



Day 3: Legislative Update, CARES Act and CRRSA Act Funds

www.bruman.com

Bonnie Graham, Esq.

bgraham@bruman.com

Julia Martin, Esq.

jmartin@bruman.com



Federal Updates



The New Congress

116th Congress (2019-2020)

House Majority → Democrat

- Speaker: Nancy Pelosi (D-CA)

Senate Majority → Republican

117th Congress (2021-22)

House Majority → Democrat

- Speaker: Nancy Pelosi (D-CA)

Senate Majority → Democrat
(VP as tiebreaker)



116th Congress (19-20)

House Education Committee

- Chairman → Bobby Scott (D-VA)
- Ranking Member → Virginia Foxx (R-NC)

Senate Education Committee

- Chairman → Lamar Alexander (R-TN)
- Ranking Member → Patty Murray (D-WA)

117th Congress (21-22)

House Education Committee

- No changes

Senate Education Committee

- Chairman → Patty Murray (D-WA)
- Ranking Member → Richard Burr (R-NC)

Patty Murray Becomes Chairwoman

- Has served as Ranking Member since 2015
- Key player in reauthorizing ESEA (Every Student Succeeds Act)
- Expected to focus on COVID-19 impact on schools and response
- Proponent of robust accountability in K-12 education
- Reversal of Title IX regulations?
- Expansion of early childhood education?
- Had very productive working relationship with Alexander – can we expect that with new Republican Ranking Member?





Drama in Ed and Labor

- Democrats give GOP leadership 72-hour deadline to remove Representative Marjorie Taylor Greene (R-GA) from Education and Labor Committee after evidence surfaces of some conspiracy beliefs
- Republicans refuse to expel, threaten to vote to remove Ilhan Omar (D-MN) from her committees
- Democrats pass resolution on the floor removing Greene from committees, including Education and Labor

The 117th Congress's Agenda

- Additional stimulus funding
- Infrastructure
- Climate change/energy
- Social justice/ voting rights reform
- CARES Act oversight efforts
- Congressional Review Act actions?



CARES Act Oversight

- Republicans on House Committee on Education and Labor requested Government Accountability Office to issue report on education of CARES Act education funding
 - Report requested in first quarter of 2021
- Follow-up on ED database showing large amount of CARES money not yet spent
 - Failed to account for funds that are obligated but not yet liquidated
- Requested report to help determine whether additional aid needed (now moot with passage of Coronavirus)

Congressional Review Act

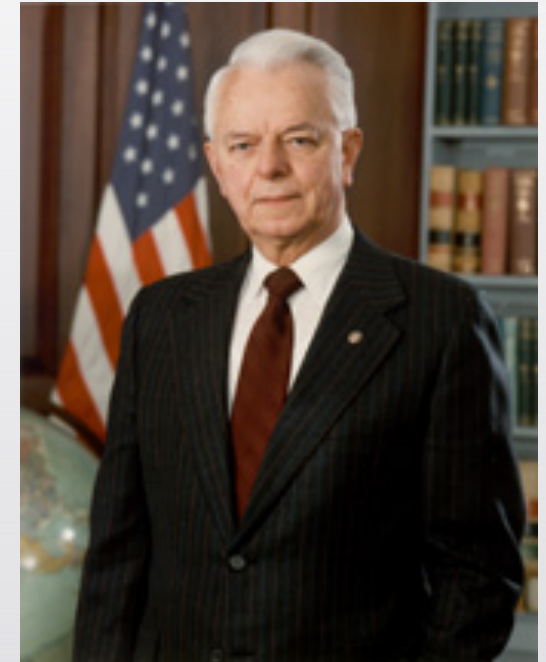
- Oversight tool that allows Congress to overturn regulations promulgated by federal agencies
- Can overturn rule within 60 session days (Senate) or legislative days (House)
 - Estimated at August 21st
- Resolution must pass House and Senate, then be signed by the President

Congressional Review Act

- If regulations are overturned, agency cannot issue “substantially similar” regulation
 - No clear guidelines for “substantially similar”
- Potential Targets:
 - Higher Ed “free speech” regulations
 - “public charge” rule
 - Maybe Title IX sexual harassment and assault regulations (may be a better candidate for regulatory reform)

Reconciliation

- Budgetary process for making changes to spending through programmatic adjustments
 - Can only happen once per year on: spending, revenue, debt limit
 - Must be tied to fiscal year expenditures
 - Must have a “budgetary” impact (Known as the Byrd rule)
 - Non-incidental
 - Occurs within 10-year budgetary period
- Bypasses filibuster → 50-vote threshold



The Filibuster



- Allows one member of the Senate to hold up passage of legislation if there are not 60 votes to override
 - Has been used either as “talking filibuster” or procedural filibuster
 - Has been eliminated for purposes of judicial nominations
- Significant part of discussion regarding Senate organizing resolution for 117th Congress
 - Both Joe Manchin (D-WV) and Kyrsten Sinema (D-AZ) say they oppose getting rid of the filibuster
 - Will remain in rules for now, but only require 50 votes to change
- Most important where Senate majority is between 50 and 60 votes

Fiscal Year 2021 Funding

- New fiscal year begins on October 1st every year
 - FY 2021 began on October 1, 2020
 - BUT for education funding, States do not get these funds until July 1, 2021
 - House passed most bills during summer 2020
 - Senate delayed
 - Appropriations Committee released draft bills after Nov. election
 - Government was running under continuing resolutions prior to CRRSA passage

The CRRSA Act

Coronavirus Response and Relief Supplemental Appropriations Act

5500+ page legislative package including:

- Funding for all 12 appropriations accounts for FY 2021;
- Stimulus funding; and
- Other legislative actions (ex: FAFSA simplification)
- Passed by Congress December 21st, signed into law December 27th



The Overall Funding Picture

- FY 2021 funding = monies States receive on July 1, 2021
- \$73.5 billion for U.S. Dept. of Education
 - \$785 million increase from FY 2020, or about one percent
- Slight increases for most formula-funded programs
- No cuts in funding

FY 2020 v. FY 2021 Funding Levels for Major Programs

Program Name	FY 2020	FY 2021	\$ Increase
ESEA Title I	\$16,309,802,000	\$16,536,802,000	\$227,000,000
ESEA Title II-A (Supporting Effective Instruction)	\$2,131,830,000	\$2,142,830,000	\$11,000,000
ESEA Title III (English Language Acquisition)	\$787,400,000	\$797,400,000	\$10,000,000
ESEA Title IV-A (SSAE)	\$1,210,000,000	\$1,220,000,000	\$10,000,000
ESEA Title IV-B (21 st Century CCLC)	\$1,249,673,000	\$1,259,673,000	\$10,000,000
IDEA Grants to States	\$12,764,392,000	\$12,945,392,000	\$181,000,000
Perkins State Grants	\$1,282,598,000	\$1,334,598,000	\$52,000,000

CRRSA Stimulus Funding

CRRSA Education Funding

- \$81.9 billion total for education through preexisting Education Stabilization Fund
 - \$4.05 billion for Governor's Emergency Education Relief Fund
 - \$2.75 billion in Emergency Assistance to Non-Public Schools
 - \$54.3 billion for Elementary and Secondary School Education Relief Fund
 - \$22.7 billion for the Higher Education Emergency Relief Fund

GEER, Part II

- \$4.05 billion for Governor's Emergency Education Relief Fund
- Grants to each State with an approved application under CARES Act GEER program
- Must be allocated within 30 days of enactment
- Allocation:
 - 60% of funds on basis of relative school-age population
 - 40% of funds on basis of low-income school-age population
 - As defined in ESEA Sec. 1124(c)





GEER II

- Allowable Uses of Funds by Governor (or designee)
 - Emergency support to LEAs that the **State deems** have been “most significantly impacted” to continue services and ongoing functionality
 - Emergency support to IHEs that **governor determines** have been “most significantly impacted”
 - Support to: “any other institution of higher education, local educational agency, or education related entity within the State that the Governor deems essential for carrying out emergency educational services ... the provision of child care and early childhood education, social and emotional support; and the protection of education-related jobs.”

