

Federal Grants Update

**Presented at the LASAFAP 2022 Fall Conference
October 27, 2022**

Sheara Krvaric

Federal Education Group, PLLC

www.fededgroup.com

Introduction

Federal Education Group, PLLC (FEG) is a law and consulting firm that helps states, school districts, and other educational organizations understand federal law so they can use federal money to achieve their goals while maintaining compliance.

FEG's practice areas include all major federal K-12 education programs, including COVID relief programs, ESEA, IDEA, and Perkins, as well as federal grants management requirements, such as the Uniform Grant Guidance.

FEG's co-founders Melissa Junge and Sheara Krvaric previously served as in-house counsel for an SEA and in private practice at an education law firm.

Agenda

- ESSER implementation updates
 - Timelines
 - Navigating ED guidance on allowable uses of funds
 - Local maintenance of equity requirement
 - ESSER reporting
- Preparing for audits and oversight
- Other Updates
 - Recent ED guidance documents
 - Observations from recent ED monitoring reports

ESSER Timelines

ESSER Timeline Concerns

- Concerns about supply chains, hiring challenges, and the projected long-term impact of the pandemic on students have prompted questions about whether SEAs and LEAs can get additional time to spend ESSER funds.
- On September 29, ED released a “liquidation extension” process for CARES ESSER and GEER funds:
 - ED’s letter is [here](#).
 - The request template is [here](#).
 - A recording of an ED webinar on the process is [here](#), the slides are [here](#), and a transcript is [here](#).

Additional Context

- On January 21, 2022, organizations sent a letter to ED asking for more time to spend ARP ESSER funds for school construction and capital projects.
- On May 13, 2022, ED responded that it would consider giving SEAs and LEAs more time to draw down and spend (but not to obligate) ARP ESSER funds for construction projects in specific cases.
- On July 22, 2022, organizations sent a follow-up a letter asking for expanded flexibility. On August 29, 2022, nearly 700 school districts sent a similar letter.

Understanding “Liquidation Extensions”

- Grant spending timelines are governed and affected by:
 - Program laws,
 - GEPA,
 - EDGAR,
 - UGG, and
 - Federal appropriations law.
- There are, generally, three issues to consider:
 - Obligation,
 - Draw down and liquidation, and
 - Goods/service delivery.

Obligation Deadlines

- When Congress appropriates money for a grant program, it usually includes an “obligation” deadline. For example:
 - CARES ESSER has an obligation deadline of 9/30/2021,
 - CRRSA ESSER has an obligation deadline of 9/30/2022, and
 - ARP ESSER has an obligation deadline of 9/30/2023.
- For most ED programs, the obligation deadline set by Congress is extended by one year for SEAs and LEAs through a GEPA provision known as the Tydings amendment. For example, SEAs and LEAs have until:
 - 9/30/2022 to obligate CARES ESSER,
 - 9/30/2023 to obligate CRRSA ESSER, and
 - 9/30/2024 to obligate ARP ESSER.

Obligation Deadlines

- ED does not have authority to extend the obligation deadline without waiver authority from Congress.
 - ESEA programs, for example, have waiver authority.
 - IDEA, Perkins, and ESSER do not.
- An obligation happens when there is a formal commitment to spend funds.
 - EDGAR establishes when an obligation is made for certain kinds of transactions (see next slide). ([34 CFR § 76.707](#))

Definition of an Obligation

If the obligation is for -	The obligation is made -
(a) Acquisition of real or personal property	On the date on which the State or subgrantee makes a binding written commitment to acquire the property.
(b) Personal services by an employee of the State or subgrantee	When the services are performed.
(c) Personal services by a contractor who is not an employee of the State or subgrantee	On the date on which the State or subgrantee makes a binding written commitment to obtain the services.
(d) Performance of work other than personal services	On the date on which the State or subgrantee makes a binding written commitment to obtain the work.
(e) Public utility services	When the State or subgrantee receives the services.
(f) Travel	When the travel is taken.
(g) Rental of real or personal property	When the State or subgrantee uses the property.
(h) A pre-agreement cost that was properly approved by the Secretary	On the first day of the grant or subgrant performance

