

COVID, CARES, and UGG Final Updates

Tiffany Kessler, Esq. tkessler@bruman.com

Brustein & Manasevit, PLLC www.bruman.com

October 2020

Agenda

- OMB and ED UGG COVID Flexibility
- OMB Final UGG Updates
- 2020 Compliance Supplement
- Recent ED Waivers
- CARES Act Equitable Services Updates



<https://www.bruman.com/resources/>

OMB and ED COVID Flexibility



30 days hath
September, April, June
and November, all the
rest have 31, except
for 2020 which has
5328.

March 19, 2020 (OMB Memo M-20-17)

Administrative Relief for Recipients and Applicants of Federal Financial Assistance Directly Impacted by the Novel Coronavirus (COVID-19) due to Loss of Operations

- Short term relief for the requirements under 2 CFR Part 200 without compromising accountability requirements. (per authority under 200.102 exceptions)
- Applies to All Federal Granting Agencies!
- Expired June 19, 2020 (valid 90 days)



<https://www.whitehouse.gov/wp-content/uploads/2020/03/M-20-17.pdf>

OMB COVID-19 Guidance

1. SAM registration
2. Application deadline flexibility
3. Waiver of Notice of Funding Opportunities
4. No-cost extensions
5. Abbreviated non-competitive continuation
6. Salary and benefits allowability
7. Cancellation fees allowability
8. Waivers from prior approval
9. Procurement exemptions
10. Reporting extensions
11. Indirect cost rate extensions
12. Closeout extensions
13. Single audit extension

April 8, 2020 ED Fact Sheet

Select Questions Related to Use of Department of Education Grant Funds During the Novel Coronavirus Disease 2019

- ED adopted 2 of the OMB flexibilities



<https://www2.ed.gov/documents/coronavirus/factsheet-fiscal-questions.pdf>



ED Fact Sheet

May a grantee or subgrantee continue to pay the compensation of an employee paid with grant funds from ED during the period the employee is unable to work because his or her organization is closed due to novel Coronavirus Disease 2019 (COVID-19)?

Yes. Generally, a grantee or subgrantee may continue to charge the compensation

- Consistent with the organization's policies and procedures re: emergencies
- The grantee or subgrantee may amend or create a policy in order to put emergency contingencies in place for Federal and non-Federal similarly situated employees.
- Maintain appropriate records and cost documentation.



ED Fact Sheet

If a conference, training, or other activity related to a grant from the Department is cancelled due to COVID-19, may grant funds be used to reimburse nonrefundable travel (e.g., conveyance or lodging) or registration costs that were properly chargeable to the grant at the time of booking?

Yes, provided that a grantee or subgrantee first seeks to recover nonrefundable costs (e.g., travel, registration fees).

- Must seek to exercise “Act of God” clauses to the extent possible in light of the COVID-19 outbreak.

May charge the appropriate grant for the cancellation costs, provided the costs were reasonable and incurred in order to carry out an allowable activity under the grant.

Must maintain appropriate records and cost to substantiate the charging of any cancellation or other fees related to the interruption of operations or services.

June 18, 2020 (OMB Memo M-20-26)

Extension of Administrative Relief for Recipients and Applicants of Federal Financial Assistance Directly Impacted by the Novel Coronavirus (COVID-19) due to Loss of Operations

- Extended two flexibilities
- Applies to All Federal Granting Agencies!



<https://www.whitehouse.gov/wp-content/uploads/2020/06/M-20-26.pdf>

6. Allowability of salaries and other project activities (200.403; 200.404; 200.405)

- Extended through September 30, 2020 – expired!!

- May continue to charge salaries and benefits ... consistent with recipients policy of paying salaries (under unexpected or extraordinary circumstances) from all funding sources
 - Awarding agencies may evaluate grantee's ability to resume activity and appropriateness of future funding (as normally done)
 - Payroll costs paid with Paycheck Protection Program (PPP) loans or other CARES Act funds may not also be charged to current Federal awards as it would be double payment.
 - Due to limited funding, awarding agencies MUST inform recipients to exhaust other available funding sources to sustain its workforce and implement necessary steps to save overall operational costs (such as rent negotiations) during this pandemic period in order to preserve Federal funds for the ramp-up effect.
 - Recipients should retain documentation of their efforts to exhaust other funding sources and reduce overall operational costs.