GEER II ... to Private Schools

- ED must reserve \$2.75 billion for Emergency Assistance to Non-Public Schools (EANS)
 - States will be designated to administer
 - Applications for States must be released within 30 days of enactment
 - State may reserve \$200,000, or 0.5% of its grant, whichever is greater, for administration
 - Prioritize low-income schools and those most impacted
 - Short timeline to administer
 - “public control” standard





EANS Allowable Uses of Funds

- Supplies to sanitize/disinfect/clean
- Personal Protective Equipment
- Improving ventilation systems
- Training and PD on sanitization, use of PPE, minimizing spread of disease
- Physical barriers to facilitate distancing
- “Materials, supplies, or equipment” needed to implement public health recommendations
- Expanding testing capacity
- Education technology
- Reworking instructional plans for remote learning or learning loss
- Leasing space in order to meet distancing guidelines
- “Reasonable transportation costs”
- Support services for remote/hybrid instruction or to address learning loss

ESSER, Part II

- \$54.3 billion for Elementary and Secondary School Education Relief Fund
 - Allocated to all States with an approved CARES Act application according to relative shares of Title I
 - States must subgrant at least 90% of funds to LEAs (including charter LEAs) based on share of Title I
 - May reserve up to 0.5% for administrative costs, 9.5+% for State-level expenditures
 - State must allocate funds within one year (ED: “award” = subgrant to LEA)



ESSER II Allowable Uses of funds

1. Any activity allowed under ESEA, IDEA, AEFLA, Perkins, or McKinney-Vento Title VIIB
2. Coordination of preparedness and response efforts with State, local, Tribal, and territorial public health departments
3. Providing principals and others school 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



ESSER II Allowable Uses of funds

5. Developing and implementing procedures and systems to improve the preparedness and response efforts of local educational agencies
6. Training and professional development for staff of the local educational agency on sanitation and minimizing the spread of infectious diseases
7. Purchasing sanitization and cleaning supplies for LEA-operated buildings
8. Planning for and coordinating during long-term closures, including for how to provide meals to eligible students, how to provide technology for online learning to all students, how to provide guidance for carrying out requirements under the IDEA and ensuring other educational services can continue to be provided

ESSER II Allowable Uses of funds

9. Purchasing educational technology (including hardware, software, and connectivity) that aids in regular and substantive educational interaction, including assistive technology
10. Providing mental health services and supports
11. Planning and implementing activities related to summer learning and supplemental afterschool programs



ESSER II Allowable Uses of funds

12. Addressing learning loss among students, including low-income students, children with disabilities, English learners, racial and ethnic minorities, students experiencing homelessness, and children and youth in foster care... including by
 - A. Administering and using high-quality assessments that are valid and reliable
 - B. Implementing evidence-based activities to meet comprehensive needs of students
 - C. Providing information and assistance to parents and families on how they can effectively support students
 - D. Tracking student attendance and improving student engagement in distance education

ESSER II Allowable Uses of funds



13. School facility repairs and improvements to enable operation of schools to reduce risk of virus transmission and exposure to environmental health hazards



14. Inspection, testing, maintenance, repair, replacement, and upgrade projects to improve the indoor air quality in school facilities

15. 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

HEERF, Part II

- \$22.7 billion for the Higher Education Emergency Relief Fund
 - [ED says it will not reallocate](#) unspent CARES funds after all – will roll over into HEERF 2 per statutory instruction
 - IHEs divide into institutional costs and student aid
- Cannot use funds for:
 - Recruitment and marketing
 - Adding to endowments
 - Capital outlays for athletics or religious facilities
 - Senior administrator or executive salaries and benefits
 - Stock buybacks, shareholder dividends

Funding Timeline



General Provisions



- “An LEA, SEA, IHE, or other entity “shall, to the greatest extent practicable, continue to pay its employees and contractors during the period of any disruptions or closures”

General Provisions

- Extends deadline for spending Coronavirus Relief Funds by one year
 - Now December 31, 2021



Maintenance of Effort

- CRRSA
 - States must provide an assurance that state will maintain support for elementary and secondary, and higher education
 - Two tests!
 - Calculation must:
 - Include State funding for IHEs and State need-based financial aid
 - Exclude capital projects, research and development, tuition and fees
 - ***For FY 2022, education spending must be at least proportional to spending out of total as averaged over 2017, 2018, 2019***

Maintenance of Effort

CARES Act	CRRSA
“...such State will maintain support for elementary and secondary education, and State support for higher education ... <u>in fiscal years 2020 and 2021</u> at least at the levels of such support that is the average of such State’s support for elementary and secondary education and for higher education provided in the 3 fiscal years preceding the date of enactment of this Act.”	“... such State will maintain support for elementary and secondary education, and for higher education... <u>in fiscal year 2022</u> at least <u>at the proportional levels</u> of such State’s support for elementary and secondary education and for higher education relative to such State’s overall spending, averaged over fiscal years <u>2017, 2018, and 2019.</u> ”

Maintenance of Effort

- ED [guidance](#) (May 2020)
 - Establish baseline for what is included (September 2020)
 - Use the same data points each year
 - Federal stimulus dollars not included as allowable source of “effort”
 - If MOE not met and no waiver granted, ED is “entitled to recover the full amount of a State’s GEER Fund and ESSER Fund awards” or take “other appropriate enforcement actions” including:
 - New grant conditions on CARES
 - Withholding CARES funds
 - High-risk status

Maintenance of Effort Waivers?

- “The Secretary may waive the requirement in subsection (a) for the purpose of relieving fiscal burdens on States that have experienced a precipitous decline in financial resources.”
- What does that mean?
 - ED guidance: “abrupt, steep drop in financial resources available for State effort to support elementary, secondary and postsecondary education”

Maintenance of Effort Waivers?

- ED guidance: waiver might be granted by looking at
 - Whether the percentage of State revenues spent on elementary and secondary education in FYs 2020 and 2021 is at least as high as the percentage prior to the coronavirus pandemic.
 - Whether the percentage of State revenues spent on higher education in FYs 2020 and 2021 is at least as high as the percentage prior to the coronavirus pandemic.
 - Whether the decreases in support for education were due to the COVID-19 pandemic.
 - Whether the State took steps to ameliorate its levels of support for education from State FY 2020 to State FY 2021

New Proposed Stimulus for Reconciliation

- \$170 billion to refill ESSER and HEERF
 - ESSER III
 - 5% for State-level expenditures
 - 5% for State-level learning loss mitigation
 - 90% for subgrants to LEAs
 - 20% of LEA subgrant to be reserved for learning loss mitigation for at-risk populations
 - Subject to equitable services “in the same manner as provided under Section 1117” of ESEA

DRAFT

New, More Complicated MOE!



- “a State shall maintain support for elementary and secondary education, and for higher education... in each of fiscal years 2022 and 2023 at least at the proportional levels of such State’s support for elementary and secondary education and for higher education relative to such State’s overall spending, averaged over fiscal years 2017, 2018, and 2019.”

Multi-year MOE

Bill	Comparison Years	Applicable Years	Comparison Tool
CARES	3 preceding fiscal years (2017, 2018, 2019)	2020, 2021	“at least at the levels of such support”
CRRSA	2017, 2018, 2019	2022	“at least at the proportional levels ... relative to such State’s overall spending”
Reconciliation	2017, 2018, 2019	2022, 2023	“at least at the proportional levels ... relative to such State’s overall spending”

DRAFT

But wait, there's more!



- “State maintenance of equity”
 - MOE + hold harmless
 - “a State educational agency shall not, in fiscal year 2022 or 2023, reduce State funding (calculated on a per-pupil basis) for any high-poverty local educational agency in the State by an amount that exceeds the overall per-pupil reduction in State funds, if any, across all local educational agencies in such State in such fiscal year.”
 - AND must not reduce State funding for any LEA “that is part of the 20 percent of local educational agencies in the State with the highest percentage of economically disadvantaged students ...below the level of funding provided to such local educational agencies in fiscal year 2019”

But wait, there's more!



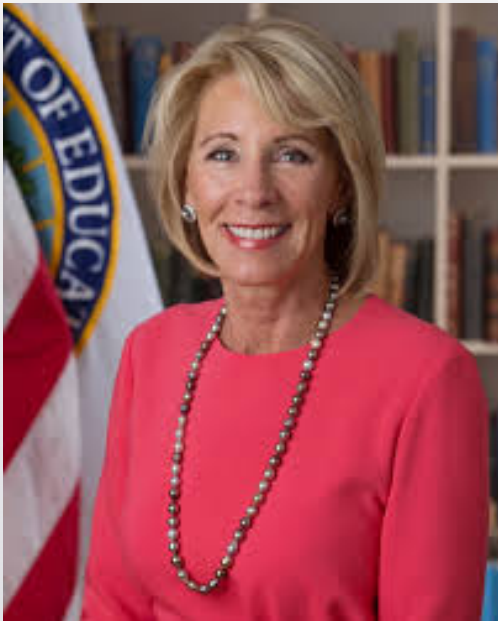
- “LEA maintenance of equity”
 - LEA may not, in 2022 or 2023, reduce per-pupil funding (state and local) or staffing levels for any “high-poverty school” by an amount that exceeds the total average reduction in the LEA, if any
- “high-poverty” = serving a higher percentage of economically disadvantaged students (as defined in ESEA) than the median percentage served by the entity
 - At LEA level, can be by grade-span

What will happen with this bill?



