

FLORIDA ASSOCIATION OF STATE AND FEDERAL EDUCATION PROGRAM ADMINISTRATORS

ORLANDO, FL
SEPTEMBER 2013

Road Map to the future of Federal Grants Management: The “Super Circular” and Other Recent Developments

Leigh M. Manasevit, Esq.
Brustein & Manasevit, PLLC
lmanasevit@bruman.com
www.bruman.com



Why “Supercircular”???

1. Greater simplicity
2. Greater consistency
3. Obama Executive Order on Regulatory Review – 2011
 - Increase efficiency
 - Strengthen oversight

- Greater “simplicity” means elimination of several compliance elements in the Compliance Supplement, including:
 1. Equipment Management
 2. MOE/Ear-Marking
 3. Procurement
 4. Program Income

What is covered?

1. Administrative Requirements (A-102, A-110)
2. Cost Principles (A-87, A-21, A-122)
3. Audit Requirements (A-133)



Who is covered?

- All non-federal entities expending federal awards



When is it effective?

- NPRM – 2/1/13
- Close of comment period
05/02/13
- Analysis of public comment
- Final regulation – not likely before
1/1/14 →
- EDGAR revisions – within one year
of final regulation ?
- No splitting FY
-

When is it effective?

Part 2

- BUT SEE highly critical comments of Council of Inspectors General for Integrity and Efficiency (CIGIE)

Can a revised EDGAR be inconsistent with Supercircular?

- Yes, **but** federal agencies applying more restrictive requirements need OMB approval



If program statute differs
from Supercircular,
statute governs



So what is new?



1. Federal agencies must evaluate risks to the program posed by each applicant

- a) Financial stability
- b) Management system
- c) History of performance
- d) Generally available information
- e) Single audits
- f) Capacity to implement programs

2. Agencies may impose conditions on grantee based on risk assessed



3. Performance Expectations

- Award includes: timing and scope of expected performance – as related to intended outcomes



4. Subawarding Scope of Work

- Eligible recipients may perform or subaward the performance of all or a portion of the work

5. Pass Through Entity: case by case determination whether pass-through funds are grant or contract



6. Pass Through Agency should consider imposing risk conditions on subrecipients in noncompliance



7. Pass Through Agency may impose “supplemental requirements”



8. Pass Through monitoring shall include:

- a) Analyzing financial and programmatic reports
- b) Ensure subrecipients take timely and appropriate corrective action
- c) Issue management decision on A-133 finding at subgrantee level
- d) Other – as necessary

9. Monitoring Tools of Pass Through

- a) On-site reviews
- b) Provide training and technical assistance
- c) Arrange for “Agreed Upon Procedures”



10. Risk Factors for Pass Through Monitoring



- a) Previous audits
- b) New subrecipients
- c) New personnel or substantially changed system
- d) Extent of federal monitoring

11. Cash Management

- Recipients shall maintain advances of federal funds in interest bearing accounts unless...
 - a) Recipient receives less than \$120,000 in federal \$ per year
 - b) Interest will not exceed \$500
 - c) Bank requires minimum balance

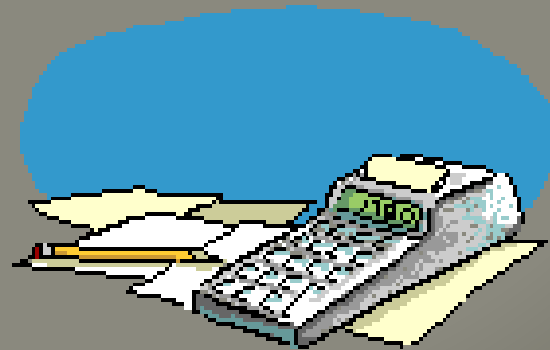
12. Cash Management

- Calculation of match based on A-110, not A-102
- Clear rules on fair market value, etc.



13. Cash Management

- Changes to Budget –
 - Scope, Objective
 - Key person changes
 - Absence of manager



14. Inventory Management

2 year inventory requirement remains

- Equipment
- Definition same
 - a) Acquisition cost of \$5,000
 - b) Useful life greater than one year

15. Inventory Management

- Use/Management/Disposition
 - Same as EDGAR 80.32



16. “Costs of Computing Devices” = “Supplies”

But

- ▣ When no longer needed for any other federally sponsored project, recipient may
 - a) Retain them
 - b) Sell them
- ▣ But compensate federal government if per unit value exceeds \$5000

But

- ▣ Conflicts with C-31 (6)  “total aggregate value” of \$5000

17. Procurement Management

- States must follow same procurement rules it uses for procurements from nonfederal funds
- All others must follow Section 504

18. Procurement Management

- Section 504 Procurement Standards derived from A-110, EDGAR Part 74 and A-102, EDGAR Part 80



19. Record Retention Management

- Same as EDGAR: 3 years from date of submission of final expenditure report **BUT** – 5 year S/L