Liquidation Deadlines

- The UGG requires SEAs to liquidate funds no later than 120 days after the end of the period of performance “unless the Federal awarding agency . . . authorizes an extension.” ([2 CFR 200.344\(b\)](#))
- Under federal appropriations law the funds Congress appropriates do not immediately revert to the U.S. Department of Treasury once a program ends.
- Generally, funds revert five years after the initial federal obligation deadline set by Congress, which is typically four years after the SEA/LEA obligation deadline under Tydings.

Goods/Service Delivery

- The UGG requires that costs be incurred during the approved budget period. (2 CFR 200.403(h))
 - This is a change. The UGG was revised in August 2020.
 - Before the revision, 2 CFR § 200.309 said “a non-Federal entity may charge to the Federal award only allowable costs incurred during the period of performance.”
- Budget period is defined as “the time interval from the start date of a funded portion of an award *to the end date of that funded portion during which recipients are authorized to expend the funds awarded, including any funds carried forward or other revisions pursuant to § 200.308.*”

Goods/Service Delivery

- Questions E-1, E-2, and E-3 of ED's [May 2021 ESSER FAQs](#) say:
“Although funds must be obligated by [September 30], grant activities carried out through a valid obligation of funds may continue beyond that date. Under 2 CFR § 200.344(a), ESSER funds must be liquidated within 120 calendar days after the end of the performance period.”
- ED's [May 13 letter on late liquidation](#) says:
“[T]he delivery of goods and services may continue to be provided through the end of the liquidation period, so long as a timely and valid obligation has been made pursuant to 34 CFR §76.707.”
- ED's new CARES late liquidation request template says:
 - *Under a liquidation extension, the delivery of goods and services may continue to be provided through the end of the liquidation period, so long as a timely and valid obligation had been made pursuant to 34 C.F.R. § 76.707.*

Overview of CARES Liquidation Extension Process

- States must submit requests on behalf of their LEAs.
- If approved, LEAs can get up to 14 extra months to liquidate funds beyond the normal liquidation deadline, which works out to March 2024 as follows:

Obligation deadline	September 30, 2022
Liquidation deadline	January 28, 2023 (120 days from obligation deadline)
Potently extended liquidation deadline	March 28, 2024 (18 months from the obligation deadline/14 months from the normal liquidation deadline)

Overview of CARES Liquidation Extension Process

- Requests must identify:
 - The specific expenditure(s) at issue (e.g., construction contract, HVAC contract, instructional materials contract, etc.).
 - A justification for why extra liquidation time is necessary. *According to ED, “needing more time to expend funds is not an adequate reason or justification for a liquidation extension request.”*
- SEAs submitting requests must attest (among other things):
 - All activities and services are allowable and were properly obligated.
 - Sufficient supporting documentation has been collected and is available and on file with the SEA.
 - LEAs covered are “low-risk based on a review of data.”

ED Guidance on Allowable Uses of ESSER Funds

Key Points About Allowable Uses of Funds

- Activities supported with ESSER funds should be consistent with the goal of preventing, preparing for, or responding to COVID-19.
- As described in December 2021 [guidance](#), ED views that goal broadly:

In response to the pandemic, ESSER and GEER funds offer the opportunity to make educational systems better for students, educators, staff, schools, and their communities post-pandemic. The Department encourages SEAs and LEAs to think holistically about their response to COVID-19 in order to address the impact of lost instructional time from the pandemic on all students and to address pre-existing challenges that, if left unaddressed, will impede recovery from the pandemic.

Key Points About Allowable Uses of Funds (cont.)

- As with all expenses paid with federal funds, ESSER-funded activities must be reasonable and comply with other federal cost principles.
- Depending on an LEA's needs and circumstances, allowable ESSER activities might include:
 - Sustaining operations, including paying existing staff, addressing staffing shortages and transportation issues.
 - Mental health services and supports to students (including those who experienced trauma before the pandemic).
 - Programs to re-engage students (including addressing factors that contributed to student disengagement before the pandemic).
 - Continuing to address issues of digital equity and access.
 - Implementing rigorous curricula across P-12 schools.