The Transition and the Biden Administration

DeVos' Last Word



- Sent letter to Congressional leaders and leaders of House/Senate Education Committees
- Farewell remarks to Congress on education policy
 - COVID-19 has exposed much that is “not encouraging” in education system
 - Final push for school choice legislation
 - Criticizes many Biden administration policy priorities for education
 - Asks Congress to preserve new Title IX regulations
 - Offers “sincere gratitude for your partnership”



DeVos Resigns Early

- January 7, 2021 DeVos submitted resignation letter to President Trump, citing violence at the Capitol
 - Leaves position of Acting Secretary to Mick Zais (pre-inauguration), Phil Rosenfelt (post-transition)

“We should be highlighting and celebrating your administration’s many accomplishments....Instead, we are left to clean up the mess caused by violent protesters overrunning the U.S. Capitol....That behavior was unconscionable for our country. There is no mistaking the impact your rhetoric had on the situation, and it is the inflection point for me.”

New Secretary of Education

Miguel Cardona nominated

- Less controversial than other potential picks (former leaders of teachers' unions)
- Currently serves as Commissioner of Education for Connecticut
- Teacher → Principal → Assistant Superintendent for district → Commissioner of Ed
- Minimal higher ed experience
- Will need to be confirmed by Senate but can serve in Acting capacity in meantime (with time limitation)



Cardona's Education Record

- Has pushed to reopen/keep school open during COVID-19 in Connecticut
 - Concerns over learning loss from virtual instruction
 - Has not mandated it; allowed local decisions
- Has not been as critical as others on certain education issues:
 - Charter schools;
 - Standardized testing
- Emphasis on closing achievement gap
 - Dissertation on achievement gap b/w ELs and their peers

Cardona Confirmation Hearing

- Held February 3rd (approved 2/11)
- Major issues raised
 - Assessment waivers
 - Ranking member Burr asked for flexibility on assessments during opening statement, without conditions
 - Response: want to see where individual students are, but States should have opportunity to “weigh in” on how scores are used
 - Title IX and gender identity
 - Senator Paul (R-KY) asked about Cardona’s position on students who are transgender participating in girls’ sports in particular



New Deputy Education Secretary???



- Cindy Marten
 - Current San Diego schools Superintendent
 - Former principal, vice principal, classroom teacher, and literary specialist. Recently signed on to a letter to California Governor Gavin Newsom criticizing his plan to reopen schools as inadequate and insufficiently attentive to the coronavirus's effect on low-income communities.
 - Some objections to nomination from San Diego community – concerns about transparency
- Would take the position previously held by Mick Zais

Staffing/Organization at the Department of Education

- Significant ED reorganization under the Trump administration
 - Will any of these actions be reversed?
 - Moving Office of Non-Public Education back out of Secretary's office?
 - New organizational changes?
 - National Skills Coalition pushing for Assistant Secretary of Community and Technical Colleges

Staffing/Organization at the Department of Education

- Major staffing reductions over the past four years (down 14% since 2016)
 - Ramping up hiring under new administration?
 - Time for this may delay implementation of policy priorities under new admin
 - Have some staffers in place, but few Deputies and Assistant Deputies



Biden Administration Education Priorities

- Increased funding for Title I
- “Full funding” for IDEA
- Additional aid for schools
- Expand K-12 education to include universal 3- and 4-year old pre-K
- New child tax credit



Needs
Congressional
action

Biden Administration Education Priorities

Can be
done
without
Congress

- Provide guidance on reopening for schools and colleges
- Prioritize teachers for vaccination
- Use the Defense Production Act to ramp up manufacturing of PPE
- Reinstate Obama-era Title IX guidance
- Rescind other regulations/ guidance
- Cancel first \$50k of student loan debt?

Biden Administration Education Priorities

Other campaign policy issues:

- Increasing teacher pay
- Establishing free community college
- Providing tuition-free education at 4-year college/university for families making less than \$125,000 annually

First Executive Orders



- Direct OMB to hold all pending regulations for 60 days to allow for review
- Extend student loan forbearance to September (was January)
- Commit to protect DACA students and find a path to citizenship
- Use Defense Production Act to help in vaccination/distancing efforts
- Asks OSHA to create workplace safety guidance on COVID
- Direct HHS/ED to work together for COVID reopening guidance



Expected Actions in First 100 Days

- Changes to Title IX regulations/guidance on sexual harassment/ assault
 - Possibility for Congress to use CRA to overturn DeVos regulations
 - Could take executive action/agency action to rescind DeVos regulations and issue new ones
 - May rework current regulations, only modifying in certain areas
 - Lower burden on IHEs re: reworking compliance with this option
- Reinstating guidance on preventing racial discrimination in school discipline policies

Expected Actions in First 100 Days

- Executive Order re: application of *Bostock v. Clayton County*
 - Tells agencies to review and revise guidance for applicability government-wide
 - *Bostock* decided by SCOTUS in June 2020
 - Employment discrimination under Title VII of Civil Rights Act
 - Says that gender identity and sex are inextricably linked in cases of discrimination, so gender identity discrimination not permitted
 - Decision says to apply narrowly
 - ED had previously said that *Bostock* does not apply to Title IX
 - Will likely now reinstate 2014 guidance re: protection of gender identity
 - Also being battled out in the courts
 - Gavin Grimm case

Expected Actions in First 100 Days

- Assessments
 - DeVos letter in September 2020 said that ED would not approve assessment waivers for spring 2021
 - In letter to Congress: “[S]tates should implement their own assessments on schedule in spring 2021, given that they do not face the same constraints as NAEP and have ample time to plan for successful test administration tailored to their unique circumstances.”
 - But: asked for delay in conducting NAEP
 - Not able to assess in-person because of closures and limits on visitors
 - Need to “postpone the administration of NAEP tests until the assessment will be able to produce useful results, likely in 2022”
 - Granted in CRRSA

Expected Actions in First 100 Days

- Assessments – will there be waivers?
 - Short-term concerns
 - Are we missing developing achievement gaps?
 - Will the data be reliable regarding those gaps?
 - Medium-term concerns
 - Is this data reliable for purposes of identifying TSI and CSI schools?
 - Long-term concerns
 - Is this data a reliable comparison point for growth and improvement?





ED Accountability Guidance (October 2020)

- Starts from the baseline assumption that States will have 2020-21 assessment data, but not 2019-20
- No national waivers (thus far), i.e. SEA meet requirements for accountability, school identification, and report cards based on data from the 2020-2021 school year
- SEA can ask for “State plan addendum” to shift timeline forward by one year for:
 - Identifying schools or
 - Meeting measurements of interim progress (MIPs) and long-term goals.

ED Accountability Guidance

- If State doesn't believe it can meet requirements with that flexibility, must submit an ESEA State plan amendment request
 - E.g.:
 - Use different methodology to calculate achievement indicator
 - Use a different indicator entirely
 - Adjust weighting of indicators
 - Use an earlier data year for comparison for some indicators (ELP) or omit a year (grad rate)
 - Submit a waiver of the calculation on this indicator

ED Accountability Guidance

- CSI and TSI Schools
 - Schools designated CSI, TSI, or ATSI in 2019-20 will maintain that status in 2020-21
 - SEA may not exit schools EXCEPT if identification based on graduation rate
 - SEA can shift timelines for identification forward by one year to account for lost data in CSI and ATSI (two-year cycles)
 - SEA must resume identification of TSI schools (one-year cycle)
 - But may request a waiver under Sec. 8401



What Next?

- ED delayed deadline for submitting State plan amendments/addenda related to assessments and delays/changes in identification
 - Was 2/1, now TBD
 - Indicates that there is some plan to modify waiver/amendment groundwork
- Cardona confirmation hearing
 - Said that he felt assessments were still important for gauging individual student progress
 - But states should have opportunity to "weigh in" on how tests are administered/how scores are used
 - Doesn't want students in schools just to take tests

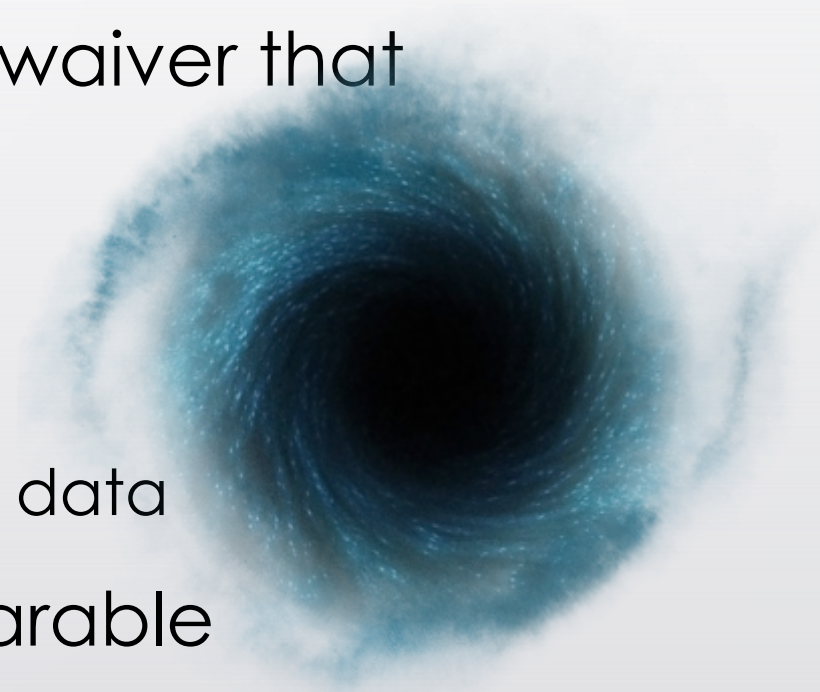
Potential for Congressional intervention in assessment question?