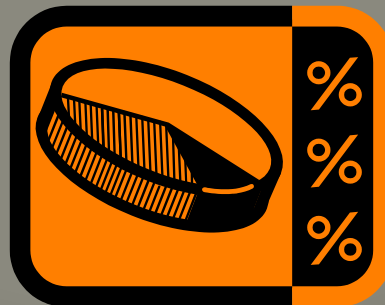
20. Cost Principles – Basic Considerations

- Similar to A-87 but restructured



21. Cost Allocation

- If a cost benefits two or more projects in a proportion easily determined, cost allocated on proportional benefit



22. Cost Allocation

- If proportion cannot be easily determined, allocate on any reasonable **documented** basis

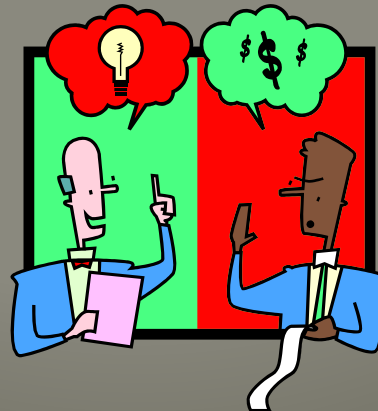


23. Administrative Costs

- Salaries of administrative and clerical staff should be treated as indirect, unless
 - a) Services are integral to project, and
 - b) Individuals can be specifically identified, and
 - c) Costs are explicitly set out in budget, and
 - d) Costs not recovered as indirect

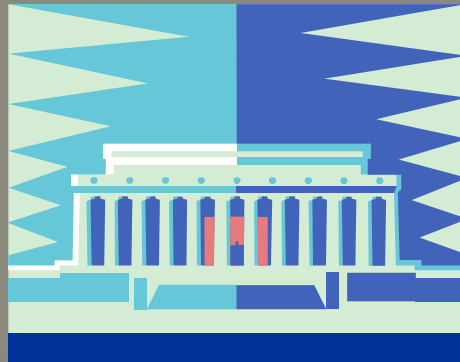
24. Indirect Costs

- A federally approved negotiated rate shall be accepted by all federal agencies
 - Exception: If required by law/regulation (restricted rate)



25. Indirect Costs

- Pass through entities must abide by the federally recognized indirect cost rate negotiated between the federal agency and subrecipient



26. Indirect Costs

- But if no such rate exists, the pass through must negotiate the rate, or a de minimis indirect cost rate equal to 10% of total modified direct costs (But what about restricted rates? Most LEAs have restricted rates in single digits.)

27. Time and Effort Management

MAJOR OVERHAUL

- Eliminate reference to PARs
- Now “Certified Reports”
- Reports may be electronic
- Semi-Annual for single cost objective - same

28. Time and Effort Management

- Certified Reports on 2 or more cost objectives certified by employee or individual responsible for verification



29. Time and Effort Management

All others:

- After the fact, unless mutually satisfactory alternative approved by awarding agency
- Certification periods cannot exceed 12 months:
- Activities may be expressed as percentages

30. Time and Effort Management

- At postsecondary level, “reliance may be placed on estimates in which a degree of tolerance is appropriate”



31. Time and Effort Management

- No additional support other than certification is necessary



32. Time and Effort Management

- Substitute systems may be used if approved by cognizant agency
- Federal agencies are encouraged to approve alternative proposals based on outcomes

33. Time and Effort Management

- Awarding agencies may approve “blended funding” where multiple programs involved, and “performance -oriented metrics” are used

34. Cost Principles Changes

- Costs for services of counsel (in-house or Bruman) for administrative proceedings (OALJ) may be charged unless the ALJ imposes a “monetary penalty.” Legal expenses are allowable if the proceeding is resolved by consent or compromise.

35. Cost Principles Changes

- Cost of Meetings
 - Costs from meetings and conferences “beyond the recipient entity” are allowable



36. Cost Principles Changes

- Travel Costs
 - Grantee must retain documentation
 - a) Participation of individual is necessary to the federal award
 - b) Costs are reasonable and consistent with entity's established travel policy

37. Cost Principles Changes

▣ Travel

- If no institutional travel policy,
GSA rates apply
 - 48 CFR 31.205-46(a)



38. Single Audits

- Single Audit Threshold is raised from \$500,000 in federal annual expenditures to \$750,000



39. Audit Follow-Up

- Federal awarding agencies shall use “cooperative audit resolution mechanisms” to improve federal program outcomes through better audit resolution, follow-up and corrective action

40. Cooperation Audit Resolution

- Improve communication, foster collaboration, promote trust, develop understanding between auditor and auditee





41. Cooperative Audit Resolution

- This approach is based upon “Federal Agencies offering appropriate amnesty for past noncompliance when audits show prompt corrective action”

42. Agency Determination Letters

- The federal agency or pass-through entity may request additional information from auditee as a way of mitigating disallowed costs

43. Audit Findings

- The auditor shall report known questioned costs greater than \$25,000 for major programs
- If not a major program (auditor normally will not find questioned costs) but if auditor becomes aware of questioned costs greater than \$25,000 for non-major programs – must report

Comments of Council of
Inspectors General for
Integrity and Efficiency
(CIGIE) on Super Circular

- CIGIE represents 20 federal agencies (including the U.S. Education Department) overseeing 94% of \$1.2 trillion in direct federal awards covered by A-133



Summary of Concerns of CIGIE

What is the reaction of OIG to the Super Circular?

