

# The Federal Update for December 9, 2022

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Re: Federal Update

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## Legislation and Guidance

### ED Updates ESSER/GEER Guidance on Uses of Funds, Liquidation

On Wednesday, December 7th, the U.S. Department of Education (ED) published updated guidance on the use of funds under the Elementary and Secondary School Emergency Relief Fund (ESSER) and the Governor’s Education Emergency Relief Fund (GEER). The updated guidance primarily incorporates informal responses provided by the agency since the last document was issued but does contain some new conclusions and information on the use of funds, as well as how programs are to be closed out.

Several portions of the guidance reiterate concerns or restrictions around potentially allowable uses of funds. For example, in B-6.e, the guidance outlines the requirement to record a federal interest in real property if funds are used to purchase land, construct a building, or make improvements. ED expresses concern about the use of ESSER or GEER to renovate, remodel, or construct athletic facilities, saying “[t]his would not be an allowable use of funds unless there is a connection between the expenditure and preventing, preparing for, or responding to COVID-19.” ED says that it is the responsibility of the grantee to ensure all conditions are met, and suggests some skepticism over whether such projects would qualify as allowable. While purchasing and installing video security systems is technically allowable, ED reiterates that grantees must ensure that the use of funds can prevent, prepare for, and respond to COVID-19, and outlines in detail some concerns related to student privacy and the Family Educational Rights and Privacy Act, civil rights laws and policies, and State laws surrounding recording of video, maintenance of files, and retention. ED states that districts may not use ESSER or GEER to provide incentive payments to encourage parents or students to ensure students attend mandatory activities like school.

However, ED does include some new allowable uses of funds, including mitigating damage related to natural disasters where consistent with the purpose of “preventing, preparing for, and responding to COVID-19.” Funds can be used to pay costs for utilities and gasoline where necessary to maintain the operation of the LEAs, and to pay student fees for activities such as art, music, and theater classes where targeted and necessary to meet students’ needs. Several new questions in section C discuss ways that ESSER and GEER funds can be used to support multilingual learners, including through family engagement and assessments. Additionally, in Section C, ED states that if other sources of funds are not available, a district may use ESSER or GEER to provide meals to students “if the need arises from or relates to recovery from the pandemic,” and to “cover additional labor costs associated with serving meals to students during the pandemic; or support COVID-19 pandemic-related expenses, such as school meal service equipment/supplies, meal packaging, and transportation services,” as well as waiving outstanding school meal balances accumulated by students.

ED provides links to portions of the federal rules surrounding disposition of equipment and supplies and their use beyond the period of performance by a State or district. This information is not new, but as districts and States begin to close out the first round of ESSER funds, there will no doubt be questions as to whether existing rules apply.

The guidance in several points notes that the State has broad discretion throughout the process. For example, in new question B-6.a, ED reiterates that the State can determine the process for granting prior approval to districts to use ESSER or GEER funds for capital expenditures. For example, the guidance says, the State can develop a checklist for the districts and require certain assurances. The guidance also says that States may establish a period of availability for State reserve funds that is shorter than the full period of availability for ESSER formula funds.

While the guidance states that ESSER and GEER funds should ideally be “utilized in a timely manner to carry out activities to prevent, prepare for, or respond to COVID-19,” ED also says that in limited circumstances “ESSER- or GEER-funded activities may continue for a reasonable time beyond the liquidation period,” including prepayment of services. Question E-3.d lists of number of factors that should be considered in determining if such uses are allowable, and ED expresses some skepticism, calling this practice “[g]enerally… not good stewardship.” In all cases, ESSER- or GEER-funded services must terminate by the date on which funds revert to the federal treasury, four years after the obligation deadlines. This represents a shift in policy for ED, which had previously issued findings against institutions of higher education for such purchasing agreements.

The updated guidance is [available here](https://oese.ed.gov/files/2022/12/ESSER-and-GEER-Use-of-Funds-FAQs-December-7-2022-Update.pdf).

Author: JCM

### Letter Defers to States for Some Pre-Award, Participant Support Costs

In a letter to State chiefs on Thursday, the U.S. Department of Education (ED) said States can, in some cases, approve pre-award costs for subgrantees and participant support costs of up to $5,000 or less per participant per event where such costs are associated with the State’s approved consolidated State plan. This change will impact Title I, Title II-A, Title III-A, Title IV-A and B, and Title V-B Subpart 2 under the Elementary and Secondary Education Act.

