
 - Require payback of funds

Construction: Prior Written Approval

- 34 CFR 200.439 Equipment and other capital expenditures.
- “(b)(1)Capital expenditures for general purpose equipment, buildings, and land are unallowable as direct charges, except with the prior written approval of the Federal awarding agency or pass-through entity.
- (2) Capital expenditures for special purpose equipment are allowable as direct costs, provided that items with a unit cost of \$5,000 or more have the prior written approval of the Federal awarding agency or pass-through entity.
- (3) Capital expenditures for improvements to land, buildings, or equipment which materially increase their value or useful life are unallowable as a direct cost except with the prior written approval of the Federal awarding agency, or pass-through entity.”

Prior Written Approval

- Suggested “checklist” for LEAs seeking prior written approval (select items from [ESSER/GEER guidance](#))
 - How the project prevents, prepares for, or responds to the COVID-19 pandemic;
 - Identification of the LEA’s interest in, or authority over, the school facility involved, such as an ownership interest or a lease arrangement;
 - Sources and amounts of funds available for the proposed project;
 - A statement signed by an appropriate, independent local official affirming that:
 - The project meets applicable Federal, State, and local requirements with respect to health and safety, environmental standards, Historic Preservation, and other requirements (see FAQ B-6 and 34 CFR part 75); and
 - The renovation or construction is necessary (e.g., current status threatens the health and safety of facility occupants or prevents the use of the facility).

Prior Written Approval

- Suggested “checklist” for LEAs seeking prior written approval (select items) (cont.)
 - A cost estimate and other details needed to support the reasonableness and allowability of the expenditure under the applicable statute (e.g., ARP Act) and cost principles in the Uniform Guidance (e.g., the original construction date and the dates and descriptions of any other major renovations of the facility); and
 - Applicable assurances and certifications (see FAQ B-6 for applicable requirements that must be met for any renovation or construction project).



Title to Construction Site



- A district must have and be able to demonstrate title or other interest to the site where the construction is taking place, including right of access, that is sufficient to ensure the grantee's undisturbed use and possession of the site for 50 years or the useful life of the facilities, whichever is longer (34 CFR § 75.603).

Federal Interest

- When SEAs or LEAS use federal funds to purchase land, construct a building, or make improvements, must:
 - Record the federal interest in the title of the property per agency instructions
 - Include a covenant of nondiscrimination during useful life of project
 - Agree not to dispose of, modify use of, or change terms or property without permission and instructions of awarding agency (OMB form 424D)
 - Report to the pass-through on the status of the property acquired with federal funds annually (unless different time period established) for 15 years (2 CFR 200.313)