- Probably not!
- CRRSA Section 313(d)(12), ESSER II allowable uses of funds include:
 - “Addressing learning loss among students, including low-income students, children with disabilities, English learners, racial and ethnic minorities, students experiencing homelessness, and children and youth in foster care, of the local educational agency, including by—
 - Administering and using high-quality assessments that are valid and reliable, to accurately assess students’ academic progress and assist educators in meeting students’ academic needs, including through differentiating instruction.”

New Data Flexibility

COVID Complications: Lack of FRPL Data

- 2020-21 School Year: school operating on waiver that involves serving meals community-wide
 - Eligible meals are federally reimbursable
 - Does not require collecting FRL applications
 - Not necessarily pulling new direct certification data
- Result: a lack of valid, reliable, and comparable federal poverty data!



Uses of FRL Data in ESEA

- Title I formula for “special LEA” (census data not available): optional (ESEA sections 1124(c)(1)-(2), 1124A(a)(1), 1125(a)(1), and 1125A(c))
- Title I within-State allocations for small LEAs with approval from ED (ESEA sections 1124(a)(2)(B), 1124A(a)(4), 1125(d))
- Title I rank and serve (ESEA section 1113(a)(5)(a))
- Equitable services option for calculating income level (ESEA Section 1117(c)(1))
- Title I reporting on accountability by subgroup (ESEA section 1111(b)(2)(B)(xi), (c), and (h))
- Title II allocations for special LEAs (ESEA section 2102(a)(2)(B))
- RLIS option for alternate poverty data (ESEA section 5221(b)(1))(in phase-out)

Data guidance from ED (January 2021)

- For Special LEAs (Title I eligibility and allocations, Title II allocations, RLIS eligibility)
 - Prefer to use NSLP data from 2020-21 to derive census poverty
 - If not available, SEA may use:
 - Poverty data other than NSLP data (e.g., Medicaid counts or other poverty data available to an SEA for State purposes);
 - “The best available NSLP data, *which may be from SY 2019-2020*”
 - NSLP data from SY 2020-2021 that may be accessible (e.g., counts of children identified through direct certification)
 - Data from a *poverty survey conducted by the SEA or LEA* that replicate NSLP or other poverty data

Data guidance from ED (January 2021)

- For small LEAs
 - Prefer to use NSLP data from 2020-21
 - If not available, *SEA may seek ED approval to use:*
 - The best available NSLP data, *which may be from SY 2019-2020;*
 - NSLP data from SY 2020-2021 that may be accessible (e.g., counts of children identified through direct certification); or
 - Data from a *poverty survey conducted by the SEA or LEA* that replicate NSLP or other poverty data.

Data guidance from ED (January 2021)

- Within-LEA Title I allocations (rank and serve)
 - Prefer to use NSLP data from 2020-21
 - If not available, *LEA may use*:
 - Medicaid or TANF data or a composite of data of these two sources from SY 2020-2021
 - The best available NSLP data, which may be from SY 2019-2020
 - NSLP data from SY 2020-2021 that may be accessible (e.g., counts of children identified through direct certification)
 - A composite of NSLP, Medicaid, and TANF data, and the best available FRPL data, which might include Medicaid, NSLP, or TANF counts from SY 2020-2021
 - Data from a *poverty survey conducted by the SEA or LEA* that replicate NSLP, Medicaid, or TANF data

Data guidance from ED (January 2021)

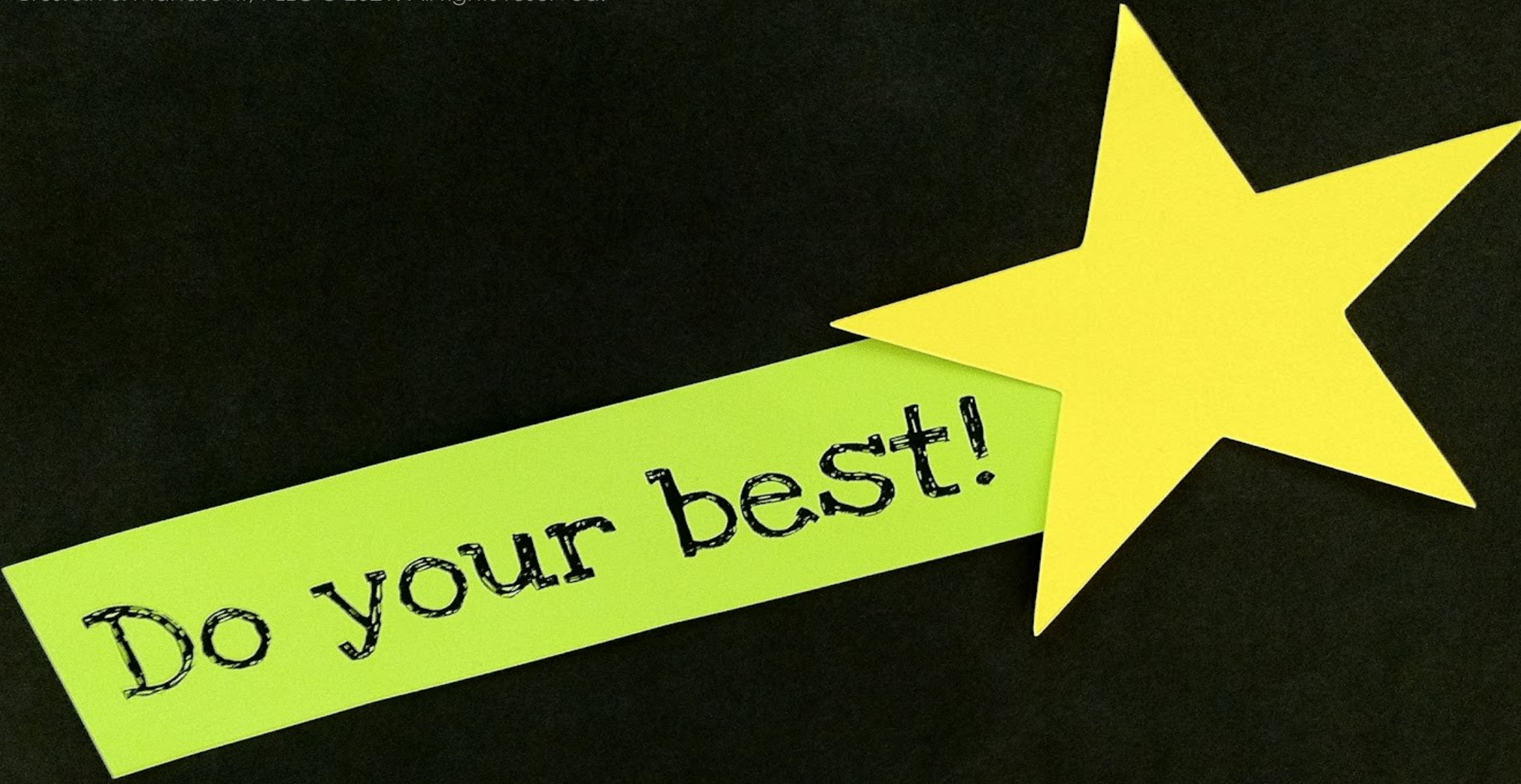
- Equitable Services
 - LEA may choose from the following data sources, *in consultation with private schools*:
 - The same measure of poverty used to count public school children
 - Comparable poverty data from a survey and allowing such survey results to be extrapolated if complete actual data are unavailable
 - Comparable poverty data from a different source
 - The application of the low-income percentage of each participating public school attendance area to the number of private school children who reside in that school attendance area; or
 - An equated measure
 - ED notes: this may mean relying on NSLP data!