1. Disagrees
2. Strongly Disagrees
3. Extremely Disagrees

- Will OIG rebuttal of so many proposed changes derail projected effective dates?

Certifications

- All certifications must reference consequences of false certification
 - By signing this report... I am aware that any false, fictitious, or fraudulent information, or the omission of any material fact may subject me to criminal, civil, or administrative penalties.

- 18 U.S. Code Section 1001

Fraud

- Circular must allow for immediate award suspension or termination where evidence of ongoing fraud
- NPRM only prevents entity from receiving new awards

Time and Effort

- Any relaxation of time and effort rules would have “significant detrimental impact on government’s ability to protect from fraud, waste, abuse, improper payments

Time and Effort

- NPRM proposed standards “would seriously undermine our community’s ability to identify and question unallowable and even fraudulent charges.”

Time and Effort

- Do not issue final rule until results from four national pilot projects are considered



Time and Effort

- OMB should provide uniform language:
 1. Time charged reflects time actually worked on project
 2. Alerts signer that he/she subject to federal laws on submission of false information

Time and Effort

- Retain A-87 language:
 - “Where employees work on multiple activities or cost objectives, a distribution of their salaries or wages will be supported by personnel activity reports or equivalent documentation.”

Time and Effort

- Payroll distributions are based on budget estimates that do not focus on actual activity

Time and Effort

- 12 month certifications do not provide adequate oversight → it is too extensive a period for persons to identify actual activity performed (unless supported by additional source documentation)

Time and Effort

- Drop phrase “mutually satisfactory alternative” in lieu of “after the fact certifications.” According to OIG, there are “no mutually satisfactory alternatives.”

Time and Effort

- How would quarterly adjustments be validated using 12 month certifications?

Time and Effort

- Certifications from supervisory personnel must include review of labor distribution reports to ensure effort being charged is reasonable.

Time and Effort

- Charges for salaries and wages of nonprofessional employees (old A-21) must be supported by records that include time on tasks

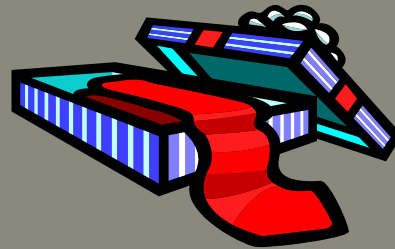
Time and Effort

- Substitute systems must contain sufficient detail to be useful for audit purposes

Employee Morale

- Do not allow expenses for recipient's established practices → could result in purchase of:

- Groceries
- Pizza parties
- Toiletries
- T-shirts
- Gifts
- Jewelry
- Flowers
- Balloons



- Funds must be closely related to grant purposes

Meetings and Conferences

- OIGs have found conferences held by recipients where per-person cost of daily catering was between 189% and 400% of applicable location's federal per diem for meals and incidental expenses

FAQ from Department of Education

- FAQ from Department of Education
 - “Generally there is a very high burden of proof to show that paying for food and beverages with a federal grant is necessary to meet the goals and objectives of a federal grant.”
 - “...There may be some instances where the cost would be permissible, it is likely that these circumstances will be rare.”
 - www2.ed.gov/policy/fund/guid/gposbul/faq-grantee-conferences-may-2013.doc

Meetings and Conferences

- OMB should limit meal costs to federal per diem rates and document a cost comparison of at least three sites to determine most cost-advantageous location

Single Audit Thresholds

- Increasing threshold from \$500,000 to \$750,000 loses audit coverage of 6400 auditees
- But these smaller auditees have more non-compliance and material weaknesses on internal control

Reclassifying Computing Devices as “Supplies” → OIG Opposes

- Accounting definition of “supplies” are general purpose consumable items with shorter life span than machines
- Computers would not be subject to basic inventory controls although “misuse” is high
- Federal agencies would not know if computers are being used for intended purposes or kept on entity’s premises

Interim Financial Statements

- Request OMB require recipients and subrecipients to provide interim financial statements
- Such statements must contain basic line item information on how federal funds are spent
- Without such interim statements pass-throughs and federal agencies cannot effectively monitor grantees

Cash Management

- Recommend specific time frames for which recipient can draw cash
- Terms such as “minimize” or “anticipated needs” are too general and not auditable

Cash Management

- Clarify the type of working capital analysis that is required of federal agencies prior to providing advance payments

Cash Management

- All recipients should account for program income using the “deduction method” unless federal agency indicates otherwise

Cash Management

- Align Circular with Compliance Supplement on “Reimbursement”
- Compliance Supplement requires that costs must be paid by the recipient before reimbursement is requested.
- Under accrual accounting, a cost could be expensed on an award that has not been paid.