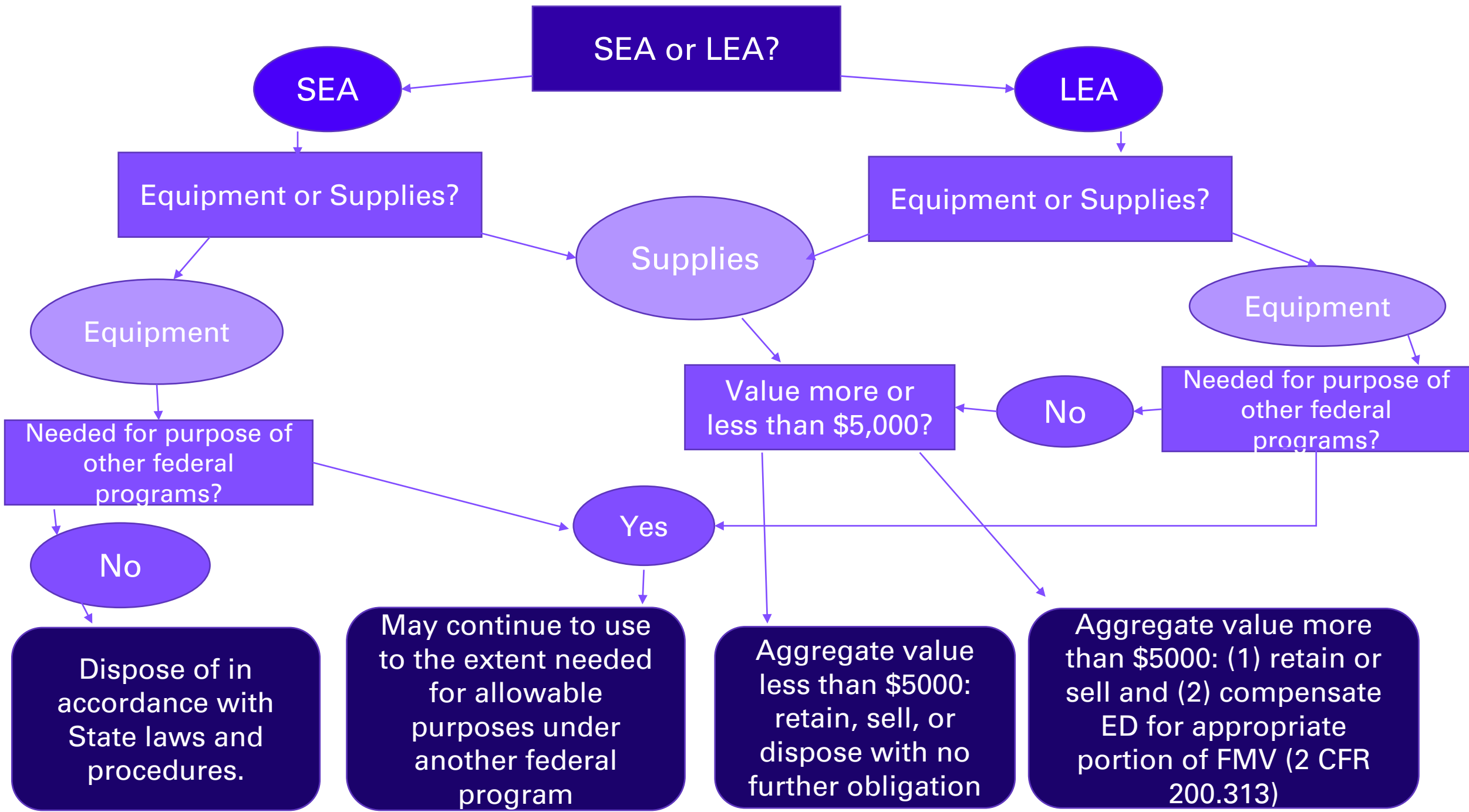
DISPOSITION

+



+





SEA or LEA?

SEA

LEA

Equipment or Supplies?

Equipment or Supplies?

Equipment

Supplies

Equipment

Needed for purpose of other federal programs?

Value more or less than \$5,000?

Needed for purpose of other federal programs?

No

No

Yes

Dispose of in accordance with State laws and procedures.

May continue to use to the extent needed for allowable purposes under another federal program

Aggregate value less than \$5000: retain, sell, or dispose with no further obligation

Aggregate value more than \$5000: (1) retain or sell and (2) compensate ED for appropriate portion of FMV (2 CFR 200.313)

Equipment v. Supplies Defined

Equipment

- Tangible personal property (including information technology systems) having a useful life of more than one year and a per-unit acquisition cost that equals or exceeds the lesser of the capitalization level established by the non-Federal entity for financial statement purposes or \$5,000. (2 CFR 200.1)

Supplies

- All tangible personal property that is not equipment. A computing device is a supply if the acquisition cost is less than the lesser of the capitalization level established by the non-Federal entity for financial statement purposes or \$5,000, regardless of the length of its useful life. (2 CFR 200.1)
 - Computing Devices

General Disposition Rule

- Equipment and supplies purchased with ESSER or GEER funds
 - may be used by States or LEAs for the authorized purpose during the period of performance
 - OR
 - until the equipment and supplies are no longer needed for the purposes of the ESSER or GEER program.
- If the equipment or supplies are no longer needed for purposes of the ESSER or GEER program, a State or LEA may:
 - continue to use the equipment and supplies to the extent they are needed for allowable purposes under another Federal education program in which the State or LEA participates,
 - OR
 - use the equipment or supplies for a Federal program of another Federal awarding agency