Data guidance from ED (January 2021)

- Equitable Services (cont.)
 - Reminder: LEA can make the determination every two years, so can use last year's data if it's the second year of a cycle
 - E.g. use 2019-20 data for 2020-21 AND 2020-22
 - For an LEA that would normally use 2020-21 data to determine proportional share for 2021-22, if NSLP data are not available, LEA may use data from 2019-20 instead *in consultation with private school officials*

Data guidance from ED (January 2021)

- Reporting and Accountability
 - Prefer to use NSLP data from 2020-21 to derive census poverty
 - If not available, SEA may use to identify “economically disadvantaged” students:
 - Poverty data other than NSLP data
 - The best available NSLP data, which may be from SY 2019-2020
 - NSLP data from SY 2020-2021 that may be accessible (e.g., counts of children identified through direct certification)
 - Data from a poverty survey conducted by the SEA or LEA that replicate NSLP or other poverty data.

A large, bright yellow five-pointed star is positioned diagonally across the center of the slide. A green banner with a black border is placed across the middle of the star. The banner contains the text "Do your best!" in a black, hand-drawn, slightly irregular font.

Do your best!

Poverty Surveys

- Often used for:
 - Community eligibility program
 - State formula programs
- Commonly ask for:
 - Family/household size
 - Student name
 - Income range
- Disadvantages
 - Administrative burden
 - Questions of accuracy



Average Daily Attendance Guidance

- From ED OESE, January 2021
- Offers States two options for 2019-20 school year:
 - If State CANNOT determine accurate ADA during remote learning → count only up until date of school closure
 - If states CAN determine accurate count for remote learning → do
 - For those using federal definition, use total aggregate days of attendance
 - Minus any “interruptions”
 - Otherwise use State definition
- Assume we will need a full count for 2020-21 school year, regardless of operational status!

Impact Aid Coronavirus Relief Act (H.R. 8472)

- Signed by the President on December 4, 2020
- Impacts Title I, Part C allocations to SEAs for FY 2021
 - Directs the Secretary to use migratory child count data from 2018-19 or 2019-20, whichever is higher,
- Can carry over to subsequent years in which 2019-20 data would otherwise have been used
 - This change will impact Title I Part C allocations to SEAs for FY 2021 through FY 2023.
- ED “Timely and accurate reporting of 2019-20 child count data (due this month) is imperative for the Secretary to determine whether the 2018-19 or 2019-20 data are greater for each State.”



Bottom Line:

- Use “best available data”
 - We know no data is going to be “great” right now
 - No federal standard, so document and be prepared to justify use of particular data set
 - In most cases, SEA has discretion
 - But may need to check with ED
 - For equitable services, make sure to meet consultation requirements
- May want to consider a survey for some purposes







Data Resources

- Department of Education [State Plan Accountability guidance](#), October 2020
- Department of Education, [Fact Sheet on NSLP Data Alternatives](#), January 2021
- NCES, [Average Daily Attendance Guidance](#), January 2021



Questions??



Services to Students in Private School

Title I Equitable Services Refresher

- Set aside a portion of funds to provide services to low-income students in private schools
 - Slightly different in other programs!
- Allocation based on residence in “eligible school attendance area” (i.e. an LEA that receives Title I)
- Services targeted to students academically at risk
 - Can be provided school-by-school, pool within an LEA, or pool across LEAs

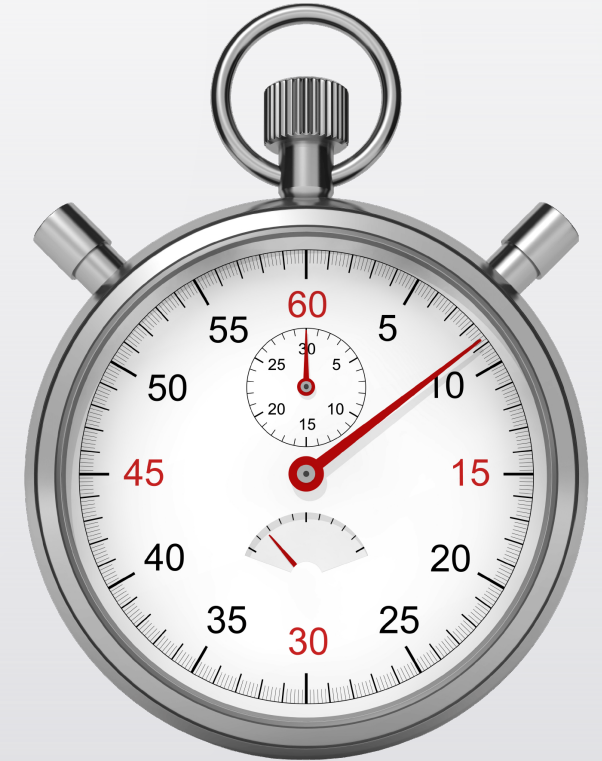


Title I Equitable Services Refresher

- Sec. 1117 of the Elementary and Secondary Education Act (as amended by the Every Student Succeeds Act)
 - “To the extent consistent with the number of eligible children identified under section 1115(c) in the school district served by a local educational agency who are enrolled in private elementary schools and secondary schools” LEAs should provide services “on an equitable basis”

Focus on Consultation

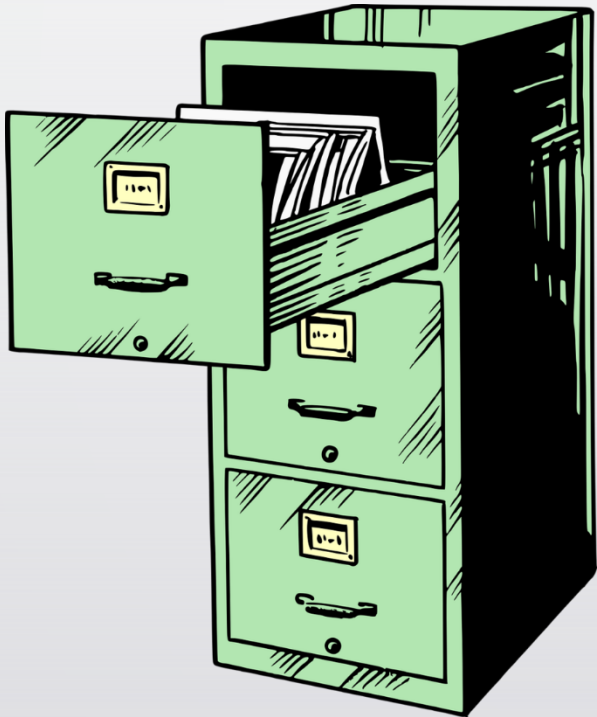
- Must be “timely”
- LEA obligated to conduct outreach to schools every year
 - “All private schools within the district that might have students eligible to participate in Title I programs”
 - Even if they have previously refused services
 - May set a “reasonable deadline” for response



Focus on Consultation

- Must be “meaningful”
- Topics to include:
 - Distribution of services among eligible schools within district
 - Services to be offered and when (e.g. before school, after)
 - Children who may meet eligibility criteria, and data used to determine
 - Providing services directly or through a contract
 - Transfer of funds between programs
 - Pooling funds (requires agreement by the non-public schools)
- “Goal of reaching agreement”

Focus on Consultation



- LEA should keep documentation that consultation has occurred:
 - Required:
 - Written affirmation from private schools
 - Results of agreement, if any
 - Reasons for and areas of disagreement, if any
 - Recommended:
 - Record of invitation, agendas, sign-up sheets
 - Notes regarding topics discussed
 - Record of evaluating programs, addressing complaints

School-Level Data

- LEA needs to request data every 1 or 2 years from private school officials to help calculate services, e.g.:
 - Number of private schools from low-income families
 - Where students reside
- Can calculate share to private schools based on:
 - Same measure of poverty used to count public school children
 - Comparable representative survey data that allows results to be extrapolated
 - Comparable poverty data from a different source
 - Proportionality (apply the same percentage to students in private schools as in public schools)
 - An “equated measure” based on existing data (e.g. shares of participation in other income-based programs)

What can equitable services funds be used for?

- Direct services provided by the LEA
- Third-party contractor services
 - Contractor may be a religiously-affiliated entity
 - Contractor may NOT be the school
- Materials, equipment, and property if reasonable and necessary to provide equitable services
 - But not materials and supplies alone!
- Transportation costs, if reasonable and necessary

What can equitable services funds be used for?

- Services must be
 - Secular
 - Neutral
 - Non-ideological
- Broad range of services including:
 - Instructional services
 - One-on-one tutoring
 - Family literacy
 - Expanded learning time, including before- and after-school or summer school
 - Counseling/ mentoring
 - Computer-assisted instruction



Who is eligible for services?

- Differs from students who drive funding numbers!
- Students “identified by the LEA as low achieving on the basis of multiple, educationally related, objective criteria” (as determined through consultation)
- Students “identified as eligible solely by virtue of their status” as:
 - Homeless children;
 - Children who in the last two years participated in:
 - Head Start
 - Title II, Part B, Subpart 2 literacy programs
 - Title I preschool program
 - Title I, Part C (Migrant Education) program
 - Children in a local institution for neglected or delinquent children and youth or attending a community day program for such children



Can a Private School Say “Thanks but No Thanks?”