Cash Management

- Clear language is needed to assure “profit” is prohibited from all grants and cooperative agreements

Enforcement

- Agencies that do not provide an opportunity to challenge suspension or terminations until after the action is taken (NSF) should be permitted to do so

Administrative Costs vs. Indirect

- Circular must explicitly state that it is recipient's responsibility to prove through verifiable means that direct charging of administrative and clerical salaries are reasonable, necessary, allocable.

Administrative Costs vs. Indirect

- OIG “would have a very difficult time auditing to determine whether administrative clerical salaries were charged both indirectly and directly, as indirect costs are not always identified by position.”

Administrative Costs vs. Indirect

- OIG demands more detailed reporting to justify charging administrative and clerical salaries as a direct cost demonstrating that such costs “are so integral to a project or activity to warrant direct charging.”

Attorney Fees

- All costs related to administrative proceedings should be completely unallowable, regardless of disposition

Janitorial Costs

- Circular must clarify how janitorial costs charged → directly or indirect. OIG has same concerns on clerical salaries.



Audit Quality

- OIG recommends language that auditor engagement not exceed five consecutive years.

Submission of Audit Reports

- Do not eliminate requirement for subrecipients to submit audit reports to their “pass-through” entities. This would adversely impact the monitoring function.

Questioned Costs

- Revise the proposed guidance to require the reporting of all known questioned costs, not just those over \$25,000.

New Developments on ESEA Flexibility aka Waivers

- ED Declares:
 - Kansas
 - Oregon
 - Washington
- High Risk regarding waiver
- Basis: Teacher Evaluation

Waivers

- High Risk
 - Consequences?
 - Withhold Funds
 - Withdraw Waiver Approval
 - Other

Waivers: Renewal

- ED Releases renewal guidance
 - Updated request
 - Continue to meet the four principles and demonstrate:
 - Activities in waiver request were conducted
 - Contributed to student improvement
- www2.ed.gov/policy/elsec/guid/ese-a-flexibility/flex-renewal/flexrenewalguidance.doc

Waivers: Renewal

- Renew original assurances
- Input:
 - LEAs
 - Teachers
 - Administrators
 - Students
 - Parents
 - CBOs
 - Civil Rights Organizations
 - SWD Organizations
 - ELLs
 - Business
 - Indian Tribes

Waiver: Renewal

- Information or Updates Re:
 - College and Career Ready Standards and Assessment
 - Appropriate resources to meet educator needs
 - ELP standards 2013 – 2014
 - Aligned assessments
 - High Quality Aligned Assessments 2014 – 2015
 - Alternative Assessments
 - Grade Level
 - 1%
 - ~~○ 2%~~

- New Report Cards (Feb. 2013 Card Guidance)
- Rigorous Interventions in Priority and Focus Schools
- Graduation Rates
- Accountability
- Teacher Principal Evaluation 2014 – 2015
- www2.ed.gov/programs/titleiparta/state_local_report_card_guidance_2-08-2013.pdf

Waiver: Renewal

- Equity plan for teacher distribution:
 - Assure poor and minority students not taught at higher rates:
 - Inexperienced
 - Ineffective
 - Out of field

Waiver: Renewal

- State Specific Issues
 - Analyze
 - Subgroup Achievement
 - Subgroup Graduation Rates
 - AMO by Sub Group
 - Sub Group Participation Rate
 - Combined subgroups – if applicable
 - N Size over 30
 - Evaluation if accountability system is effectively identifying low performing schools