Disposition of Equipment by SEA



- For States: If the item is not needed for authorized purposes under ESSER or GEER or for any of the State's other Federal programs, then a State must dispose of the equipment in accordance with State laws and procedures.
 - Includes EANS property.
 - See ED Guidance (August 2022): <https://oese.ed.gov/files/2022/08/EANS-Disposition-Clarification-8-2-22.pdf>

Disposition of Equipment by LEA

- LEAs: If the item is not needed for authorized purposes under ESSER or GEER or for any of the LEA's other Federal programs, then:
 - Fair market value of **\$5,000 or less**, may be retained, sold, or otherwise disposed of without additional responsibility to the Department.
 - Fair market value **in excess of \$5,000**, the LEA may retain or sell the equipment, but ED is entitled to its proportionate share.
 - The amount is calculated by multiplying the current fair market value or proceeds from the sale by the Department's share or proportion of the cost of the original purchase. (2 CFR 200.313(e)).
 - Plus keep up to \$500 for administrative costs.

Disposition of Supplies (SEA or LEA)

- If there is a residual inventory of supplies that are not needed exceeding \$5,000 in total aggregate value, the State or LEA may retain or sell the supplies but, in either case, must compensate the Department for its share per 2 CFR 200.313(e)(2).
 - A State or LEA may calculate the total aggregate value when disposition occurs - e.g., at the end of each year for which supplies are disposed
- A State or LEA must make a good faith effort to sell unneeded supplies and document its efforts (2 CFR 200.314(a)) .
 - EANS Guidance: If a State cannot find a buyer and cannot use the supplies itself, the State has no further obligation to the Department.

What about CARES Act Equitable Services property?

- Equipment and supplies may be used for the authorized purposes of a CARES Act program during the period of performance (i.e., through September 30, 2022) or until the equipment and supplies are no longer needed for the purposes of the program (34 CFR 76.661(b); 2 CFR 200.313 and 200.314(a)).
 - If an LEA determines, in consultation, that non-public school students and teachers continue to need such equipment and supplies for the purposes of the CARES Act program beyond the period of performance, the LEA may, but is not required to, continue to permit non-public school students and teachers to use the equipment and supplies.
- **If an LEA permits use to continue beyond the period of performance, the LEA must continue to maintain title to, and keep administrative control over, the equipment and supplies.**

What about CARES Act Equitable Services property? (cont.)

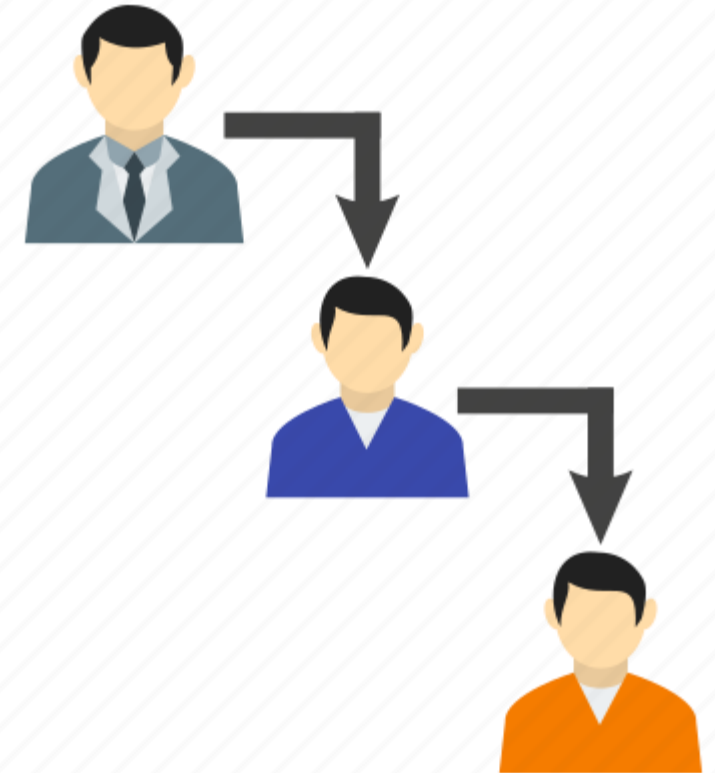
- If no longer needed for the CARES Act program, then the CARES Act equipment and supplies:
 - Can be used for another federally-funded program at the private school (i.e. another equitable services or applicable program);
 - Can be transferred to the LEA or other public entity for purposes of another federally funded program; or
 - Can be otherwise disposed of based on fair market value.