13. Single Audit Extension (200.512)

- Audits not filed by March 19, 2020: Federal awarding agencies may delay audits with normal due dates from March 30, 2020 through Jun 30, 2020 up to 6 months.
- Audits with a normal due date from July 31, 2020 through September 30, 2020 will have a 3 month extension – to December 31, 2020.
 - No further action by Federal awarding agency is required to enact this extension.
 - No specific approval is required.
 - Documentation of the reason for the delayed filing must be maintained.

Schedule of Expenditures of Federal Awards (SEFA) Requirement:

- Recipients and subrecipients must separately identify the COVID-19 Emergency Acts expenditures on the SEFA and audit report findings.

August 2020 ED Fact Sheet

Regarding Contracted Services Not
Performed Due to COVID-19



<https://www2.ed.gov/documents/coronavirus/factsheet-covid19-contracts.pdf>

ESSER Application and Assurances

Paying staff and contractors

- Pay employees and contractors “to the greatest extent practicable based on the unique financial circumstances of the entity.”
- Executive salaries/benefits *outside the SEA or LEA* generally not allowable
- Teacher or faculty union or association membership fees generally not allowable
- Funds should not be used for bonuses, merit pay, or similar expenditures unless related to COVID-19 disruptions or closures

<https://oese.ed.gov/files/2020/04/ESSERF-Certification-and-Agreement-2.pdf>

Contracted Services Not Performed Due to COVID-19

Can grant funds be used to cover the cost of approved contracted services that were not performed by a contractor because of the COVID-19 pandemic?

Yes, in some limited circumstances, grant funds may be used to cover the costs of contracted services that were cancelled or otherwise not performed due to the COVID-19 pandemic if the contractor was ready and able to perform such services at the time.

Contracted Services Not Performed (cont.)

1. Check on alternative arrangements first:
 - Alternative ways to provide those services (e.g., teleconferencing, training via webinars, and other virtual or remote strategies for service delivery) to carry out the intent and purpose of contracts.
 - May require modification of the contract.
2. Steps if services cannot be provided in an alternative manner:
 - a) Recover refundable and nonrefundable costs paid in advance of services;
 - If unable to recover funds paid, and the contractor was prevented from performing under the contract, but was ready and able to perform such services at the time, due to the closure or other inability to accept the services, caused by the pandemic then should try to negotiate a reasonable compromise amount.
 - b) Invoke emergency or “act of God” or “force majeure” provisions, as applicable;
 - c) If no compromise can be negotiated, the grantee or subgrantee may charge the appropriate grant for the costs of cancelling the contract.
 - Must be necessary, reasonable, allowable under the grant and meet UGG requirements.

What Now?

How to Assure Allowability in Light of COVID



Allowability and Internal Controls 200.403; 200.303

- Amend/ Create Policies and Procedures
 - “the grantee or subgrantee may amend or create a policy in order to put emergency contingencies in place....” – ED’s Fact Sheet, April 8, 2020
 - Time and effort procedures, procurement justifications, disposal of equipment, etc.
 - Must still meet any State/local requirements
- Amend LEA plans, schoolwide plans, budgets, etc.
- Amend contracts with 3rd party providers.
- Maintain documentation of expenditures per OMB and ED flexibility.
- Ensure time and effort documentation is maintained.

Tracking Time and Effort 200.430(i)(I)

© Randy Glasbergen / glasbergen.com



"My boss says I can start working from home two days a week...Saturday and Sunday."

Look at:

Policies and procedures

- New forms? (no longer set-schedule?)
- Edited updates?

Allocability:

- Actual effort
- Allocate using prior, representative period

Substitute Systems 200.430(i)(5) still applicable.