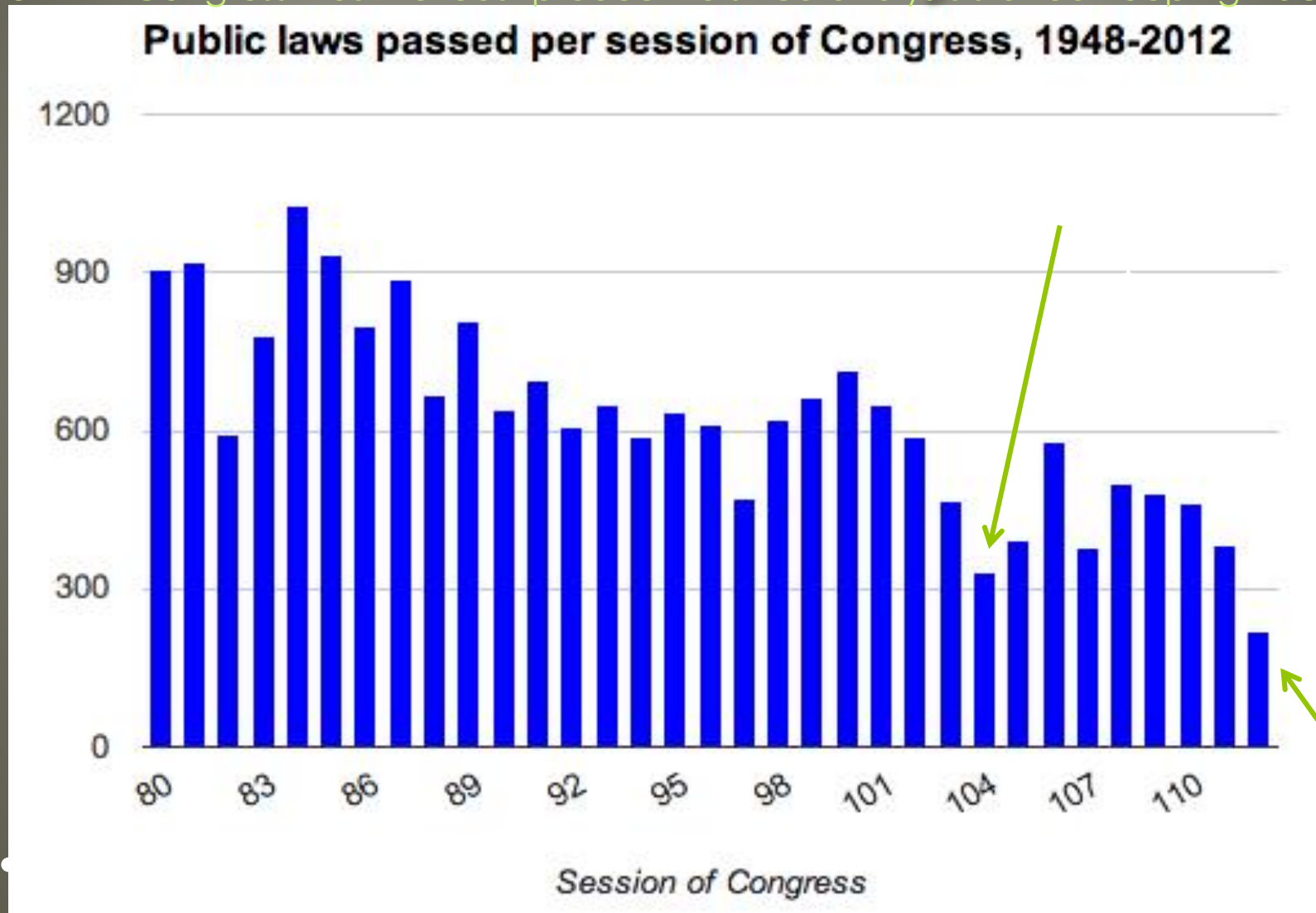
Campaign for High School Equity

(CHSE) Report

- “Maintaining a Focus on Subgroups in a Era of Elementary and Secondary Education Act Waivers”
- ESEA Waivers Leave (Subgroup) Children Behind
- www.highschool equity.org/images/WaiversReport_R8.pdf
- Same concerns expressed by letters from Senator Tom Harkin and Representative George Miller to Secretary Duncan
- January 2012 Harkin & Miller letter:
www.edweek.org/media/harkinmillerwaivers-blog.pdf
- September 2012 Miller letter:
www.democrats.edworkforce.house.gov/sites/democrats.edworkforce.house.gov/files/documents/112/pdf/letters/9-21-12_Accountability_ltr_to_Arne_Duncan.pdf

Congressional Productivity

The 112th Congress was the least productive since analysts started keeping track



th: 283
public laws
sed 103

Congressional Productivity

- Lack of Productivity is a result of:
 - Gridlock in legislative process
 - Divisions between parties and within parties
 - Divided Congress, continued influence of “Tea Party”
 - Significant focus on “must-pass” legislation in contentious policy areas like federal spending
- 113th Congress not doing much better

Retirements and Turnover

- Significant numbers of Representatives and Senators have retired or announced pending retirement in recent years.
- Most cite age, but also driven out by gridlock, partisan politics, etc.
 - Voter dissatisfaction means greater electoral turnover in Congress
 - Lucrative post-Congressional job opportunities add incentive to retire at younger age

Largest Turnover Since 1970's



- Current announced retirements, plus defeats in last election, means largest turnover in Congress since 1970's
 - Especially pronounced in Senate
- Expect continued turnover in next few years

Recent Retirements/Departures

- Sen. Jeff Bingaman (D-NM) (retired)
- Rep. Dale Kildee (D-MI) (retired)
- Rep. Lynn Woolsey (D-CA) (retired)
- Rep. Todd Platts (R-PA) (retired)
- Rep. Judy Biggert (R-IL) (primary defeat)
- Rep. Dennis Kucinich (D-OH) (primary defeat)
- Rep. Jason Altmire (D-PA) (primary defeat)
- Rep. Donald Payne (D-NJ) (died in office)
- Rep. Mazie Hirono (D-HI) (elected to Senate)