ESSER MONITORING



Monitoring Chain of Command

- Congress asks ED for data (NCES), evidence of success (program offices)
- OIG Monitors ED's implementation, TA, and guidance in implementing federal programs
- ED monitors States
 - Both implementation of State-level expenditures AND oversight of LEAs
 - And reviews/monitors policies and processes in a sample of districts
- SEA monitors individual LEAs



ESSER/EANS Monitoring

ESSER Monitoring Protocols

[ESSER Grantee Self-Assessment Protocol](#)

[ESSER Subrecipient Self-Assessment Protocol](#)

[SEA Self-assessment Protocol – Fiscal](#)

[LEA Self-assessment Protocol – Fiscal](#)

EANS Monitoring Protocols

[EANS Grantee Self-Assessment Protocol](#)

[SEA Self-assessment Protocol – Fiscal](#)

[LEA Self-assessment Protocol – Fiscal](#)

**There are also GEER monitoring protocols!*



ESSER Top Monitoring Findings⁵¹ (so far)

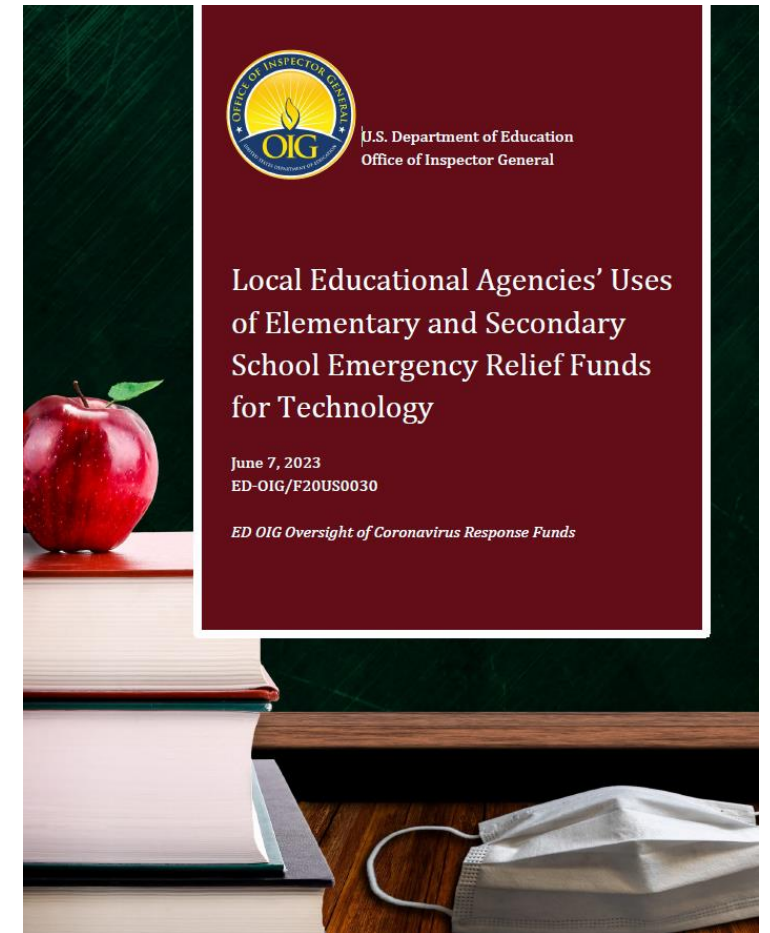
<https://oese.ed.gov/offices/american-rescue-plan/performance-and-reporting/>