Key Points About Allowable Uses of Funds (cont.)

- Depending on an LEA's needs and circumstances, allowable ESSER activities might include (cont.):
 - Sustaining and expanding existing summer learning and enrichment programming or early childhood education programs.
 - Creating or improving existing data systems to identify and respond to student needs in light of the pandemic.
 - Supporting the needs of children with disabilities by eliminating evaluation backlogs, providing services, personnel preparation, and professional development and training.
 - Maintaining healthy facilities, which could include addressing pre-existing or new ventilation, roofing, and plumbing needs, or other needs that may inhibit healthy learning environments during full-time in-person learning. This might include roof repairs or replacement; reducing lead exposure in water; or mold, radon, and asbestos remediation, as well as facility updates (such as upgrading science labs) to address the impact of lost instructional time.

Where to Find ESSER Use of Funds Guidance

- Much of ED's ESSER guidance is posted in the following places:
 - <https://oese.ed.gov/offices/education-stabilization-fund/elementary-secondary-school-emergency-relief-fund/>
 - <https://oese.ed.gov/offices/american-rescue-plan/resources/>
 - <https://www.ed.gov/coronavirus>
- But guidance is also posted on other parts of ED websites (like [this ventilation guidance](#)), which can make ESSER guidance difficult to find.

Key Pieces of ESSER Use of Funds Guidance

- ESSER and GEER FAQs
 - Clarification on construction issues
 - Clarification on connecting activities to the pandemic
- Guidance on vaccination and testing
- Guidance on incentives for vaccination
- Guidance on incentives for testing
- Guidance on teacher shortages
- Guidance on teacher shortages
- Guidance on sustaining teacher investments
- Guidance on staff shortages
- Guidance on transportation
- Guidance on promoting public safety
- Guidance on full-service community schools and related strategies
- Guidance on addressing lost instructional time
- Guidance on learning acceleration
- Guidance on ventilation
- Guidance on preaward costs

ESSER Opportunity and Challenge

- Misunderstandings about the federal rules that govern ED programs influence the way districts and schools deliver services to students.

For example, many believe that a service cannot be considered a special education service under IDEA if non-special education students receive the same service. This is not accurate and affects how students with disabilities are served.

- ESSER gives LEAs an opportunity to revisit service delivery models for vulnerable students, but this opportunity could be narrowed if pre-existing misunderstandings limit ESSER spending.

For example, many believe a service supported with IDEA funds cannot be expanded to other struggling students with another funding source. This is not accurate and could limit ESSER spending.

Maintenance of Equity

Upcoming Deadlines Related to Local MOEquity

November 1, 2022	On their websites, SEAs must publish the: <ul style="list-style-type: none">• Identity of each LEA excepted for SY 2022-2023 and the reason for the exception• Identity of high-poverty schools in each non-excepted LEA
November 1, 2022	On their websites, SEAs must publish a description of how the SEA will ensure non-excepted LEAs meet MOEquity requirements for SY 2022-2023 including information about when the SEA will require noncompliant LEAs to describe the adjustments they will make to come into compliance
December 31, 2022	On their websites, SEAs must publish MOEquity data for SY 2021-2022 for each non-excepted LEA

What is MOEquity?

- Maintenance of Equity (MOEquity) is a new fiscal rule under ARP ESSER. There are:
 - **State-level** MOEquity requirements that limit states from cutting state funds to certain school districts in 2021-2022 and 2022-2023, and
 - **Local-level** MOEquity requirements that limit districts from cutting (1) combined state/local funds and (2) staff to certain schools in 2021-2022 and 2022-2023.

Which LEAs Must Meet Local MOE Equity Requirements?

