

ESSER Updates

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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

- Timelines and late liquidations
- Navigating ED guidance on allowable uses of funds
- Local maintenance of equity requirement

ESSER Timelines

ESSER Timeline Concerns

- Concerns about supply chain and hiring challenges have prompted questions about whether SEAs and LEAs can get additional time to spend ESSER funds.
- On January 21, AASA and other organizations sent a letter to ED asking for more time to spend ARP ESSER funds for school construction and capital projects.
- ED replied on May 13 noting that while it cannot extend the time to “obligate” funds, it can extend the time to “liquidate” funds and will consider doing so on a case-by-case basis.

Scope of ED's Letter

- ED's letter is focused on ARP ESSER funds, but ED officials have said it applies to all ESSER funds (CARES/CRRSA/ARP).
- ED's letter is focused on school construction and infrastructure, but according to [media outlets](#), ED will consider requests for other types of activities too.
 - Although apparently ED will prioritize construction-related requests.

Understanding ESSER's Spending Dates

	Spending Start Date	Spending End Date
CARES ESSER \$13.23 billion	3/13/2020	Deadline to obligate: 9/30/2022 LEA financial reporting: 12/29/2022 SEA liquidation: 1/28/2023
CRRSA ESSER \$54.3 billion	3/13/2020	Deadline to obligate: 9/30/2023 LEA financial reporting: 12/29/2023 SEA liquidation: 1/28/2024
ARP ESSER \$121.975 billion	3/13/2020	Deadline to obligate: 9/30/2024 LEA financial reporting: 12/29/2024 SEA liquidation: 1/28/2025

Obligation Considerations

- ED's letter confirms it cannot extend the obligation deadline.
 - This is different from ESEA that gives ED authority to waive certain provisions, which it has used to extend the obligation deadline for ESEA programs (often called "Tydings" waivers).
 - ESSER does not have similar waiver authority. (Nor does IDEA or Perkins.)
- Generally speaking, an obligation occurs when there is a legal commitment to spend funds.
- ED regulations specify when obligations for certain expenses are made ([34 CFR § 76.707](#)).

Liquidation Considerations

- Federal regulations give:
 - LEAs 90 days to submit final financial information to their SEA. ([2 CFR § 200.344\(a\)](#))
 - SEAs 120 days to liquidate funds, that is, to finish drawing down money from ED in order to pay off valid and timely obligations. ([2 CFR § 200.344\(b\)](#))
- ED has authority to extend the liquidation period, which would give states more time to draw down and pay out ESSER funds but would not allow for new obligations.
- ED's letter confirms it will consider extending the ESSER liquidation deadline if requested in writing by an SEA, but any decision will be based on "the specific facts and circumstances of a given obligation."

Effect of a Liquidation Extension

- If the liquidation deadline is extended, ED said “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 has been made pursuant to 34 CFR §76.707.”
- This appears to mean ESSER-funded activities can continue after September 30 until the end of the liquidation extension if the activities relate back to a valid and timely obligation.
- Some questions remain, however, and additional clarifications from ED would be helpful.

Practical Limitations

- ED has said it will only consider a request for an extension very close to the end of the period of availability.
- ED has said it will only consider requests on a case-by-case basis, which might mean individual requests for each affected project.
- It is unclear what happens if a project is disrupted after the obligation deadline.

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 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 preaward costs
- Guidance on ventilation

Local Maintenance of Equity Updates

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 LEAs from cutting (1) combined state/local funds and (2) staff to certain schools in 2021-2022 and 2022-2023. (Details on slide 25.)

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 ED due to exceptional or uncontrollable circumstances.

Reporting on Exception Status

- As discussed more on slide 27, SEAs are required to list on their websites all LEAs that are excepted from MOEquity.
 - For SY 2021-2022, SEAs had to post this information by July 8, 2022.
 - For SY 2022-2023, SEAs must post by November 1, 2022.
- The next few slides address how LEAs demonstrate various exceptions.
- If LEA is eligible for an exception, but is unsure about its status, it should contact the SEA immediately.

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: LEAs with a total enrollment of less than 1,000 students, that operate only one school, or that have only one school per grade span are **automatically excepted** from MOEquity requirements.
 - Such LEAs do not need to submit any documents to claim the exception,
 - But they 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 their SEA**.
- 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.
- If an LEA qualifies for this exception but has not submitted a certification to its SEA, it should contact its SEA immediately.

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 [state].oese@ed.gov and cc: the SEA.
 - The email should provide detailed information on the exceptional or uncontrollable circumstance and how it prevents the LEA from maintaining equity.
 - Examples of approved ED exceptions are [here](#), [here](#), and [here](#).
- If an LEA believes it qualifies for this exception but has not submitted a request to ED, it should contact its SEA immediately.

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.

Final Requirements for Reporting on LEA MOEquity

- On June 8, ED published final reporting requirements for LEA-level MOEquity in the Federal Register.
 - <https://www.govinfo.gov/content/pkg/FR-2022-06-08/pdf/2022-12296.pdf>
- On June 9, ED conducted a webinar about the final requirements:
 - Slides https://oese.ed.gov/files/2022/06/WEBINAR-6.9.22_NFR-Local-MOEquity-Reporting.pdf
 - Recording <https://oese.ed.gov/files/2022/06/060922-843399-DeptofEd-LEA.mp3>
 - Transcript <https://oese.ed.gov/files/2022/06/060922-843399-DeptofEd-LEA-transcript.pdf>

Summary of Information SEAs Must Post To Their Websites

Deadline	Information to Be Posted
Jul 8, 2022	<ul style="list-style-type: none">• Identity of each LEA excepted for SY 2021-2022 and the reason for the exception• Identity of high-poverty schools in each non-excepted LEA
Jul 8, 2022	<ul style="list-style-type: none">• Description of how the SEA will ensure non-excepted LEAs meet MOEquity requirements for SY 2021-2022 including information about when the SEA will require noncompliant LEAs to describe the adjustments they will make to come into compliance
Nov 1, 2022	<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
Nov 1, 2022	<ul style="list-style-type: none">• 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
Dec 31, 2022	<ul style="list-style-type: none">• MOEquity data for SY 2021-2022 for each non-excepted LEA
Dec 31, 2023	<ul style="list-style-type: none">• MOEquity data for SY 2022-2023 school year for each non-excepted LEA

Important Clarifications on Remedies

- “If an LEA does not maintain equity and cannot make adjustments in that year, then the LEA may remedy this violation by **making adjustments to funding and FTE staffing in the next year** to ensure that high-poverty schools in the LEA are treated equitably.” (p. 2 of [FR notice](#), right column)
- “[W]e've had a few questions from a couple of folks about if an LEA does not maintain equity in one year, what does it mean? What are the implications for adjustments in the next year? And I would say **this is a situation where we want to gather the information first** and then it'll be based on... **We would expect that there would be adjustments made to be in compliance in the next year.** There is also a requirement for that LEA to maintain equity in fiscal year '23, so this will be lots of facts and different situations going on, and so I think as those situations occur, **we are happy to work with SEAs and have discussions about what things look like and targeted conversations.**” (p. 7 of [webinar transcript](#))

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