- Yes!
- But helpful to have documentation that they are declining services
- If no written affirmation, SEA can request LEA provide a reason, or facilitate resolution
- If no response to “good faith effort” to contact, then no more responsibility in that year



Complaint Process



- State appoints private school ombudsman
 - General resource, monitoring, technical assistance, record-keeping, dispute resolution
- Private school can file a complaint with the SEA (through ombudsman) that:
 - LEA has not engaged in timely and meaningful consultation;
 - LEA has not given due consideration to views of private school official(s);
 - LEA has not made a decision that treats private school students equitably

Complaint Process

- SEA must respond to complaint in writing within 45 days
- Any interested party may appeal to ED within 30 days if:
 - SEA does not respond within 45 days
 - If dissatisfied with resolution
 - ED has 90 days to resolve appeal
- Possible resolution: bypass (SEA provides services directly or through third-party provider)

CARES Act Equitable Services



- Section 18005 of CARES Act provides for equitable services to non-public schools
 - Applies to the Elementary and Secondary School Education Relief Fund (ESSER) and the Governors Emergency Education Relief Fund (GEER)
 - Services should be provided to students and teachers in non-public schools “in the same manner as provided under section 1117 of the ESEA”
 - Subject to consultation
 - Funds must remain “under the control” of the public entity (LEA)

What Can it Pay For?

- CARES Act services: anything allowable under Title I, IDEA, Perkins, some McKinney-Vento, other specific uses, catch-all to ensure continuity and employment
- Services must be secular, neutral, and non-ideological
- Can be provided by third party contractor or by LEA
- “Public Control” standard
 - Limited ability for reimbursement per ED non-binding guidance
 - Expenses incurred after March 13, but before consultation began
 - 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.
 - Non-permanent, easily removable improvements allowed

Who is eligible for services?

- CARES Act eligibility is all teachers and students
 - Subject to consultation, allowable uses under CARES
 - CARES Act activities are more broad than services to individual students
- Contrast to Sec. 1117 requirements
 - Students must reside in participating attendance area
 - Must be low-achieving, or otherwise at risk under Sec. 1115 (c)



How to Calculate set-aside?



- ED guidance/proposed regulations:
 - ED: there is a statutory ambiguity inherent in “in the same manner”
 - CARES Act funds can and should serve all students and teachers (ED: this is required for equity)
 - Should allocate funding according to non-public schools’ share of total enrollment
 - Allocation should be based on schools located in the LEA (not student residency)

Significant pushback from States and advocates leads to legal challenges

Summary Judgment

- NAACP suit (Federal District Court for the District of Columbia)
 - “[t]he interim final rule is contrary to the unambiguous mandate of the Act. And the Act provides neither express rulemaking authority nor any ambiguity for the agency to clarify”
 - Congress “expressed a clear and unambiguous preference for apportioning funding to private schools based on the number of children from low-income families.”
 - “[I]t is not at all obvious how the Department’s proposed revision of ‘as provided in’ is any clearer than Congress’s chosen words of ‘in the same manner as provided under...’”

So What Now?

- September 25 DeVos [letter to SEAs](#):
 - Disagrees with ruling but will not appeal
 - Time as a concern
 - ED “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.”
 - Focus on compliance with consultation requirements
- Follow statute and October 2020 guidance, not regulations or April guidance





So What Now?

- 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)

How Do I Calculate the Proportionate Share?

- 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
- Apply Title I 19-20 OR 20-21 percentage



“But 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
- Prepare for potential appeals under Sec. 1117



GEER II Services to Students in Private Schools

- “CORONAVIRUS RESPONSE AND RELIEF SUPPLEMENTAL APPROPRIATIONS ACT of 2021,” or “CRRSA” enacted December 27, 2020
- Contains
 - Appropriations for fiscal year 2021
 - \$81 billion in education stimulus
 - ESSER II
 - GEER II → EANS
 - HEERF II
 - Broadband aid
 - Additional program modifications

GEER II ... to Private Schools

- ED must reserve \$2.75 billion (of \$4 billion) for Emergency Assistance to Non-Public Schools (EANS)
 - Allocated to States based on their share of low-income children enrolled in non-public schools
 - As determined by ED based on “best available data”
 - SEA will be designated to administer
 - Applications for States must be released within 30 days of enactment
 - State may reserve \$200,000, or 0.5% of its grant, whichever is greater, for administration

GEER II ... to Private Schools

- States must
 - Prioritize private schools that enroll low-income students and “are most impacted” by the national emergency
 - Distribute information and make easily available
 - Move quickly to allocate and obligate:
 - Publish applications within 30 days of receiving GEER funding
 - Approve or deny applications within 30 days of receipt
 - Obligate funds within 6 months (or will be returned to Governor for other GEER uses)

GEER II ... to Private Schools



- Applications must include:
 - Number and percentage of students from low-income families enrolled **in the 2019-20 school year**
 - A description of authorized activities requested
 - *(and reimbursements requested?)*
 - Whether the school received a PPP loan
 - If the school receives a PPP loan after 12/27/20, it is not eligible for funds



EANS Allowable Uses of Funds

- Supplies to sanitize/disinfect/clean
- Personal Protective Equipment
- Improving ventilation systems
- Training and PD on sanitization, use of PPE, minimizing spread of disease
- Physical barriers to facilitate distancing
- “Materials, supplies, or equipment” needed to implement public health recommendations
- Expanding testing capacity
- Education technology
- Reworking instructional plans for remote learning or learning loss
- Leasing space in order to meet distancing guidelines
- “Reasonable transportation costs”
- Support services for remote/hybrid instruction or to address learning loss

EANS “Public Control” Standard

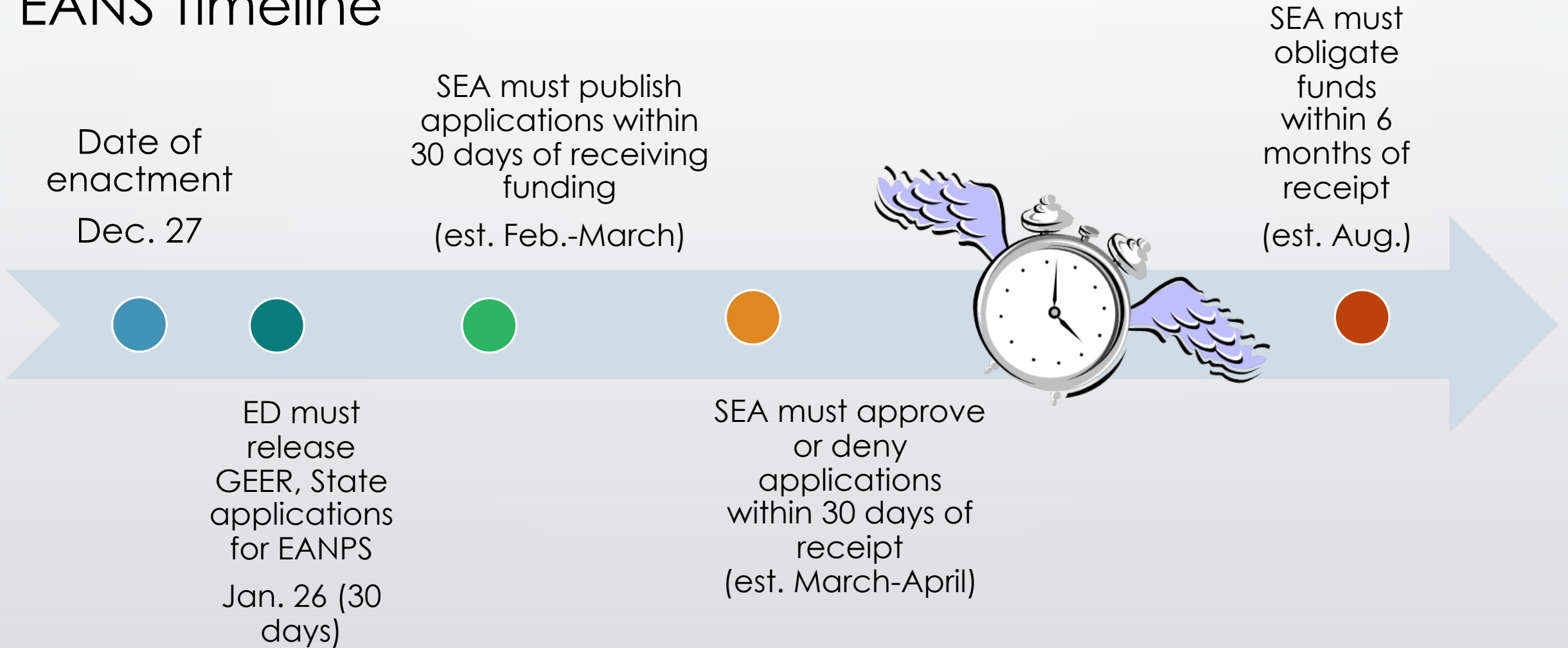
- Funds must remain under control of “public entity” → SEA
- Services can be provided directly or through contracts
 - Providers must be independent of private school
- Services must be “secular, neutral, and non-ideological”
- Funds may not be used for vouchers or scholarship programs
 - Exception: if a student received that assistance under CARES, may use funds to complete school year



EANPS Reimbursement?