OMB UGG Final Revisions



2 CFR PART 200

PUBLISHED AUGUST 13, 2020

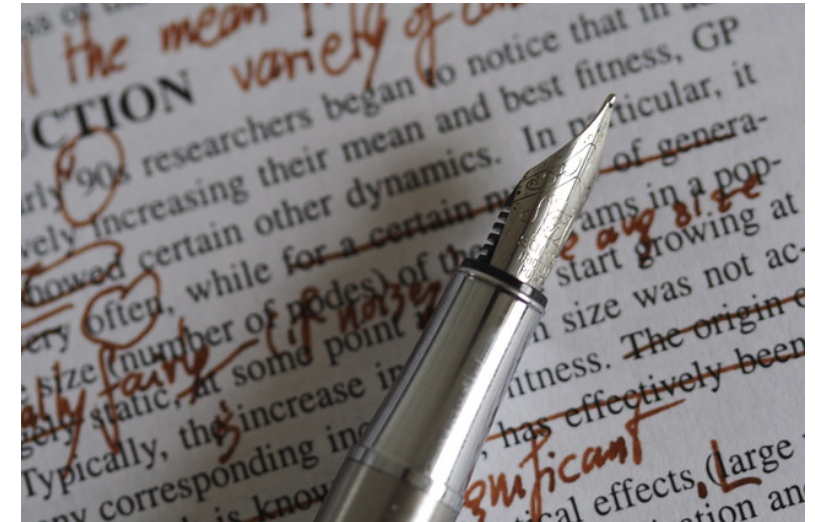
OMB Revises the UGG – August 2020

Proposed changes to 2 CFR Part 200

Published January 22, 2020

Comments closed March 23, 2020

Final Revisions published August 13, 2020



OMB Revisions to the UGG – Effective Dates

Effective as of **November 12, 2020**

- Except for 200.216 and 200.340, effective August 13, 2020

200.216: Prohibition on certain telecommunications and video surveillance services or equipment

- Prohibits grantees from entering into contracts with certain covered entities

200.340: Termination

- Allows awards to be terminated “**if an award no longer effectuates the program goals or agency priorities**”
- Previously: “For cause”

Period of Performance 200.1

The total estimated time interval between the start of an initial Federal award and the planned end date, which may include one or more funded portions, or budget periods.

Identification of the period of performance in the Federal award ... does not commit the awarding agency to fund the award beyond the currently approved budget period.



Budget Period 200.1



The time interval from the start date of a funded portion of an award to the end date of that funded portion during which recipients are authorized to expend the funds awarded, including any funds carried forward or other revisions pursuant to §200.308.

- 200.308 – Revisions of budget and program plans.
- May have more than one budget period within period of performance; renewal starts a new period of performance. 2 CFR 200.1

When Obligations Are Made 34 CFR 76.707

Type of Obligation	When Obligation Occurs
Acquisition of Property	Date of binding written commitment
Personal Services by Employee	When services are performed
Personal Services by Contractor	Date of binding written commitment
Travel	When travel is taken
Approved Pre-Agreement Cost	On the first day of the grant or subgrant performance period.

Period of Performance 2 CFR 200.309

❖ (Previous language: allowed pre-award costs “authorized by the federal awarding agency or pass-through entity”)

❖ Comments: Do not delete!

“It was not OMB’s intention to remove the pass-through entities’ authority to allow preaward costs to subrecipients. OMB recognizes these concerns and added language to 2 CFR 200.458 for clarification in response to commenters.”

❖ But it was deleted!!

❖ Pre-award costs will need Federal approval.

Pre-Award Costs 2 CFR 200.458

Those costs incurred prior to the effective date of the Federal award directly in negotiation or anticipation of the award

Costs must be necessary for efficient and timely performance of the scope of work

Allowable to the extent they would have been allowable if incurred after the effective date and ONLY with written approval from the Federal awarding agency

Competition 200.319

(a) All procurement transactions **for the acquisition of property or services required under a Federal award** must be conducted in a manner providing full and open competition consistent with the standards of this section and §200.320.

...

(f) Noncompetitive procurement can only be awarded in accordance with 200.320(c).

Methods of Procurement 200.320

Grantee **must have and use documented procurement procedures** for the following methods:

- (a) Informal procurement methods
 - Micro-purchase
 - Small purchase procedures
- (b) Formal procurement methods
 - Competitive sealed bids
 - Competitive proposals
- (c) Noncompetitive proposals



Informal Procurement, 200.320(a)(1)

Micro-purchases

Distribution. “To the maximum extent practicable, the non-federal entity should distribute ... among qualified suppliers.”

Awards. May be awarded without price or rate quotes if non-federal entity “considers the price to be reasonable based on research, experience, purchase history or other information and documents its files accordingly.”

Given that many businesses are closed, can we sole source our contracts right now?



Noncompetitive Proposals

2 CFR 200.320(f) → 200.320(c)

Appropriate only when:

- **Micro-purchases;**
- The item is only available from a single source;
- **There is a public emergency for the requirement that will not permit delay resulting from publicizing a competitive solicitation;**
- The Federal awarding agency or pass-through expressly authorizes noncompetitive proposals in response to a written request from non-Federal entity; or
- After soliciting a number of sources, competition is determined inadequate.

UGG update on micro purchases:

- “Micro-purchases may be awarded without soliciting competitive price or rate quotations if the non-Federal entity considers the price to be reasonable **based on research, experience, purchase history or other information and documents it files accordingly.**”

Domestic Preferences for Procurements 200.322

“To the greatest extent practicable” must provide a preference for the purchase of goods and materials produced in the U.S.

