

# The Federal Update for May 13, 2022

From: Michael Brustein, Julia Martin, Steven Spillan, Kelly Christiansen

Re: Federal Update

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## Legislation and Guidance

### OMB Releases 2022 Compliance Supplement

The Office of Management and Budget released its 2022 Compliance Supplement on Thursday. The Compliance Supplement is the main tool that auditors use to evaluate federal programs, including federal education programs. States, districts, and colleges should become familiar with the Compliance Supplement to ensure they are meeting all program and fiscal requirements.

The Compliance Supplement includes 12 types of compliance requirements: activities allowed or unallowed and allowable costs/cost principles; cash management; eligibility; equipment/real property management; matching, level of effort, earmarking; period of performance; procurement, suspension & debarment; program income; reporting; subrecipient monitoring; and special tests and provisions. Of those 12 requirements, the U.S. Department of Education (ED) selects six for auditors to test in a given year for each federal education program. However, although auditors may not be testing all 12 requirements each year, grantees must still be in compliance on all elements.

Under the section discussing allowability for the Elementary and Secondary School Emergency Relief Fund (ESSER), the language describing what activities funds can be used for has been adjusted compared to the 2021 supplement. The 2021 Compliance Supplement indicated that funds must be used only for activities to “prevent, prepare for, and respond to the coronavirus.” The 2022 language aligns with clarifications from ED in recent months that grantees may use funding under ESSER “to support a very wide range of activities, including activities indirectly linked to the impact of COVID-19, as outlined in the ED Volume 2 COVID Handbook.”

The language surrounding time and effort requirements for education stimulus funds continues to be unclear from one year to another in the Compliance Supplement. The 2021 supplement said that time distribution records are required “for all employees including when an individual employee is splitting their time between activities that are allowable and unallowable” under stimulus programs. The 2022 supplement says that local educational agencies (LEAs) must maintain the records they normally maintain for salaries and wages, “except that LEAs must maintain time distribution records (sometimes called ‘time and effort’ reporting) if an individual employee is splitting their time between activities that may be funded under ESSER or [the Governor’s Emergency Education Relief Fund (GEER)] and activities that are not allowable under ESSER or GEER.” Given the lack of clarity surrounding the time and effort requirements, Brustein & Manasevit suggests that grantees maintain time and effort documentation, such as after-the-fact certifications, consistent with the grantee’s procedures – even for employees not splitting their time on allowable and unallowable activities (e.g., single cost objective employees).

The 2022 Compliance Supplement also adds new language regarding “minor remodeling,” saying that grantees and subgrantees may use education stimulus funds for minor remodeling “without triggering [ED’s] construction regulations in 34 CFR section 76.600 and 34 CFR sections 75.600-75.617.” This language was included in the 2021 supplement with regard to the Higher Education Emergency Relief Fund (HEERF) but had not previously been included for ESSER or GEER. The supplement provides examples of what constitutes minor remodeling, such as extension of utility lines, and that it means “minor alterations in a previously completed building.” The supplement also notes that grantees and subgrantees using stimulus funds for “minor remodeling, renovation or construction contracts that are over $2,000 and use laborers and mechanics must meet Davis-Bacon prevailing wage requirements.”

For HEERF, the supplement adds the option to use HEERF (a)(2) awards (funding designated for Historically Black Colleges and Universities, Minority Serving Institutions, Tribally Controlled Colleges, and Strengthening Institutions Programs) for construction but states that grantees must seek prior approval from ED and that funds cannot be used for construction associated with athletic facilities, sectarian instruction, or religious worship. The supplement has not been updated with the new period of performance for HEERF. In early April, ED extended the period of performance for all HEERF awards until June 30, 2023, but the compliance supplement still includes language stating that grantees must expend funds within one year “from the date when ED processed the most recent obligation of funds for each specific grant.”

Finally, similar to the 2021 Compliance Supplement, the 2022 supplement directs auditors to take a close look at noncompetitive procurements relying on the emergency exception in the Uniform Grant Guidance. However, new language is added stating that “[g]iven this [fiscal year 2022] Compliance Supplement covers grant activity from July 1, 2021 onward, it is unlikely that an institution would be able to utilize this previously-described flexibility from competitive procurement given the distance of July 1, 2021 from the beginning of the pandemic.”

[The full 2022 Compliance Supplement is available here](https://www.whitehouse.gov/wp-content/uploads/2022/05/2022-Compliance-Supplement_PDF_Rev_05.11.22.pdf).

Author: BLG, KSC

### ED to Update Section 504 Regulations

The U.S. Department of Education (ED) announced last week that it intends to update regulations governing the implementation of Section 504 of the Rehabilitation Act of 1973. Section 504 prohibits disability discrimination in programs receiving federal financial assistance.

ED is seeking public input on which areas of the regulations need updating. In addition, ED plans to hold listening sessions with the public later this year, but those dates have not yet been announced. The planned update was sparked by President Biden’s “Unity Agenda” which includes a focus on mental health needs. As part of its stakeholder outreach efforts on the updated regulations, ED plans to seek input from people with disabilities who also have mental health needs.

The current regulations were implemented 45 years ago in May of 1977. “While the world has undergone enormous changes since 1977, the Department’s Section 504 regulations have remained, with few exceptions, unaltered,” said Catherine Lhamon, Assistant Secretary for Civil Rights, in a statement. “As we observe the 45th anniversary of these important regulations this month, it is time to start the process of updating them.”