**Last posted monitoring report is dated February 2023.*

- Lack of internal risk assessment
- Missing required policies and procedures
- Cash management
- Lack of subrecipient monitoring process
- Not complying with procurement requirements (or following state versus federal requirements)

ED OIG Actions

- [Local Educational Agencies' Uses of Elementary and Secondary School Emergency Relief Funds for Technology \(June 7, 2023\)](#)
 - [Informational – no recommendations](#)
- The OIG surveyed a nationwide sample of LEAs about their experiences with using ESSER funds to purchase educational technology to continue student instruction during the coronavirus.
- We determined (1) the types of educational technology that LEAs purchased with their ESSER funds, (2) the challenges that LEAs experienced when using ESSER funds for educational technology, and (3) the impact the educational technology had on student learning.



TRANSITIONING AWAY FROM ESSER/GEER

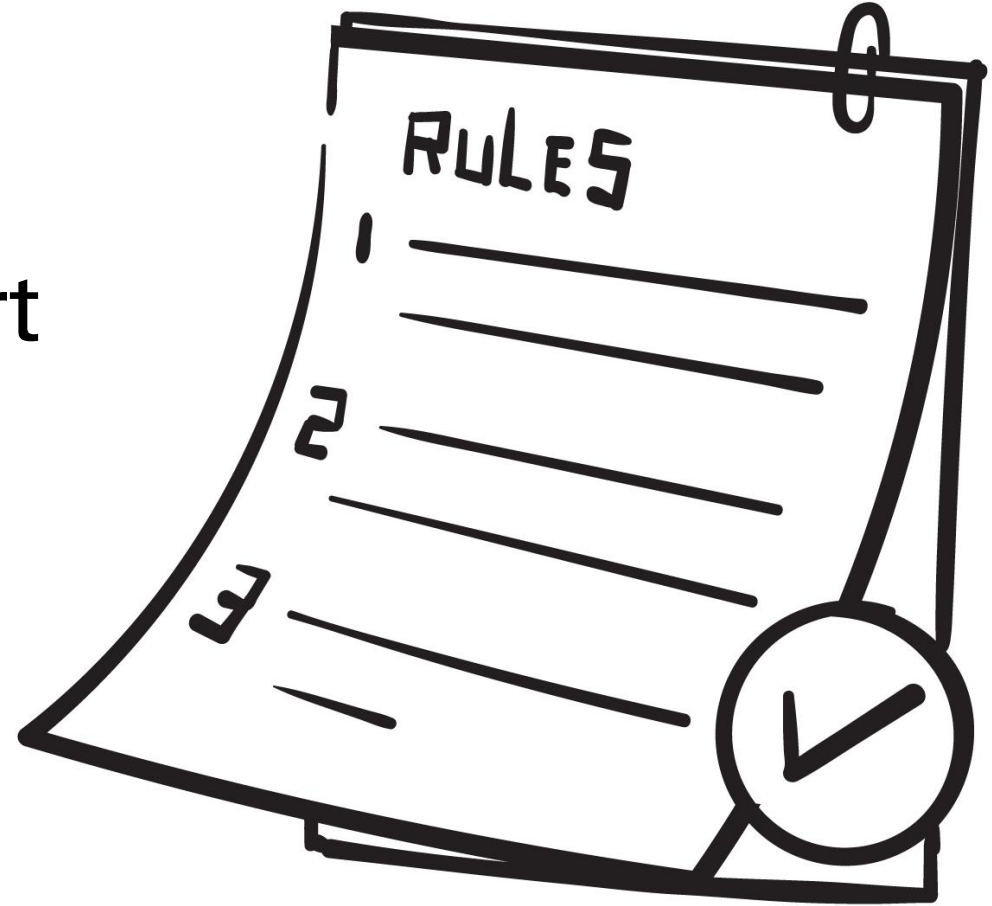
Outlook for Appropriations

- Substantive increases to spending extremely unlikely
- Plan for flat-funded amounts (in dollars)
 - Inflation may impact value of appropriations