Pending Retirements/Departures

- Sen. Tom Harkin (D-IA)
 - Most significant for education policy
 - Chairman of Senate Committee on Health, Education, Labor, and Pensions (HELP)
 - Lack of clear successor may mean scramble to get ESEA reauthorization done



Changes to Committee Leadership

- Sen. Lamar Alexander (R-TN) is new Ranking Member of Senate HELP Committee
 - Takes over from Sen. Mike Enzi (R-WY)
 - Former U.S. Secretary of Education
 - Definite ideas about reauthorization and policy, and desire to move forward
- Subcommittee on Children and Families
 - Was Sen. Barbara Mikulski (D-MD) → Now Senator Kay Hagan (D-NC)
- Senate Appropriations Committee
 - Sen. Barbara Mikulski (D-MD) is new chair

Changes to Committee Leadership

- Rep. Todd Rokita new Chairman of House Subcommittee on Early Childhood, Elementary, and Secondary Education
 - Takes over from Rep. Duncan Hunter (R-CA)
 - Very conservative (“Tea Party”) Republican
 - Has supported amendments/bills to repeal NCLB, limit number of employees at ED, make English official language of U.S.

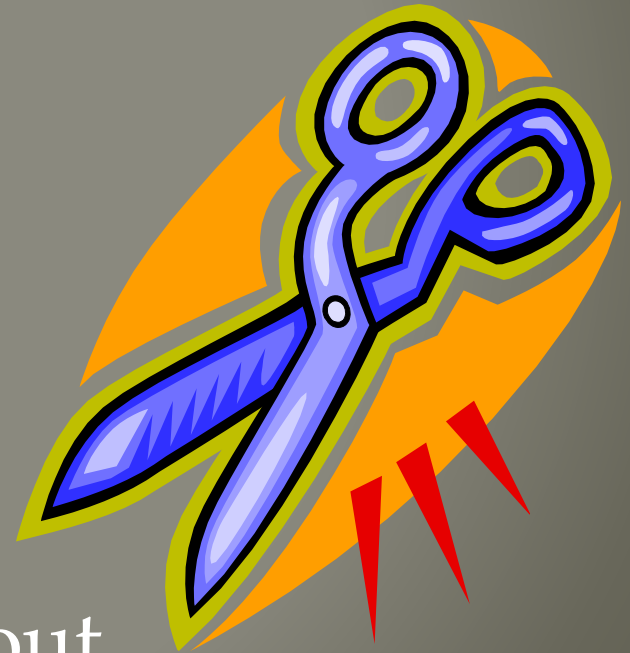
The State of Congress



- Overall:
 - Continued partisanship
 - Significant turnover on education-relevant Committees and Committee leadership
 - Loss of institutional knowledge/relationships
 - Focus on fiscal policy above all else