[Information on how to submit comments to ED on updating the regulations is available here](https://www2.ed.gov/policy/rights/reg/ocr/index.html).

Resources:

Bianca Quilantan, “Education Department to update law for students with disabilities,” *Politico*, May 6, 2022.

U.S. Department of Education Press Release, “U.S. Department of Education Announces Intent to Strengthen and Protect Rights for Students with Disabilities by Amending Regulations Implementation Section 504,” May 6, 2022.

Author: KSC

## News

### White House Sees Pushback on Charter Regulations

In the last two weeks, the U.S. Department of Education and the White House have seen increased pushback on draft regulations which would institute new requirements under the federal Charter School Grant Program, limiting the ability of some charter schools to receive funds under the program absent policy changes.

The proposed changes would require that charter schools submit a “community impact analysis” that sets out whether demand in a given locale would support a charter school, and asks the school to describe how planned charters would avoid increasing racial or socioeconomic segregation. They would also prohibit schools managed by a for-profit entity from receiving funds under the grant program and would limit the funds that could be accessed until a charter school has secured a facility and is approved to open. Schools that do not receive federal Charter School Grant Program funds would still be eligible for other federal funding streams, including under Title I of the Elementary and Secondary Education Act.

In a letter from Senators on both sides of the aisle last week, lawmakers say they are concerned that the proposed priorities documented for the grant program “does not prioritize the needs of students and limits high quality choices to certain families.” The letter also expresses logistical concerns, saying these requirements would make it difficult for new charter start-ups to access federal funds and would add burden to the upcoming grant cycle.

And this week, charter school advocates protested in front of the White House and the U.S. Department of Education, saying that these priorities, if implemented, would limit students’ and parents’ choices. Protestors and advocacy groups say they want ED to rescind the proposed priorities or, at the very least, to run the current year’s competition under the existing program rules.

In a hearing at a House Appropriations Subcommittee earlier this month, Secretary of Education Miguel Cardona responded to concerns about the proposal, saying that its opponents were promoting “misinformation.” Instead, he said, the proposals “ask for greater accountability, transparency, and fiscal responsibility.”

[The proposed priorities for the Charter School Program can be found here.](https://www.federalregister.gov/documents/2022/03/14/2022-05463/proposed-priorities-requirements-definitions-and-selection-criteria-expanding-opportunity-through)

Author: JCM

### Group Urges ED to Extend ESSER Liquidation

Advocacy groups including the School Superintendents Association (AASA) say they are urging the U.S. Department of Education to release guidance that will allow school districts an additional 18 months to spend down funds under the American Rescue Plan. The groups say that supply chain issues, worker shortages, and slow procurement processes, among other challenges, have made it difficult for districts to finalize contracts for improvements to things like HVAC systems.

Congressional staff suggested that this might take the form of a wide-scale extension to the liquidation deadline – known as “late liquidation” – that would offer States more time to spend dollars that were obligated by the existing 2024 deadline. States, in turn, could pass that flexibility along to districts that also meet the timetable for committing to their spending plans.

AASA says guidance could be forthcoming “later this month.”

Author: JCM

## Reports

### GAO Report Says Online Program Managers Need More Oversight

A report from the U.S. Government Accountability Office (GAO) published last week suggests that guidance and oversight on the use of entities called “online program managers” (OPMs) is lacking, despite the growing use of such entities by colleges and universities.

While GAO says that as of July 2021, at least 2,900 education programs at more than 550 colleges worked with OPMs, guidance from the U.S. Department of Education (ED) is outdated and vague. Because OPMs can – and often do – work to recruit students for colleges and programs, contracts with OPMs are subject to oversight from ED and a prohibition on “incentive compensation” outlined in the Higher Education Act (HEA). Under that ban, institutions of higher education may not pay individuals or third parties engaged in recruiting based on their success in enrolling students. However, exceptions can be made for entities that provide certain other services in addition – known as the “bundled services exception.”

But GAO says that ED’s monitoring instructions do not require monitors to obtain information about OPM arrangements. In addition, instructions to auditors do not reference a 2011 Dear Colleague letter on incentive compensation and exceptions and do not instruct auditors to ensure that OPMs do not make prohibited payments to their employees. “Without clearer instructions to auditors and colleges about the information on OPM arrangements that must be assessed during compliance audits and agency reviews,” GAO concludes, “there is a risk that [ED] will not have the information it needs to detect incentive compensation violations.”

The report was provided to members of the Senate Committee on Health, Education, Labor, and Pensions following a request that GAO examine ED’s role in ensuring compliance with the ban on incentive compensation. GAO recommended to ED that the agency provide additional instructions on incentive compensation for inclusion in the Compliance Supplement to help auditors identify and assess potential violations of the ban on incentive compensation, and suggested that ED provide additional instructions to colleges that explain institutions’ responsibility to avoid prohibited arrangements.

[The GAO report is here](https://www.gao.gov/assets/gao-22-104463.pdf).

Author: JCM

*To stay up-to-date on new regulations and guidance from the U.S. Department of Education, register for one of Brustein & Manasevit’s upcoming virtual trainings. Topics cover a range of issues, including COVID-19 related issues, grants management, the Every Student Succeeds Act, special education, and more. To view all upcoming virtual training topics and to register, visit* [*www.bruman.com/virtualtrainings/*](http://www.bruman.com/virtualtrainings/)*.*

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Contributors: Bonnie Graham, Julia Martin, Kelly Christiansen

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