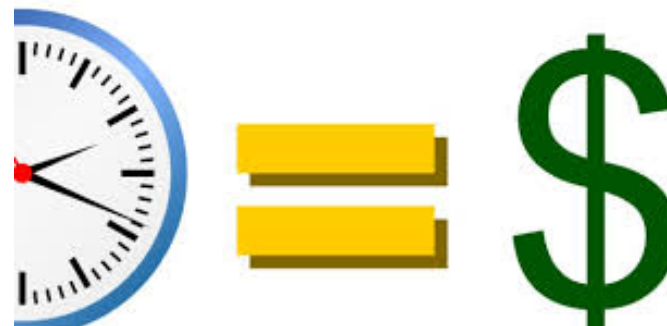
Must include this section in all subawards, contracts and purchase orders



Closeout 2 CFR 200.344 (formerly 200.343)

Subrecipients must prepare closeout reports and final accounting within 90 days after period; pass-through entities have **120 days**

2 CFR 200.343



So What?? What Does All this mean?



Update Written Policies and Procedures

Required:

- Cash Management Procedures - 200.302(b)(6) & 200.305
- Allowability Procedures - 200.302(b)(7)
- Managing Equipment – 200.313(d)
- Conflicts of Interest Policy - 200.318(c)
- Procurement Procedures - 200.320
- Method for Conducting Tech Evals of Proposals - 200.320(d)(3)
- Travel Policy - 200.474(b)
- Time and Effort Procedures - “essential” ED’s Cost Allocation Guide

The Administrator's Handbook on EDGAR, 5th Ed.

Compiled by Brustein & Manasevit, PLLC



Only \$44
plus shipping



COMING
SOON

Pre-Order your copy today!

The new 5th Ed. updates include:

- ✓ UGG final updates with impactful changes to procurement, timeliness of spending, pre-award costs, liquidation periods, budget period, indirect costs and more;
- ✓ Inclusion of excerpts of the General Education Provisions Act;
- ✓ The time and effort requirements from ED's Cost Allocation Guidance; and more!

If you register for our Virtual Fall Forum, you get a complimentary copy and can order additional copies at a discounted rate!



2020 Compliance Supplement

https://www.whitehouse.gov/wp-content/uploads/2020/08/2020-Compliance-Supplement_FINAL_08.06.20.pdf

Released on August 14, 2020

1,559 Pages

Compliance Supplement

The Supplement provides a source of information for auditors to understand the federal program's objectives, procedures, and compliance requirements subject to the audit as well as audit objectives and suggested audit procedures for determining compliance with these requirements.



Organization of the Compliance Supplement

Part 1 – Background, Purpose, and Applicability

Part 2 – Matrix of Compliance Requirements

Part 3 – Compliance Requirements

Part 4 – Agency Program Requirements

Part 5 – Cluster of Programs

Part 6 – Internal Controls

Part 7 – Guidance for Auditing Programs Not Included in the CS

Part 8 - Appendices

Compliance Requirements Options

1. Activities Allowed/Unallowed
2. Allowable Costs/Cost Principles
3. Cash Management
4. Eligibility
5. Equipment & Real Property Management
6. Matching, Level of Effort, Earmarking
7. Period of Performance
8. Procurement and Suspension & Debarment
9. Program Income
10. Reporting
11. Subrecipient Monitoring
12. Special Tests & Provisions

Each federal program must select 6 requirements for auditors to focus on

Compliance Requirements

Auditors must consider compliance requirements and related audit objectives for all applicable major programs.

Each requirement has suggested audit procedures to assist in planning and performing tests of compliance (internal controls) and for determining if there were any improper payments

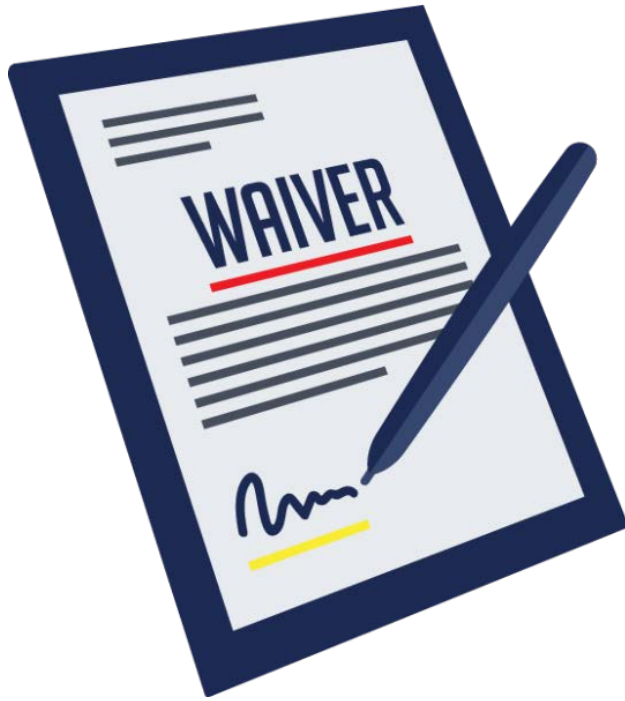
ESSA Title I, Part A Compliance Requirements