Fiscal Rules to Remember

- Supplement, not Supplant
- Maintenance of Effort
- Comparability



SNS Requirements

SNS Standard	Program										
	Title I,A	Migrant Education	Title II,A	Title III,A	Title IV,A	REAP/SRSA	21 st CCLC	IDEA	Perkins	ESSER	
	State and Local Funds	ESSA Sec. 1118(b)	ESSA Sec. 1304(c)(2)								---
	Non-Federal Funds			ESSA Sec. 2301		ESSA Sec. 4110			Sec. 211	---	
Federal, State and Local Funds				ESSA Sec. 3115(g)		ESSA Sec. 5232	ESSA Sec. 4204 Subs Non-federal funds 4202(b)(2)(G)	34 CFR 300.164 (a) (SEA); 300.202(a) (LEA)		---	

ESSA Title I, A Sec. 1118(b) SNS

- A LEA may use Part A funds only to supplement the funds that would, in the absence of the Part A funds, be made available from state and local sources for the education of students participating in a Part A program.
- In no case may a LEA use Part A funds to supplant funds from state and local sources.

An LEA may not be required to...

- 1) identify that an individual cost or service supported with Part A funds is supplemental; or
- 2) provide services through a particular instructional method or in a particular instructional setting.

(See ESEA section 1118(b)(3))

ESSA Title I, A Sec. 1118(b) (cont.)

- TEST: An LEA must demonstrate that it has a methodology (e.g., *through written procedures*) and uses it to allocate **state and local funds to each Title I school** [and] ensures that the school receives all of the state and local funds it would otherwise receive if it were not receiving Part A funds—i.e., the LEA’s methodology may not take into account a school’s Title I status
 - ED frames this as “Title I neutral”

Presumptions of Supplanting (used outside Title I,A)

Auditors presume supplanting occurs if federal funds were used to provide services...

1. Required to be made available under other federal, state, or local laws
2. Provided with non-federal funds in prior year
For Title III, A → other federal funds
3. **[Title I, C and Perkins only]** Provided services to eligible students with federal funds, and the same services were provided to non-eligible students with nonfederal funds.

These presumptions are rebuttable if the SEA or LEA can demonstrate that it would not have provided the services in question with non-federal funds had the federal funds not been available.

IDEA SNS - SEA

- *General.* Funds paid to a State under IDEA Part B must be used to supplement and increase the level of Federal, State, and local funds (including funds that are not under the direct control of SEAs or LEAs) expended for special education and related services. (34 CFR 300.164(a))
- “A State may use funds it retains under 300.704(a) [state admin] and (b) [state-level activities] without regard to the prohibition on supplanting other funds.”

IDEA SNS - LEA

- *General.* Amounts provided to the LEA under IDEA Part B must be used to supplement State, local, and other Federal funds and not to supplant those funds. (34 CFR 300.202(a)(3))
 - Compliance Supplement: Supplement not supplant is “not applicable” → (Old) ED Guidance: if meet local MOE, then meet supplanting requirement
 - Presumptions of supplanting do not apply

SNS Testing

- SNS is a current to prior year test.
- ESSER and GEER funds do not have a SNS requirement but are considered Federal Funds.
- May be able to use GEER/ESSER funds to remove supplanting presumptions for programs without an “other Federal” SNS test.