- All LEAs that receive ARP ESSER funds, except LEAs:
 1. With a total enrollment of less than 1,000 students,
 2. That operate only one school,
 3. That have only one school per grade span,
 4. That can certify they will not have an aggregate reduction in combined state and local per-pupil funding in 2021-2022 and/or 2022-2023, or
 5. That receive an exception from the U.S. Department of Education (ED) due to exceptional or uncontrollable circumstances.

How Do LEAs Claim an Exception?

- **Resource:** https://oese.ed.gov/files/2022/02/LEA-Local-Maintenance-of-Equity-Exception-Process_2.10.22.pdf
- **Automatic Exceptions:** The following LEAs are **automatically excepted** from MOE equity requirements:
 - Total enrollment of less than 1,000 students, or
 - Operate only one school, or
 - Have only one school per grade span.
- Automatically excepted LEAs do not need to submit documentation to claim the exception, but should be prepared to verify the exception if requested.

How Do LEAs Claim an Exception (cont.)?

- No Funding Cuts at Local Level: LEAs that did not have an aggregate reduction in combined state and local per-pupil funding in a covered year should **submit a certification to LDOE**.
- A sample certification form can be found in Appendix B of ED's MOEquity FAQs https://oese.ed.gov/files/2021/12/Maintenance-of-Equity-updated-FAQs_12.29.21_Final.pdf.

How Do LEAs Claim an Exception (cont.)?

- Exceptional or Uncontrollable Circumstances: LEAs that cannot meet local MOEquity requirements because of an exceptional or uncontrollable circumstance should **email ED** at louisiana.oese@ed.gov and cc: LDOE.
- The email should provide detailed information on the exceptional or uncontrollable circumstance and how it prevents the LEA from maintaining equity. (See examples on next slide.)

Examples of Exceptional or Uncontrollable Circumstances

- Examples of exceptions approved by ED:
 - School closures and consolidation in a covered year. (See [here.](#))
 - Staffing changes due to an unexpected enrollment change. (See [here.](#))
 - Flooding in a school that led to unanticipated change in spending. (See [here.](#))
 - Impact of wildfires. (See [here.](#))
- Other examples from ED guidance:
 - Increased one-time expenditures in the baseline year due to the pandemic.
 - A very small school where MOEquity calculations do not result in meaningful information about resource availability.
 - A significant change in spending because a school no longer serves a student who required high-cost services.

Overview of Local MOEquity Requirements

- If not excepted from MOEquity, then in FYs 2022 (SY 2021-2022) and 2023 (SY 2022-2023) LEAs may not reduce:
 - **Per-pupil state and local funding** (“fiscal equity”) to high-poverty schools more than the total reduction in per-pupil funding to all schools, and
 - **Per-pupil FTEs** (“staffing equity”) to high-poverty schools more than the total reduction in per-pupil FTEs in all schools.
- LEAs must satisfy both tests.
- High poverty schools are an LEA’s poorest 25% of schools.

ESSER Reporting

Annual Report

- States that receive ESSER funds must annually report how they and their subgrantees spent funds.
- ED's reporting website for ESSER is here <https://covid-relief-data.ed.gov/grantee-help/esser>.
- ED plans to make reported ESSER data public.
 - Currently, ED is only reporting on totals spent by states and districts <https://covid-relief-data.ed.gov/>, future data collections will be more detailed.

Preparing for Future Reports

Year Filed	CARES/CRRSA/ARP Year	Expenditures Covered
2021	CARES Year 1	Mar. 13, 2020 – Sep. 30, 2020
2022	CARES Year 2/CRRSA Year 1/ARP Year 1	Oct. 1, 2020 – Jun. 30, 2021
2023	CARES Year 3/ CRRSA Year 2/ARP Year 2	Jul. 1, 2021 – Jun. 30, 2022
2024	CARES Year 4/CRRSA Year 3/ARP Year 3	Jul. 1, 2022 – Jun. 30, 2023
2025	CRRSA Year 4/APR Year 5	Jul. 1, 2023 – Jun. 30, 2024
2026	CRRSA Year 5/ ARP Year 5	Jul. 1, 2024 – Jun. 30, 2025