1. Allowability
2. Eligibility
3. Matching, Level of Effort, Earmarking
4. Reporting
5. Subrecipient Monitoring
6. Special Tests & Provisions

Future Changes

Appendix VII (Part 8)

OMB is working with federal agencies to identify the needs for additional audit guidance for new COVID-19 related programs and existing programs with compliance requirement changes and plans to publish an addendum to this Supplement in the fall of 2020.



ED Waivers

CARES Act Expedited Waivers

March 20, 2020

Required Under CARES Act:

- ESEA Section 1111(b) (2) and (3) (assessments, timelines for recently arrived ELs)
 - ESEA Section 1111(c)(4) (description of accountability system, including long-term goals and indicators)
 - ESEA Section 1111(d)(2)(C) and (D) (“additional targeted support” and notification)
 - ESEA Section 1111(h)(1)(C)(i), (ii), (iii)(I), (iv), (v), (vi), (vii), and (xi) (several report card requirements, but not high school graduation rate, professional qualifications, NAEP scores, or per-pupil expenditures)
 - ESEA Section 1111(h)(2)(C)(i) and (ii) (disaggregated data re: student achievement)
 - ***Section 421(b) of GEPA (carryover) – not included***
-
- ***All 50 states, DC, PR and BIE applied and were granted waivers.***

GEPA Waivers

Several programs were allowed to waive period of availability for federal funds

Applies to carryover of FY 2018 funding – Funds that would have expired September 30, 2020 are now available through September 30, 2021 (must be liquidated by December 30, 2021)

- IDEA ([June 8, 2020](#))
- Perkins and AEFLA ([April 16, 2020](#))
- ESEA programs ([April 3, 2020](#))

CARES Act Additional Waivers

April 3, 2020 (cont.)

- **Title I, A 15% carryover 3 year waiver limit** ESEA Section 1127
- **Professional Development** ESEA Section 8101(42) (for 19-20 SY)
- **Title IV, A Waivers**
 - Needs assessment: Section 4106(d) (applies only to 19-20 SY)
 - Buckets of funds: Sections 4106(e)(2)(C) (D) and (E) (applies to FY 18 carryover and FY 19 funds)
 - 15% limitation on technology purchases: Section 4109 (b) (applies to FY 18 carryover and FY 19 funds)
- Title IV, A waiver for FY 20 under consideration!!
<https://www.govinfo.gov/content/pkg/FR-2020-09-17/pdf/2020-20524.pdf>

Recent waiver updates!

September 3, 2020: Letter to Chief State School Officers– No assessment waivers!

- <https://www.bruman.com/wp-content/uploads/2020/09/Secretary-DeVos-Letter-to-CSSOs-09-03-2020.pdf>

September 3, 2020: Notice of proposed 21st CCLC Waiver

- Seeks emergency clearance that would allow States to fund 21st CCLC programs that take place during school hours or session days, or to fund additional instructional staff during normal school hours for hybrid learning plans.
- Could also fund in-school programs like distance learning efforts for low-income students or those whose parents are not able to supervise distance learning because they are working outside the home.
- https://s3.amazonaws.com/public-inspection.federalregister.gov/2020-19474.pdf?utm_source=federalregister.gov&utm_medium=email&utm_campaign=pi+subscription+mailing+list

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



\$30.9 BILLION IN FUNDING FOR U.S. DEPARTMENT OF EDUCATION

Secretary's Reservation

Governor's Fund (GEERF)

Elementary and Secondary
Education Relief Fund (ESSER)

Higher Education relief

Elementary and Secondary School Education Relief Fund (ESSER)



\$13.5 billion (Section 18003)

Allocated to States by proportion to Title I

- 10% State level reservation (inclusive of 0.5% for administrative costs)
- 90% allocated to LEAs by share of Title I → *subject to equitable services*

ESSER Allowable Uses of Funds

Sec. 18003(d)

(1) Any purpose under:

- ESEA (including Native Hawaiian/Alaskan programs)
- IDEA
- AEFLA
- Perkins
- McKinney-Vento Title VII B