Sequestration

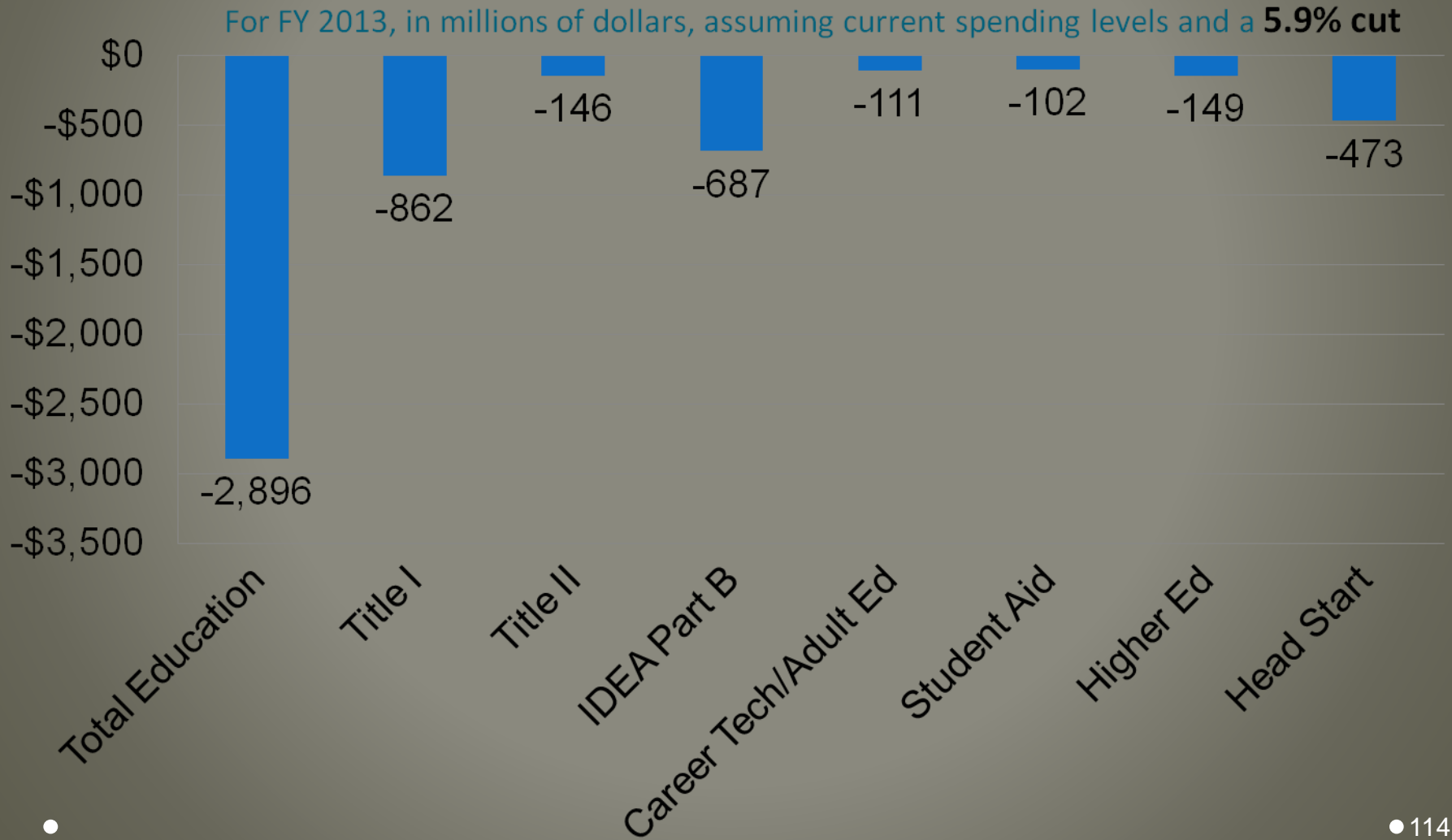
- A series of automatic, across-the-board budget cuts
- Amount and type of cuts depends on category of spending (defense or non-defense; discretionary or mandatory)
- Following procedures laid out in 1985 law



Where did it come from?

- Historic levels of Congressional gridlock hampered budget discussions on spending, debt ceiling
- Congress put “trigger” in August 2011 Budget Control Act to implement automatic cuts if earlier budget agreement not found
 - Intended as threat, not plan
 - Lack of budget agreement in November 2011 → implementation of cuts
- Originally scheduled to take effect January 2nd
- Fiscal Cliff deal pushed implementation back to March 1st
 - But requires long-term cuts to Congressional appropriations

The Impact of Sequestration (after the fiscal cliff deal)



How Sequestration Cuts are Implemented

- All funds allocated October 2012 and later are subject to cuts
- Some programs (like Impact Aid) affected immediately upon start of sequestration
- Procedure for bifurcated funding programs*:
 - E.g. Title I, IDEA, Perkins
 - Advance funding received in October of 2012 did not see cuts when allocated
 - BUT cuts will be calculated and total FY 2013 cut applied to July 2013 funds
- For non-bifurcated programs, first allocation after start of sequestration will be reduced by total amount of cut (5.9%)
- After July 2013 (FY 2014 and beyond), cuts will be incorporated into annual Congressional appropriations

*Per a July 2012 memorandum. ED has not indicated any changes to its plans following the fiscal cliff deal.