There is the potential for future reporting depending late liquidations

Categorizing ESSER Expenditures

- In the report SEAs [filed this year](#) (covering 2020-2021) and will file next year (covering 2021-2022), LEA spending is reported in four broad categories:
 - Addressing Physical Health and Safety
 - Meeting Students' Academic, Social, Emotional, and Other Needs
 - Mental Health Supports for Students and Staff
 - Operational Continuity and Other Uses
- Starting with the report filed in 2024 (covering 2022-2023), ED anticipates collecting reporting in more granular categories. (See p. 46 [here](#).)

Additional Reporting Details

- Some data is optional for this year's report and next's, but starting with the 2024 report (covering 2022-2023) ED plans to:
 - Collect student participation data in certain kinds of activities.
 - Define certain kinds of activities narrowly which will affect reporting (for example, high dosage tutoring must meet certain ED-developed criteria in order to be reported as such).
- This could change, so be on the lookout for advocacy/public comment opportunities.

Preparing for Audits and Oversight

Audit Context

- Entities that spend \$750,000 or more in federal funds in a fiscal year must have their federal programs audited by an independent auditor.
- In state-administered programs like Title I, IDEA and ESSER:
 - LEAs must arrange for the audit and respond to findings, and
 - SEAs must review their LEAs' audits and make management decisions.
- Federal agencies help auditors by providing a compliance supplement that identifies what areas auditors should review and the compliance standards they should apply.

Monitoring Context

- In state-administered programs, SEAs must:
 - Evaluate each subrecipient's risk of noncompliance to determine what kind of monitoring is needed,
 - Consider imposing specific conditions on a subrecipient's grant if appropriate, and
 - Monitor subrecipient activities to ensure compliance and performance. ([2 CFR § 200.332](#))
- “Monitoring” is a broad term that encompasses a variety of SEA oversight activities.

Monitoring Context

- At a minimum, when monitoring the SEA must:
 - Review financial and performance reports the SEA requires its LEAs to submit,
 - Ensure LEAs take timely and appropriate action on any compliance issues detected through audits, on-site reviews, and other means, and
 - Issue management decisions for single audit findings. ([2 CFR § 200.332\(d\)](#))
- Monitoring could also include:
 - Training and technical assistance on program-related matters,
 - Performing on-site reviews of an LEA's program operations, or
 - Arranging for “agreed-upon-procedures” engagements (essentially a mini-audit of certain subgrant activities). ([2 CFR § 200.332\(e\)](#))
- Monitoring should be tailored to LEA risks.

Effects of Audits/Monitoring on Program Implementation

- Federal programs allow many spending options, but SEAs and LEAs tend to spend federal funds on a narrow set of strategies.
 - For example, a [2018 ED study](#) found Title I schools, both targeted assistance and schoolwide schools, continue to spend Title I funds on traditional push-in or pull-out reading and math interventions despite (1) having more options and (2) research showing other approaches can be more effective.
- [Research suggests](#) that fear of audit findings plays a key role in shaping spending decisions. Other oversight actions (like SEA or ED monitoring) raise similar fears.

Importance of Audit Management

- Audit fears are understandable given the potential consequences of noncompliance, but:
 - There are **well documented audit quality concerns**, so much so that ED itself cautioned about poor audit quality.
 - SEAs and LEAs play an important but underutilized role in **vetting auditor work** and **challenging unwarranted findings**.
- Managing the audit process not only leads to higher quality audits (and better control of public funds), but also creates space for new kinds of spending.
 - The same is true for other oversight activities.

Example of Program Impact

- To improve attendance and student wellbeing for high-poverty students, an LEA considered using Title I funds to buy washers and dryers for its highest-poverty Title I schools that operate schoolwide programs.
- LEA staff determined the approach was reasonable based on research and outcomes in other districts.
- LEA staff also determined schoolwide program schools have the flexibility to use Title I funds in novel ways to address identified needs.
- The LEA was concerned, however, that without specific guidance from ED auditors would question the cost, so the SEA likely would not approve it.