(2) Coordination of preparedness and response efforts

(3) Providing principals and leaders “with the resources necessary to address the needs of their individual schools”

(4) “Activities to address the unique needs of low-income children or students, children with disabilities, English learners, racial and ethnic minorities, students experiencing homelessness, and foster care youth”

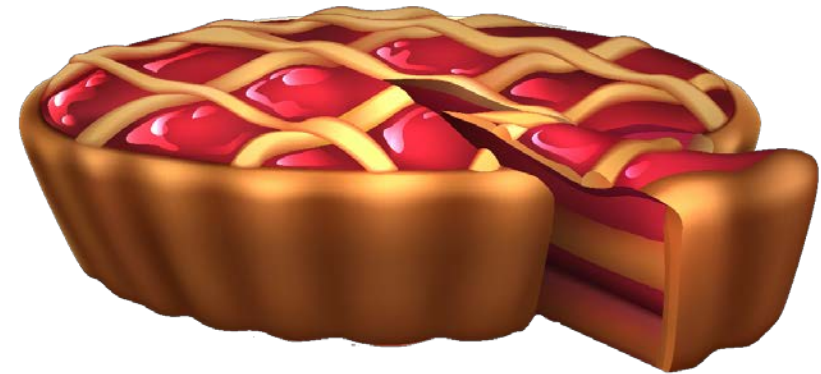
(5) Developing and implementing preparedness procedures and systems

ESSER Allowable Uses of Funds

Sec. 18003(d) (cont.)

- (6) Training and provisional development on sanitation and epidemiology
- (7) purchase of cleaning and sanitizing supplies
- (8) Planning for and coordination on technology, meals, IDEA, and other educational services during long-term closures
- (9) Purchase of educational technology, including assistive or adaptive tech/ equipment
- (10) Mental health services and supports
- (11) Planning and implementing summer learning, afterschool, and other programs targeted to high-need students, including virtually
- (12) “Other activities that are necessary to maintain the operation of and continuity of services in local educational agencies and continuing to employ existing staff of the local educational agency.”

CARES Act Equitable Services



UPDATED GUIDANCE – OCTOBER 9, 2020

[HTTPS://OESE.ED.GOV/FILES/2020/10/PROVIDING-EQUITABLE-SERVICES-UNDER-THE-CARES-ACT-PROGRAMS-UPDATE-10-9-2020.PDF](https://oese.ed.gov/files/2020/10/PROVIDING-EQUITABLE-SERVICES-UNDER-THE-CARES-ACT-PROGRAMS-UPDATE-10-9-2020.PDF)

CARES Act Equitable Services Requirements

SEC. 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.

- Applies to GEER and ESSER funds!

Timeline

National
emergency
declared

- March 13

CARES Act
passed

- March 27

ED
guidance
issued

- April 30

IFR issued

- July 1

Preliminary
Injunction
Orders

- August 21
- August 26

Summary
Judgment
Order

- Sept. 4

Equitable Services Guidance (4/30)

Guidance altered proportionate share from 1117 calculation:

Location of students to be served

- Residing within the LEA → Attending school within the LEA

Calculation of Proportional Share

- Share of low-income students → total participating private school enrollment

Guidance link: [Providing Equitable Services to Students and Teachers in Non-Public Schools Under the CARES Act Programs](#)

The CARES Act Equitable Services Interim Final Rule

Published July 1, 2020
Interim Final Rule at 34 CFR 76.665
30-day public comment period



Litigation



Four Lawsuits and One Summary Judgment

Washington State (Federal District Court for the Western District of Washington)

- *Judge issued a preliminary injunction prohibiting enforcement (geographic scope not clear).* **Multi-state suit** (Federal district court for the Northern District of California)
- CA, MI, WI, ME, MD, DC, HI, NM, PA, NYC, San Francisco, Cleveland, Chicago
- *Judge issued limited preliminary injunction (applies only to plaintiffs)*

COPAA Suit (United States District Court for the District of Maryland)

- Suit brought by Council of Parent Advocates and Attorneys on behalf of students

Four Lawsuits and One Summary Judgment (cont.)

NAACP suit (Federal District Court for the District of Columbia)

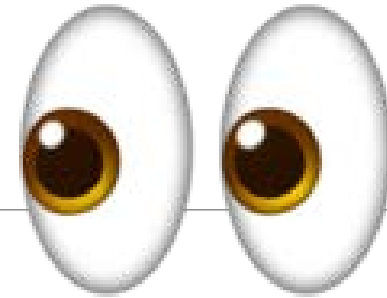
- *Judge issued a final order granting preliminary injunction/summary judgment on the merits.* Vacates rule nationwide, final decision.