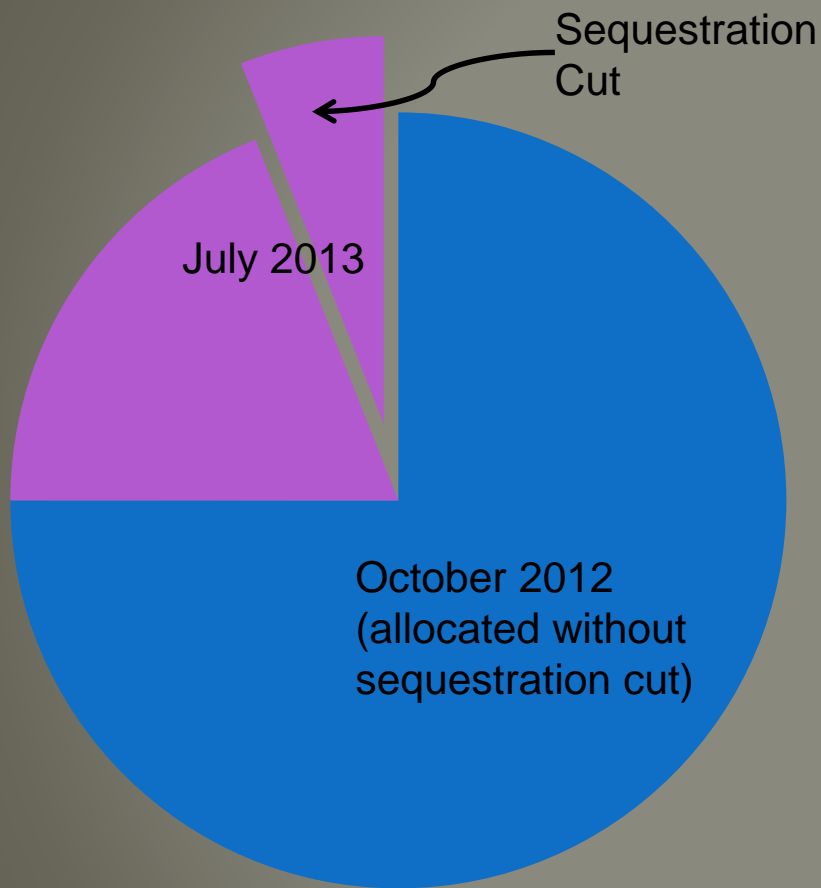
Sample Sequestration Cut

- Assume the (fictional) “School is Cool” (SIC) grant program provides \$100,000 per year to Florida
- As a bifurcated funding program, 75% of SIC funds (\$75,000) are distributed to FL every October, with the remaining 25% (\$25,000) available in July
- Under sequestration, ED* will provide the full funding amount in October of 2012. However, it will calculate a cut for the full fiscal year (approximately 5.9%, or \$5,900**) and will apply that full year’s cut against funds FL gets in July 2013.

*Per a July 2012 memorandum. ED has not indicated changes to its plans following the fiscal cliff deal.

**This assumes FY 2013 program funding levels otherwise remain the same

Sample Sequestration Cut – FY 2013



- FL received its regular SIC appropriation (\$75,000) on October 1, 2012.
- The full-year sequestration cut of \$5,900 will be taken out of July 2013 funding
- So the SIC funds sent to the State on July 1, 2013 will be \$19,100 (\$25,000 - \$5,900)
- Reduction passed along to district
- Since most States and districts use July 2013 funds for the 2013-14 school year, ED anticipates that SIC programs will not feel the impact of cuts until then.

*Per a July 2012 memorandum. ED has not indicated changes to its plans following the fiscal cliff deal.

Budget Battle Looms

- October 1 
 - New Budget?
 - CR ?
 - Government Shutdown?

Debt Ceiling Looms

- Treasury Secretary Jack Lew –
 - Government reaches debt ceiling mid October

ESEA Reauthorization: Senate

- Strengthening America's Schools Act of 2013 (S. 1094) passed out of Committee on party line vote June 12th
 - Requires States to adopt standards, assessments, performance targets
 - Lowers n-size to 15 students
 - Increased data/reporting requirements
 - Interventions in priority/focus schools
 - States must implement teacher/principal evaluations
- Committee Chairman Tom Harkin (D-IA) says he hopes to get it to the floor, but prospects murky

ESEA Reauthorization: Senate

1. Closes Comparability Loophole-all expenses included
2. Maintains SNS
3. Maintains MOE

ESEA Reauthorization: House

- Representative John Kline (R-MN) introduced Student Success Act in June 2013
 - Similar to bills passed in 112th Congress
 - Eliminates AYP, HQT requirements
 - States would get to set own performance targets, little federal guidance
 - Teacher/principal evaluations required
 - Overall smaller federal role
 - Markup June 19th

ESEA Reauthorization: House

1. Maintains Comparability
2. Maintains SNS
3. Eliminate MOE

Waiver Renewal Guidance on Reauthorization

- “... In the event that Congress reauthorizes the ESEA prior to the end of the 2015-2016 school year, the Department will provide guidance on the transition to the new law.”

2% Tests Left Behind

Background

- States authorized to develop
 - Alternative Standards / aligned assessments
 - Most significantly cognitively disabled
 - Count for AYP – 1% rule

2% Tests Left Behind

Background

- States authorized to develop modified academic achievement standards / aligned assessments
- Eligible students with disabilities
- Not expected to make grade level within a year
- Count for AYP – 2% Rule

2% Tests Left Behind

- Federal Register Announcement August 23, 2013
- <https://www.federalregister.gov/articles/2013/08/23/2013-20665/title-i-improving-the-academic-achievement-of-the-disadvantaged>
- Secretary to amend regs
- Eliminate
 - “Modified Academic Achievement Standards” aka the 2% Rule
 - 1% remains
 - Comments due October 7, 2013

OSERS on Bullying

- August 20, 2013 Letter
 - “...any bullying of a [SWD] that results in the student not receiving meaningful educational benefit constitutes a denial of FAPE under the IDEA...”
 - “...If the student who engaged in the bullying behavior is a...[SWD], the IEP team should review the student’s IEP to determine if additional supports or services are needed...”
- www2.ed.gov/policy/speced/guid/idea/memosdcltrs/bullyingdcl-8-20-13.pdf

Questions?

...

Disclaimer

This presentation is intended solely to provide general information and does not constitute legal advice. Attendance at the presentation or later review of these printed materials 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.