The letter says that approved pre-award costs must be in anticipation of the federal subaward where such costs are necessary for efficient and timely performance of the program for which the subaward is received. It also notes that the prior approval for participant support costs does not include State agency or subgrantee employees, instead only extending to program participants or trainees. It contemplates a situation where, for example, “an SEA or subgrantee provides opportunities to parents to attend a program-related conference or training, or private school teachers as part of equitable services to attend a training or conference, [or] students’ expenses for travel to a program-related conference or training.” Title VIII equitable services guidance was updated earlier this year to suggest that private school teacher participation in conferences would be considered participant support costs and require prior approval by ED, leading to pushback from States and districts.

States will no longer be required to submit individual requests for prior approval to ED, in an effort to limit administrative burden. However, the letter cautions that prior approval does not mean the costs are automatically deemed allowable, and States may still require subgrantees to submit requests for prior approval.

Brustein & Manasevit has reached out to ED to inquire as to whether these same flexibilities will be applied to the Career and Technical Education Program and the Adult Education Program. Deputy Assistant Secretary of Career and Technical Education Luke Rhine indicated on Friday that a response on this question will be forthcoming.

The [letter is available here](https://oese.ed.gov/files/2022/12/oese-pac-psc-prior-approval-dear-colleague-letter-to-post.pdf).

Author: JCM

### New “Dear Colleague” Suggests Uses of Funds for STEM

In a “Dear Colleague” letter sent this week, the U.S. Department of Education (ED) provided guidance on ways to use federal funds to “support innovative, equity-focused… STEM education strategies.” The letter focuses specifically on the use of funds under the American Rescue Plan Act, Titles I, II, III, and IV of the Elementary and Secondary Education Act (ESEA), the Individuals with Disabilities Education Act (IDEA), and the Perkins Career and Technical Education Act, but does not rule out the use of other funds for these purposes. ED also suggests these strategies should focus on effectively engaging girls and women in math and science, preventing students from dropping out, and assisting learning across grade levels.

A number of examples of allowable activities are provided, falling within five categories outlined by ED:

1. Implement STEM learning acceleration programs that support students who have been disproportionately impacted by COVID-19;
2. Redesign STEM courses and learning experiences to promote diversity, equity, and inclusion in STEM;
3. Increase students' equitable access to STEM courses and experiences, including out-of-school time (OST) programs, dual enrollment, STEM-themed schools, and career pathways;
4. Recruit, prepare, and support a diverse STEM educator workforce, increase educators' knowledge and expertise in STEM, and equip educators to meet the diverse needs of all students; and
5. Improve student access to materials and equipment needed to support inquiry-based pedagogy and active learning.

The letter cites a number of guidance documents for other authorized uses, noting that it is critical to reengage students who have fallen behind in academic achievement.

The [letter is available online here](https://www2.ed.gov/policy/gen/guid/secletter/221206.html).

Author: JCM

## News

### Democrats Pick Up Additional Seat in Senate

Democrat Raphael Warnock won the Georgia Senate runoff election that took place this week, finalizing the Senate midterm election results. With Warnock’s (D-GA) win, Democrats will hold 51 seats in the Senate for the 118th Congress, leaving Republicans with 49 seats—an increase of one seat for Democrats from the current Congress. Then Friday morning, Arizona Senator Kyrsten Sinema announced she would leave the Democratic party to become an independent. Sinema’s shift does not impact the balance of power in the Senate since she has pledged to caucus with the Democrats.

In addition, most House midterm races have been called over the past couple of weeks, with the exception of one Colorado race. The current House balance for the 118th Congress stands at 213 Democrats, a loss of nine seats, and 221 Republicans, an increase of nine seats. The remaining Colorado House race is leaning Republican but has not yet been called. In both the House and Senate, the Republican and Democratic majorities are very slim, which will make it more challenging for major policy legislation to be passed over the next two years.

Congressional and committee leadership has continued to take shape for the 118th Congress as well, with House Democrats officially selecting Hakeem Jeffries (D-NY) to serve as Minority Leader, as was predicted following Nancy Pelosi’s (D-CA) announcement last month that she would not seek the leadership role for another term. In addition, this week, Republican leadership announced that it will grant the waiver to allow Virginia Foxx (R-NC) to bid for another term as the House Committee on Education and Labor Chair position, after meeting term limits for that role. However, Tim Wahlberg (R-MI) is planning to challenge Foxx for the position. Leadership assignments in the House and Senate will be officially determined in the coming weeks.

Author: KSC

### House Committee Sends Letter to ED on OPM Oversight

On December 2, 2022, members of the House Committee on Education and Labor wrote a letter to Secretary Cardona encouraging the U.S. Department of Education (ED) to broaden its oversight of online program managers (OPMs). OPMs are third parties that contract with institutions of higher education (IHEs) for various services related to online education programs, often including recruitment. The letter came after the release of a Government Accountability Office (GAO) report, which found that the total number of OPMs, their agreements, and the number of programs OPMs help manage is unknown. The report further determined that ED does not have the information it needs to detect violations of the incentive compensation ban.