Court found:

- Congress intended funding to follow the Title I allocation, including in equitable services.
- There is no “ambiguity” in the phrase “in the same manner as,” despite ED’s assertions.
- ED lacks the ability to regulate on these issues (this is a tentative decision in the WA and multi-state cases).



So what do we do now?



OFFICE OF Elementary & Secondary Education

September 9, 2020 CARES Act Update

On July 1, 2020, the U.S. Department of Education (Department) published an Interim Final Rule (IFR) regarding equitable services under the Coronavirus Aid, Relief, and Economic Security (CARES) Act. (The rule is available at: <https://www.govinfo.gov/content/pkg/FR-2020-07-01/pdf/2020-14224.pdf>). On September 4, 2020, in *NAACP v. DeVos*, the U.S. District Court for the District of Columbia issued an opinion and an order vacating the IFR. Accordingly, the IFR is no longer in effect.

ED Letter to Chiefs, Sept 25, 2020

The Department strongly, but respectfully, disagrees with the ruling. However, we respect the rule of law and will enforce the law as the courts have opined. The Department will not appeal these rulings. As you likely know, the IFR has not been in effect since the court's decision on September 4, 2020, and we subsequently provided notice of the decision on our website.

The Department will not take any action against States or local districts that followed the guidance and/or the IFR prior to notice of the court's decision. Going forward, districts must calculate the minimal proportional share for CARES Act equitable services according to the formula provided in Section 1117(a)(4)(A) of the ESEA of 1965. Section 1117 requires robust consultation with private schools, among other things, and we will use our enforcement authority aggressively to ensure districts comply with this and other relevant equitable services requirements.

I already calculated the proportional share and spent some of the money... now what?

Re-run the calculation based on the total award;

Review the revised calculation against the existing calculation;

Adjust the remaining, unobligated balance to the best of your ability.

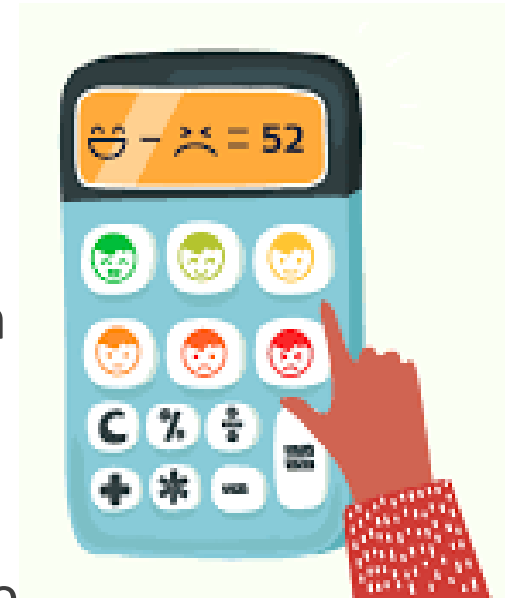
Consult, consult, consult....



How do I calculate the proportionate share?

Options

1. Apply Title I 19-20 percentage;
2. Apply Title I 20-21 percentage; or
3. Calculate a new percentage according to procedure in Sec. 1117.
 - Based on non-profit private schools who wish to participate, open prior to March 13, 2020
 - Poverty data determined through consultation (FRPL, direct certs, survey, etc.)
 - Children to be counted are the same as those in 1117: low-income students residing in eligible school attendance areas



Who is the LEA responsible to serve?

The LEA is responsible for providing equitable services to students and teachers in non-public schools within the LEA's boundaries.

- ED states this is because the CARES Act does not have a residency requirement for eligibility of services. Therefore, CARES Act funds should be provided “similar to other ESEA programs where equitable services are provided by the LEA in which a non-public school is located.”
- October 9, 2020 guidance Q&A 4.

How does the money flow?

- Set-aside amount based on student residency
- But serve schools within district boundaries
- Distribution among schools subject to consultation
 - School-by-school allocation:
 - Based on poverty; enrollment, etc.
 - Pooling: Must have private school agreement, but allows prioritization or different allocation process between schools



Can I keep the current allocation to private schools (even if more than it would otherwise be under Sec. 1117)?

No existing authority.



What is my audit exposure for funds already spent?