- Reimbursement of any allowable expenditures is allowed, **except for:**
 - Ventilation systems (portable air purification devices are eligible for reimbursement)
 - Training and professional development on cleaning, PPE, disease spread, etc.
 - Reworking instructional plans
 - Initiating and maintaining education and support services
- Allowable for expenditures back to March 13th

EANS Timeline



Resources

ED October 2019 guidance on Title I equitable services:

<https://www.eseanetwork.org/c/titlei/files/Association/2019/General/Equitable%20Services/equitable-services-guidance-logo-100419.pdf>

ED October 2020 guidance on CARES Act equitable services:

<https://oese.ed.gov/files/2020/10/Providing-Equitable-Services-under-the-CARES-Act-Programs-Update-10-9-2020.pdf>

ED January 2021 EANS Fact Sheet: https://oese.ed.gov/files/2021/01/FINAL_-_GEER_FactSheet_1.8.21.pdf

ED January 2021 EANS FAQ:

https://oese.ed.gov/files/2021/01/Final_EANS_FAQs_1.14.21.pdf



CARES Act



The Funding Streams:

- Coronavirus Relief Fund (CRF)
- Governor's Emergency Education Relief Fund (GEER 1)
- Elementary and Secondary School Education Relief Fund (ESSER 1)
- *Higher Education Emergency Relief Fund (HEERF)*

What is the CARES Act Coronavirus Relief Fund (CRF)?

- Total of \$150 billion; Administered by Treasury
- Payments for specified uses to States and certain local governments; the District of Columbia and U.S. Territories (consisting of the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands); and Tribal governments.
 - Payment amounts based on populations

Purpose of CRF

- Provides that payments from the Fund may only be used to cover costs that—
 - Are necessary expenditures incurred due to the public health emergency with respect to the Coronavirus Disease 2019 (COVID-19);
 - Were not accounted for in the budget most recently approved as of March 27, 2020 (the date of enactment of the CARES Act) for the State or government; and
 - Were incurred during the period that begins on March 1, 2020, and ends on ~~December 30, 2020~~ **December 30, 2021**
- Revenue replacement is NOT allowable use of funds

How can you use CRF funding?

- U.S. Department of Treasury website:
<https://home.treasury.gov/policy-issues/cares/state-and-local-governments>
- CRF Guidance (Updated 9/2/2020):
<https://home.treasury.gov/system/files/136/Coronavirus-Relief-Fund-Guidance-for-State-Territorial-Local-and-Tribal-Governments.pdf>
- FAQ on CRF (updated 9/2/2020):
<https://home.treasury.gov/system/files/136/Coronavirus-Relief-Fund-Frequently-Asked-Questions.pdf>

What Rules Apply?

- FAQ B-6: CRF payments are NOT considered a grant, but are “other financial assistance”
- CRF payments are still subject to 2 CFR 200.303 (internal controls), 200.330-332 (subrecipient monitoring), and Subpart F (audit requirements)
 - See FAQs B-7 & B-8
- States may transfer funds to a local subrecipient (FAQ A-33)
 - Provided that funds are used for eligible expenditures

Internal Controls (200.303)

- Must monitor subrecipient internal controls
- These internal controls should be in compliance with guidance in:
 - “Standards for Internal Control in the Federal Government” issued by the Comptroller General of the United States or
 - “Internal Control Integrated Framework”, issued by the Committee of Sponsoring Organizations of the Treadway Commission (COSO).

Subrecipient Monitoring Rules (2 CFR 200.331)

- Pass-through must monitor its subrecipients to assure compliance and performance goals are achieved (200.331 (d))
 - Review financial and programmatic reports
 - Ensure corrective action
 - Issue a “management decision” on audit findings
- Pass-throughs must consider taking enforcement action based on noncompliance (200.331 (h))

Audits – 2 CFR Part 200, Subpart F

- Treasury OIG Guidance on the CRF:
<https://www.treasury.gov/about/organizational-structure/ig/Audit%20Reports%20and%20Testimonies/OIG-CA-20-028.pdf>
- For auditing purposes, all CRF payments received by “prime recipient” subject to audit, but may include reviewing subrecipients
- CRF guidance: a grant or loan provided by a recipient using CRF payments must be used by the subrecipient only to purchase (or reimburse a purchase of) goods or services for which receipt is needed within the covered period and occurs within the covered period.
 - The direct/prime recipient of CRF payments is ultimately responsible for compliance

State Oversight of Subrecipients

- States (prime recipient) will be responsible for compliance
 - States may impose restrictions on transfers to local recipients to the extent that that they facilitate State's compliance with CRF
- States cannot place other restrictions that do not directly concern use of funding
 - Such as restrictions on reopening or requiring a match
- (FAQ A-34)

Allowable Use of Funds – Necessary Due to Public Health Emergency

- Expenditures must be used for actions taken to respond to the public health emergency.
 - May include expenditures incurred to respond directly to the emergency, such as by addressing medical or public health needs, as well as expenditures incurred to respond to second-order effects, such as by providing economic support to those suffering from employment or business interruptions due to COVID-19-related business closures.
- Funds may not be used to fill shortfalls in government revenue to cover expenditures that would not otherwise qualify under the statute.
- The statute also specifies that expenditures using CRF payments must be “necessary.”
 - Treasury understands this term broadly to mean that the expenditure is reasonably necessary for its intended use in the reasonable judgment of the government officials responsible for spending CRF payments.

Allowable Use of Funds – Unbudgeted Costs as of March 27, 2020

- Payments be used only to cover costs that were not accounted for in the budget most recently approved as of March 27, 2020.
- CRF Guidance: A cost meets this requirement if either:
 - The cost cannot lawfully be funded using a line item, allotment, or allocation within that budget; or
 - The cost is for a substantially different use from any expected use of funds in such a line item, allotment, or allocation.

Substantially Different Use

- Example: Costs of personnel and services that were budgeted for in the most recently approved budget but which, due entirely to the COVID-19 public health emergency, have been diverted to substantially different functions.
- A public function does not become a “substantially different use” merely because it is provided from a different location or through a different manner.
 - For example, although developing online instruction capabilities may be a substantially different use of funds, online instruction itself is not a substantially different use of public funds than classroom instruction.
- FAQ A-3

Allowable Use of Funds – Costs incurred by December 30, **2021**

- CRF Guidance: for a cost to be considered to have been “incurred,” performance or delivery must occur during the covered period (3-1-2020 through 12/30/**2021**)
 - Payment of funds need not be made during that time (though it is generally expected that this will take place within 90 days of a cost being incurred)
 - Example: the cost of a lease payment shall be considered to have been incurred for the period of the lease that is within the covered period but not otherwise.

Costs incurred by December 30, **2021** (cont.)

- CRF Guidance: The cost of a good or service received during the covered period will not be considered eligible under CRF if there is no need for receipt until after the covered period has expired.

but...

- Goods delivered in the covered period need not be used during the covered period in all cases.
 - The cost of a good that must be delivered in December in order to be available for use in January could be covered using payments from the Fund.

Costs incurred by December 30, **2021** (cont.)

- The cost of goods purchased in bulk and delivered during the covered period may be covered using CRF payments if:
 - A portion of the goods is ordered for use in the covered period;
 - The bulk purchase is consistent with the recipient's usual procurement policies and practices; and
 - It is impractical to track and record when the items were used.
- A recipient may use CRF payments to purchase a durable good that is to be used during the current period and in subsequent periods if the acquisition in the covered period was necessary due to the public health emergency.
- The key for determining the need for a good or service during the covered period will be reasonableness at the time delivery or performance was sought, e.g., the time of entry into a procurement contract specifying a time for delivery


Reopening Schools: \$500-per-student allowance

- Treasury will assume any cost \$500 or below per elementary or secondary student to be allowable
 - Do not have to document specific use of funds up to \$500
 - What about audits? Subrecipient Monitoring?
- FAQ A-53

May Fund recipients incur expenses associated with the safe reopening of schools?

Yes, payments from the Fund may be used to cover costs associated with providing distance learning (e.g., the cost of laptops to provide to students) or for in-person learning (e.g., the cost of acquiring personal protective equipment for students attending schools in-person or other costs associated with meeting Centers for Disease Control guidelines).