ESEA Maintenance of Effort (MOE)



- The combined fiscal effort per student or the aggregate expenditures of the LEA
- from state and local funds
- from preceding year must not be less than 90% of the second preceding year.
- Sec. 1118(a) and 8521

MOE (34 CFR 299.5)

- ESSA MOE applies to:
 - Title I, Part A (Improving Basic Programs Operated by Local Educational Agencies)
 - Title I, Part D (Prevention and Intervention Programs for Children and Youth who are Neglected, Delinquent, or At Risk)
 - Title II, Part A (Improving Teacher Quality)
 - Title III, Part A (English Language State Grants)
 - Title IV, Part B (21st Century Learning Centers)
 - Title V, Part B (Subpart 2, Rural Education Programs)

MOE Calculation (34 CFR 299.5)

Include state and local expenditures for:

- Expenditures for administration
- Instruction
- Attendance and health services
- Pupil transportation services
- Operation and maintenance of plant
- Fixed charges
- Net expenditures to cover deficits for food services and student body activities.

Exclude state and local expenditures for:

- Community services
- Capital outlay
- Debt service
- Supplemental expenditures made as a result of a declared disaster

MOE Waiver Sec. 8521(c)

Secretary of Education may waive MOE if “equitable”:

- Exceptional or uncontrollable circumstances, such as a natural disaster; or
- A change in the organizational structure of the LEA; or
- A precipitous decline in the financial resources of the LEA.

Waiver = meeting MOE!

IDEA Maintenance of Effort (LEA)

The general rule:

- An LEA may not reduce the amount of local, or state and local, funds that it spent for the education of CWDs below the amount it spent for the preceding fiscal year.
- Subsequent years rule

Two components:

- Eligibility standard (34 CFR 300.203(a))
- Compliance standard (34 CFR 300.203(b))

Failure to meet IDEA MOE

- SEA payback to ED with nonfederal funds:
 - Lesser of the amount of the failure, or the LEA's entire Part B subgrant for that fiscal year
 - Can use most favorable method
- SEA can use State procedures to recover funds from LEA
- LEA MOE Subsequent Years Rule, 34 CFR 300.203(c)
 - If LEA fails to meet MOE requirements, the level of expenditures required of the LEA for the fiscal year subsequent to the year of the failure is the amount that would have been required in the absence of that failure, not the LEA's reduced level of expenditures.

Comparability

- Title I of ESEA
- Requires school districts to provide services in Title I schools from state and local funds that are at least comparable to services in non-Title I schools.
 - If all schools in a grade span within the LEA are Title I schools, all schools must be “substantially comparable.”
 - Calculate by grade span
 - NOT spending → do not calculate salaries

Stimulus Requirements

- ESSER MOE for States
 - Does not apply past FY 2022
 - Looks at total appropriations
- ARP MOEequity for States and Districts
 - Two-year test

ED has not yet provided information on what penalties might be – States and districts could be allocating additional funds to schools or districts to make them “whole” if MOEequity was not met.



Program Sustainability

- ED announces plans to convene an ARP-ESSER “learning community” to talk about “strategic planning for continued recovery”
 - “We have already shared resources outlining how these and other Department funds can sustain pandemic relief investments in academic recovery and mental health and address staffing shortages. These State and Federal funds can and should be the foundation for sustaining priority initiatives currently supported by ARP and other recovery programs.”
- Will there be more money?
 - →no 😞

Planning for the future

- Federal stimulus funds will go away
 - No plan for reviving them
- Appropriations levels will stabilize or slightly decrease
- Oversight in Congress
- Focus from press on tutoring, ventilation

- Grants should be careful not to use federal funds to fill in the caps → raises concerns about fiscal tests



ANY QUESTIONS?

LEGAL DISCLAIMER

This presentation is intended solely to provide general information and does not constitute legal advice or a legal service. This presentation does not create a client-lawyer relationship with The Bruman Group, PLLC and, therefore, carries none of the protections under the D.C. Rules of Professional Conduct. Attendance at this presentation, a later review of any printed or electronic materials, or any follow-up questions or communications arising out of this presentation with any attorney at The Bruman Group, PLLC does not create an attorney-client relationship with The Bruman Group, PLLC. You should not take any action based upon any information in this presentation without first consulting legal counsel familiar with your particular circumstances.