- “The Department will not take any action against States or local districts that followed the guidance and/or the IFR prior to notice of the court’s decision.” – ED Letter 9/25/20
- Mitigating circumstances exist if it would be unjust to compel the recovery of funds because the recipient's violation was caused by erroneous written guidance from the department. 34 CFR 81.33(b)
- To meet this standard – reliance must be reasonable.
 - After the IFR was vacated, reliance is not “reasonable”.

May I reimburse private schools for past purchases?

Maybe ... non-binding “guidance” at NAESPA conference

Timeframe: After March 13, 2020, but before consultation

LEA must “maintain control”; reimbursements must be secular and allowable activities, adequate documentation that school received the services or goods related to those expenditures

- E.g., cleaning and sanitizing the school
- E.g., laptops to facilitate online learning → must transfer title to the LEA!

Must the equitable services funding be used for supplemental costs?

No! The CARES Act has no SNS requirement.

E.g. May use funding to facilitate remote learning for students and teachers in private schools

- Purchase laptops, increase bandwidth, etc.

But ...

- LEA must maintain title to the materials, equipment and property
- LEA must administer the contract, materials, equipment and property (CARES Act Sec. 18005)

Can I use CARES funds for repairs, renovation or remodeling in a private school? (E.g., creating outdoor classrooms)

No. LEA must maintain title to any materials, equipment and property.

34 CFR 76.661(c)(2) applies to CARES Act funds – requires equipment and supplies placed in a private school to be removable without remodeling.

But – non permanent improvements, easily removed may be allowable, such as setting up a screening area in a tent; temporary partitions to assist with social distancing; or hand sanitizing stations.

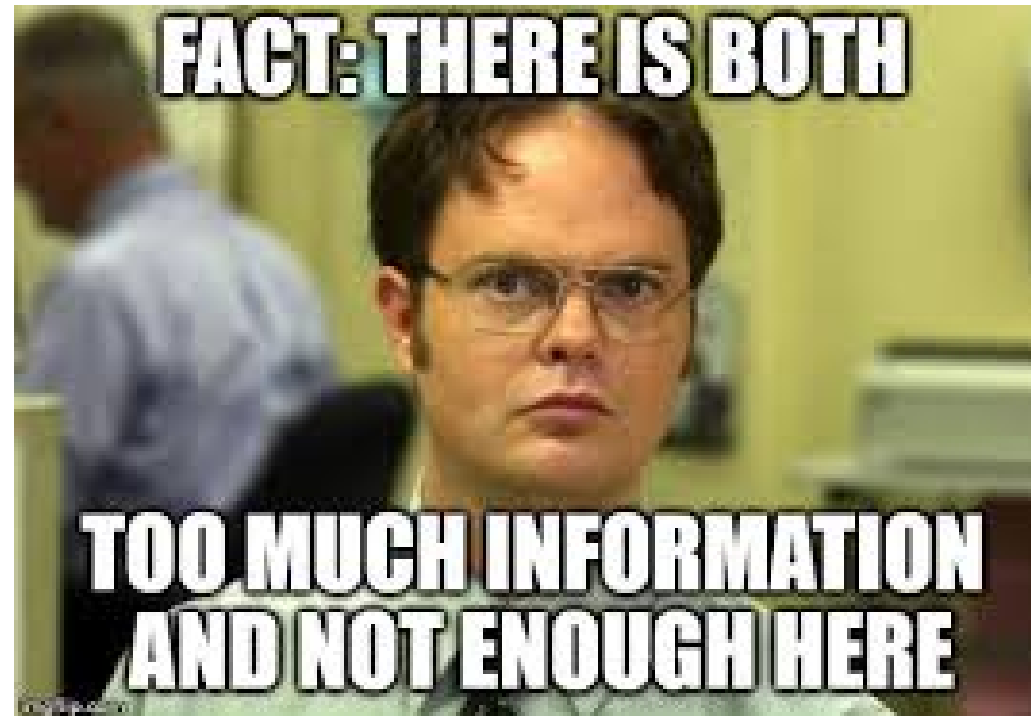
How long may equipment and supplies purchased with CARES Act funds placed in a non-public school remain there?

During the period of performance or until the equipment and supplies are no longer needed for the purposes of the CARES Act program

- 76.661(b); 200.313(a)(1), (c)(1) and 200.314(a)

Once no longer needed, the LEA may continue to use the equipment or supplies in the non-public school to the extent they are needed for other allowable purposes under another federal education program (ESEA, IDEA).

Questions??



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 Brustein & Manasevit, 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 Brustein & Manasevit, PLLC does not create an attorney-client relationship with Brustein & Manasevit, PLLC. You should not take any action based upon any information in this presentation without first consulting legal counsel familiar with your particular circumstances.