Example of Program Impact

- Recognizing that many special educators cite paperwork burdens as a key reason they leave their jobs, an LEA looked for opportunities to streamline.
- Among the many things it looked at, the LEA considered the paperwork it collects from teachers to satisfy federal time and effort requirements.
- Although only a small part of the overall paperwork load, the LEA determined its approach to time and effort contributed to burden and incentivized the segregation of services.
- After reviewing federal time and effort regulations, the LEA believed there was significant flexibility to document time and effort differently but was concerned about auditor reaction so did not try.

Putting Audits Into Context

- The role of auditors:
 - An auditor's job is to identify potential compliance concerns.
 - Auditors do not make final determinations about whether an entity did or did not comply with federal requirements.
- Responding to unwarranted findings:
 - This is not only a legal right/responsibility,
 - It is encouraged by ED as a quality control measure.

Responding to Audit Findings

- LEAs that receive findings must develop corrective action plans.
- The requirement to develop a corrective action plan does not mean an auditee has to accept a finding:

At the completion of the audit, the auditee must prepare, in a document separate from the auditor's findings described in [§ 200.516](#), a corrective action plan to address each audit finding included in the current year auditor's reports. The corrective action plan must provide the name(s) of the contact person(s) responsible for corrective action, the corrective action planned, and the anticipated completion date. **If the auditee does not agree with the audit findings or believes corrective action is not required, then the corrective action plan must include an explanation and specific reasons.** ([2 CFR § 200.511\(c\)](#))

- Common LEA misperception that they must accept audit findings. This is incorrect.

Role of the SEA: Issuing Management Decisions

- In a “management decision” an SEA determines whether the audit findings against a subgrantee are valid.
 - An SEA can either sustain a finding or not depending on the circumstances.
- A management decision should:
 - Clearly state in writing whether an audit finding is sustained or not,
 - Explain the reasons for the decision, and
 - Where findings are sustained, explain what the LEA must do to address the issue. (2 CFR § 200.521)

Recent ED Guidance Documents

Recent Guidance Highlights

ESEA

- [DRAFT Equitable Services Guidance for Programs Covered by Title VIII Provisions](#)
- [Within-District Allocations under Title I, Part A of the Elementary and Secondary Education Act of 1965](#)

IDEA

- [DCL on IDEA Services in Head Start](#)
- [Memo on Personnel Qualifications](#)
- [Questions and Answers on Discipline](#)
- [Questions and Answers on Serving Children with Disabilities Placed by Their Parents in Private Schools \(rev. Feb 2022\)](#)
- [Return to School Roadmap: Development and Implementation of Individualized Education Programs](#)

Finding ED Guidance

- Main guidance page: <https://www2.ed.gov/policy/gen/guid/types-of-guidance-documents.html>
- OESE: <https://oese.ed.gov/guidance/>
- OSEP: <https://sites.ed.gov/idea/policy-letters-policy-support-documents/>

Observations from Recent ED Monitoring Reports

Observations About OESE Monitoring

- Recent monitoring reports have been detailed.
- Monitors have adhered closely to UGG requirements.
 - For example, the UGG requires SEAs and LEAs to establish and maintain internal controls consistent with guidance in “Standards for Internal Control in the Federal Government” issued by the Comptroller General of the United States or the “Internal Control Integrated Framework”, issued by the Committee of Sponsoring Organizations of the Treadway Commission (COSO).
 - Monitors have relied on those standards to require SEAs to develop formal internal control frameworks and internal risk assessment procedures conducted regularly.

Observations About OESE Monitoring

- Strong emphasis on written policies and procedures, even where they are not specifically required by the UGG.
 - For example, monitors collect and review accounting policies, period of availability policies, record retention policies (with emphasis on PII), time and effort policies (new monitoring questions about fringe benefits).

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 Federal Education Group, PLLC. You should not take any action based upon any information in this presentation without first consulting legal counsel familiar with your particular circumstances.