Treasury recognizes that schools are generally incurring an array of COVID-19-related expenses to either provide distance learning or to re-open. To this end, as an administrative convenience, **Treasury will presume that expenses of up to \$500 per elementary and secondary school student are eligible expenditures, such that schools do not need to document the specific use of funds up to that amount.**



May Fund recipients incur expenses associated with the safe reopening of schools? (cont.)


If a Fund recipient avails itself of the presumption in accordance with the previous paragraph with respect to a school, the recipient may not also cover the costs of additional re-opening aid to that school other than those associated with the following, in each case for the purpose of addressing COVID-19:

- expanding broadband capacity;
- hiring new teachers;
- developing an online curriculum;
- acquiring computers and similar digital devices;
- acquiring and installing additional ventilation or other air filtering equipment;
- incurring additional transportation costs; or
- incurring additional costs of providing meals.



May Fund recipients incur expenses associated with the safe reopening of schools? (cont.)

Across all levels of government, the presumption is limited to \$500 per student, e.g., if a school is funded by a state and a local government, the presumption claimed by each recipient must add up to no more than \$500. Furthermore, if a Fund recipient uses the presumption with respect to a school, any other Fund recipients providing aid to that school may not use the Fund to cover the costs of additional aid to schools other than with respect to the specific costs listed above.



May Fund recipients incur expenses associated with the safe reopening of schools? (cont.)

The following examples help illustrate how the presumption may or may not be used:

- *Example 1:* State A may transfer Fund payments to each school district in the State totaling \$500 per student. State A does not need to document the specific use of the Fund payments by the school districts within the State.
- *Example 2:* Suppose State A from example 1 transferred Fund payments to the school districts in the State in the amount of \$500 per elementary and secondary school student. In addition, because State A is availing itself of the \$500 per elementary and secondary school student presumption, State A also may use Fund payments to expand broadband capacity and to hire new teachers, but it may not use Fund payments to acquire additional furniture.

English please.

- “\$500 per student allowance” in CRF means that you do not have to demonstrate the allowable use of funds up to that amount.
 - Calculated on total enrollment, total CRF received
 - Still must demonstrate costs incurred timely (during the period).
- If the district receives more than \$500 per student allowance, then:
 - (1) Must spend the excess funding on the seven bulleted examples of allowable uses in Treasury FAQ 53; or
 - (2) Document the allowability of the total allocation (not rely on the presumption of allowable up to the \$500 per student allowance)

CARES Act Education Funding

Secretary's Reservation

Governor's Fund (GEER)

Elementary and Secondary School Education Relief Fund (ESSER)

Higher Education Relief



Governor's Emergency Education Relief Fund (GEER)

- Approximately \$3 billion (CARES Act Sec. 18002)
- Allocated to States by:
 - Population ages 5-24 (60%)
 - Children in poverty as defined by ESEA (40%)
- Governors allocate funding for “emergency support” among:
 - LEAs most impacted (as determined by SEA) for educational services and to “support ongoing functionality” → *subject to equitable services*
 - IHEs most impacted as determined by Governor
 - Any other LEA, institution, or “education related entity” deemed essential for emergency educational services, childcare, and protection of education-related jobs



Governor's Emergency Education Relief Fund (GEER)

- ED's [Application/ Assurances](#)
 - Funds allocated to LEAs are subject to equitable services as under Sec. 1117 of ESEA (and require consultation) (CARES Act)
 - Report regularly and respond to requests for records
 - "Generally speaking, the Department does not expect administrative or executive salaries and benefits for IHEs, SEAs, or the other education related entities referenced at § 18002(c)(3) to be a lawful purpose for GEER funds."

Governor's Emergency Education Relief Fund (GEER): Allowable Uses of Funds

- “Unless otherwise restricted by the [State] at the time of subgrant, the LEA has considerable flexibility in determining how best to use GEER funds to prevent, prepare for, or respond to COVID-19. The LEA may use these funds for, among other things, any activities that are authorized under the ESEA.”

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 Application and Assurances

- State has one year to award funds to LEAs
 - LEA funds must include charter LEAs
 - Must reallocate funding to new and significantly expanding charters as under Title I
 - Allowable for expenditures incurred on or after March 13th
- 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



Elementary and Secondary School Education Relief Fund (ESSER): Allowable Uses of Funds

1. Any purpose under ESEA, 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
6. Training and professional development on sanitation and epidemiology
7. Purchase of cleaning and sanitizing supplies



ESSER: Allowable Uses of Funds (cont.)

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.”**

Is ESSER/GEER subject to supplement not supplant?

- No! There is not a supplement not supplant provision in ESSER/GEER
 - But, keep in mind general purposes: “to prevent, prepare for and respond to the Coronavirus”

Can I charge teachers previously charged to state funding to ESSER?

- Generally, yes!
 - CARES Act intended to help to maintain employment. LEAs that need to transfer staff to federal funding in order to keep the employees at the district (not reduce staff), could do so under CARES Act ESSER funds
- What about time and effort?
 - Generally, yes, will need to maintain internal controls and related documentation to show the allocability of the salary to ESSER Funds.

Can I charge construction costs to ESSER funds? (e.g., building outdoor classroom space)

- Yes!
 - Generally, education funds are prohibited from construction unless the statute explicitly allows it. CARES Act does not mention construction.
 - But, during “Office hours” with ED, ED argues that “any activity under ESEA” includes Impact Aid, and Impact Aid authorizes construction costs. Accordingly, ED believes ESSER funds may be used for construction costs needed to prevent, prepare for and respond to the Coronavirus.



Compliance Supplement Addendum

If governors, SEAs, and or subrecipients propose to use GEER or ESSER ESF funds for construction they must also comply with applicable requirements in 34 CFR section 76.600 and 34 CFR sections 75.600–617. Approved construction projects must comply with all other applicable Uniform Guidance requirements, as well as the ED’s regulations regarding construction, as applicable, at 34 CFR section 76.600. As is the case with all construction contracts using laborers and mechanics financed by federal education funds, recipients and subrecipients that use ESSER or GEER funds for construction contracts over \$2,000 must meet Davis-Bacon prevailing wage requirements

Can I charge buses to ESSER/GEER/CRF?

- Proceed with caution.
- Must tie the purchase to the coronavirus (e.g., necessary for social distancing measures)
- Must consider other, less expensive alternatives (leasing? Travel vouchers?)
- Must have prior approval from the state. (2 CFR 200.439)



	Period of Availability	Indirect Costs	Time and Effort?	Single audit?	Federal Procurement?	Equitable Services?	Pass-through Restrictions?
CRF	March 1- Dec 30, 2021	No	No	Yes	No	No	Generally, no
GEER	March 13 – Sept 30, 2022	Yes, state may set cap	Yes	Yes	Yes	Yes	Yes
G II	Sept 30, 2023						
ESSER	March 13 – Sept 30, 2022	Yes, “reasonable and necessary”	Yes	Yes	Yes	Yes	No
E II	Sept 30, 2023						

CRRSAA

Coronavirus Response and Relief Supplemental Appropriations Act.



GEER 2

- Allowable Uses of Funds by Governor (or designee)
 - Emergency support to LEAs that the **State deems** have been “most significantly impacted” to continue services and ongoing functionality
 - Emergency support to IHEs that **governor determines** have been “most significantly impacted”
 - Support to: “any other institution of higher education, local educational agency, or education related entity within the State that the Governor deems essential for carrying out emergency educational services ... the provision of child care and early childhood education, social and emotional support; and the protection of education-related jobs.”



ESSER 2 Allowable Uses of funds

12. Addressing learning loss among students, including low-income students, children with disabilities, English learners, racial and ethnic minorities, students experiencing homelessness, and children and youth in foster care... including by
 - A. Administering and using high-quality assessments that are valid and reliable
 - B. Implementing evidence-based activities to meet comprehensive needs of students
 - C. Providing information and assistance to parents and families on how they can effectively support students
 - D. Tracking student attendance and improving student engagement in distance education

ESSER 2 Allowable Uses of funds



13. School facility repairs and improvements to enable operation of schools to reduce risk of virus transmission and exposure to environmental health hazards
14. Inspection, testing, maintenance, repair, replacement, and upgrade projects to improve the indoor air quality in school facilities
15. 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

Can I fund a single project with ESSER I and ESSER II funds?

- Yes. See 34 CFR 76.760
 - May fund single project with two or more funding streams; must maintain separate accounting

Can I use ESSER II to remodel our bathrooms?

- Maybe. If necessary to remove “environmental health hazards” and/or to “improve the indoor air quality” in order to prevent, prepare for and respond to COVID
 - Must get prior approval from SEA
 - Must follow applicable construction requirements



Can I use ESSER II for multi-year contracts? (e.g., subscription to instructional software)

- Reminder: all costs must be reasonable, necessary and allocable
- Must “obligate” within the period of availability
- Considerations: how far past the period would the subscription last? Is the cost still allocable to the program (related to the prevention/response to coronavirus)?



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 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.