The incentive compensation ban was included in the 1992 reauthorization of the Higher Education Act of 1965 (HEA) and prevents IHEs from providing incentive compensation to recruiters for securing student enrollment. ED issued guidance in 2011 that included a “bundled services exception.” Under this exception, an IHE and a third party may share tuition revenue if (1) student recruitment is bundled into an array of other services, and (2) the contract complies with other safeguards, including requirements that the IHE and third-party are unaffiliated and the IHE makes enrollment decisions.

Since Title IV funds are involved, agreements that OPMs enter into with IHEs are subject to oversight by ED and the HEA. However, the GAO report found that ED lacks effective oversight over these agreements and the federal funds that flow to them. The committee letter shared concerns that the way these agreements are structured creates incentives for OPMs to engage in aggressive recruiting, including encouraging students to consider more expensive and less selective programs, and targeting low-income and minority students. The committee stressed that these are the types of harmful recruiting practices that the incentive compensation ban was meant to address.

The committee recommended that ED take immediate action by (1) performing a formal review of the bundled services exception and whether revenue sharing agreements should be permissible under the exception, and (2) evaluating whether OPM agreements are written agreements that should be disclosed to students.

Additionally, the Committee asked ED to provide responses to a series of questions regarding ED’s oversight, including (1) how ED reviews IHE and OPM relationships during reapplications of IHEs’ program participation agreement, (2) how ED plans to improve data collection of relevant information in OPM agreements, (3) the number of violations of the incentive compensation ban and the bundled services exception that ED has found since the exception was created, and (4) how ED plans to revise its guidance regarding audit documentation.

The full committee letter is [available here](https://static.politico.com/d2/fa/065cfc1d430c97a869e2724267c9/22-12-02-rcs-et-al-to-ed-re-opms.pdf).

Author: BNT

### ED Updates Instructions for Discretionary Grant Applications

The U.S. Department of Education (ED) issued a notice this week updating the common instructions for applicants under discretionary grant competitions. The updates supersede the version of the instructions published in December of 2021.

Changes to the instructions include removing references to the Data Universal Numbering System number (DUNS) and replacing it with the federal government’s new identifier, the Unique Entity Identifier (UEI), as well as technical updates. The instructions outline the steps applicants must take to submit applications for discretionary grants, primarily through [www.grants.gov](http://www.grants.gov), as ED discourages the submission of applications in hardcopy.

[The full set of updated instructions is available here](https://public-inspection.federalregister.gov/2022-26554.pdf).

Author: KSC

## Reports

### ED OIG Releases Semiannual Report to Congress

The U.S. Department of Education’s Office of Inspector General (ED OIG) recently released its Semiannual Report to Congress, covering the reporting period from April through September of 2022. The report describes the actions that ED OIG has taken during this period time to identify and prevent fraud and abuse and ensure that funds are used as required and reach intended recipients.

ED OIG issued 14 audit-related reports and discovered over $14 million in contested and unsupported costs during the six-month period. Six of the reports were related to pandemic relief. In one such report, ED OIG found that Oklahoma could not follow its processes for four of five initiatives funded by the Governors Emergency Education Relief (GEER) fund grant, and therefore could not ensure that $31 million of its $39.9 million in funding was being used for purposes aligned with GEER. ED OIG also identified over $650,000 in purchases from microgrants that went toward televisions, air conditioners, and Christmas trees. Three reports were related to disaster relief, including one report that determined the grantee could not support its reported number of displaced students. ED OIG found that the grantee should not have received $6.5 million in funds for Emergency Impact Aid.

Other reports identified ways that ED could improve its operations. One report examined the effectiveness of the Charter Schools Program and found that some grant recipients did not open or expand charter schools in the manner in which they had committed. ED OIG determined that ED should increase tracking and reporting on charter schools that use these program funds. Another report found that although security programs and practices were effective, ten recommendations could be implemented to improve ED’s overall security.

ED OIG also closed 26 investigations and secured over $16 million in recoveries in the six months. Actions were taken against individuals in multiple student loan discharge fraud scams. A number of high-ranking K-12 officials were found to have committed fraud in a $10 million virtual education fraud scheme, with two former superintendents facing prison sentences. ED OIG also investigated four administrators who ultimately pled guilty in charges related to a multi-million-dollar student aid fraud scam.

The full report is [available here](https://www2.ed.gov/about/offices/list/oig/edoigsar85.pdf).

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*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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