



**THE (JURIS) DOCTORS ARE IN:
A LAWYERS' PRESCRIPTION FOR
NAVIGATING THE ESSA**

**NATIONAL TITLE I CONFERENCE
FEBRUARY 2018 | PHILADELPHIA, PENNSYLVANIA**

**KAY RIGLING AND PHIL ROSENFELT
OFFICE OF THE GENERAL COUNSEL**

OBJECTIVES

- To provide tips for implementing the Elementary and Secondary Education Act (ESEA) as amended by the Every Student Succeeds Act (ESSA)
- From the perspective of lawyers who have worked with the ESEA for a combined total of more than eighty years
- To empower you to be able to effectively navigate the ESSA



AGENDA

- What is new about the ESEA as amended by ESSA
- Key to Statutes, Regulations, and Guidance
- Rules of Construction
- Guiding Cost Principles
- Flexibilities
- How to Effectively Participate in Implementation



WHAT IS NEW ABOUT THE ESEA, AS AMENDED BY ESSA

- Federal role in education: a reshaping of roles and authority among Federal, State, and local agencies
- Considerable flexibility but...
- Express Federal prohibitions increased
- Likely to be fewer regulations and guidance



FACTORS TO CONSIDER

- How can we work together most effectively? ESEA is a partnership of Federal, State, and local interests.
- The law builds in accountability at various levels.
- Stay focused and work for our bottom line customer—the students
- ESSA provides more opportunity for flexibility and innovation, and hopefully success.





Statutes, Regulations, and Guidance



STATUTES, REGULATIONS, AND GUIDANCE

DEFINITION OF “STATUTE”

- A statute is a law that is enacted by the legislative branch of a government—in the case of Title I of the ESEA, it is a Federal law enacted by the Congress of the United States, and is signed into law by the President.
- The ESEA has been in existence since 1965. It is periodically reauthorized. In the most recent reauthorization of Title I, Congress made changes through the Every Student Succeeds Act (ESSA).



STATUTES, REGULATIONS, AND GUIDANCE

EXAMPLE OF A STATUTE—MAINTENANCE OF EFFORT

(a) IN GENERAL.—A local educational agency may receive funds under a covered program for any fiscal year only if the [SEA] finds that... expenditures...with respect to...free public education...for the preceding fiscal year was not less than 90 percent...for the second preceding fiscal year....

(b) REDUCTION IN CASE OF FAILURE TO MEET.—

(1) IN GENERAL.—The [SEA] shall reduce the...allocation...under a covered program in any fiscal year in the exact proportion by which a[n LEA] fails to [maintain effort] by falling below 90 percent..., **if such [LEA] has also failed to meet such requirement... for 1 or more of the 5 immediately preceding fiscal years.**

* * *

(c) WAIVER.—The Secretary may waive the requirements of this section if the Secretary determines that a waiver would be equitable due to—

(1) exceptional or uncontrollable circumstances, such as a natural disaster **or a change in the organizational structure of the local educational agency;** or

(2) a precipitous decline in the financial resources of the [LEA].

ESEA section 8521 **(revisions are in red)**



STATUTES, REGULATIONS, AND GUIDANCE

DEFINITION OF “REGULATION”

- A “regulation” is a statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy. A regulation is issued by a governmental agency—in the case of Title I, the U.S. Department of Education.
- It is generally promulgated after public notice and comment.
- Although a regulation is not a law, a regulation has the force and effect of law, because it is adopted under authority granted by a statute (either specifically or generally).
 - ESEA section 1601 authorizes the Secretary to “issue such regulations as are necessary to reasonably ensure that there is compliance” with Title I.
 - Title I regulations are generally found in 34 C.F.R. Part 200 at https://www.ecfr.gov/cgi-bin/text-idx?gp=&SID=ffae61ad66b9fbfba58615934962ce20&mc=true&tpl=/ecfrbrowse/Title34/34tab_02.tpl.



STATUTES, REGULATIONS, AND GUIDANCE

EXAMPLE OF A REGULATION—MAINTENANCE OF EFFORT

§ 299.5 What maintenance of effort requirements apply to ESEA programs?

(a) *General.* An LEA receiving funds under an applicable program...may receive its full allocation...only if the SEA finds...expenditures of State and local funds with respect to...free public education in the LEA for the preceding fiscal year was not less than 90 percent for the second preceding fiscal year.

* * *

(c) *Meaning of “preceding fiscal year”.* For purposes of determining if the [maintenance of effort] requirement...is met, the “preceding fiscal year” means the Federal fiscal year, or the 12-month fiscal period most commonly used in a State for official reporting purposes, prior to the beginning of the Federal fiscal year in which funds are available for obligation by the Department.



STATUTES, REGULATIONS, AND GUIDANCE

EXAMPLE OF REGULATIONS –MAINTENANCE OF EFFORT CONT.

(d) *Expenditures.* (1) In determining an LEA's compliance with [the maintenance of effort requirement], the SEA shall consider only the LEA's expenditures from State and local funds for free public education. **These include expenditures for administration, instruction, attendance and health services, pupil transportation services, operation and maintenance of plant, fixed charges, and net expenditures to cover deficits for food services and student body activities.**

(2) The SEA may not consider the following expenditures in determining an LEA's compliance....:

- (i) Any expenditures for community services, capital outlay, debt service **or supplemental expenses made as a result of a Presidentially declared disaster.**
- (ii) **Any expenditures made from funds provided by the Federal Government.**

34 CFR § 299.5



STATUTES, REGULATIONS, AND GUIDANCE

DEFINITION OF “NON-REGULATORY GUIDANCE”

- “Non-regulatory guidance” is an agency statement of general applicability and future effect, other than a regulatory action that sets forth a policy on a statutory, regulatory or technical issue or an interpretation of a statutory or regulatory issue.
- A guidance document represents the Department’s current thinking on a topic. It does not create or confer any rights for or on any person and does not impose any requirements or obligations beyond those required under applicable law and regulations.



STATUTES, REGULATIONS, AND GUIDANCE

DEFINITION OF “NON-REGULATORY GUIDANCE” CONT.

- Non-regulatory guidance is not a statute or regulation and does not have the force and effect of law.
- It often explains statutory or regulatory requirements in simpler ways and presents examples of how to comply with the statute or regulations.
- A State or LEA is not required to follow non-regulatory guidance.
- If a State or LEA follows the Department’s guidance, the agency will be deemed to be in compliance with the statute or regulations that the guidance implements.
- ESEA section 8541(a)(3) requires the Secretary, to the extent feasible, to consider input from stakeholders before issuing any non-regulatory guidance.
- If guidance is “significant,” as defined by OMB, stakeholders may comment on the Department’s website at <https://www2.ed.gov/policy/gen/guid/significant-guidance.html>.





Rules of Construction



BASIC RULES OF CONSTRUCTION

- A question of statutory interpretation begins with looking at the plain language of the statute to discover its original intent. First look to the words of the statute and apply their usual and ordinary meanings.
- A court may also look at: the common usage of a word, case law, dictionaries, parallel reasoning, punctuation
- If after looking at the language of the statute the meaning of the statute remains unclear, attempt to ascertain the intent of the legislature by looking at legislative history and other related sources including committee reports, and floor debates.
- Generally steer clear of any interpretation that would create an absurd result which the legislature did not intend.
- Because legislators may intend different things when they vote for a bill, statutory construction is often fairly difficult. Statutes are sometimes ambiguous enough to support more than one interpretation. In these cases, courts or parties are free to interpret the statutes themselves in a “reasonable manner.”



OTHER RULES OF STATUTORY INTERPRETATION

- Courts will often defer to a reasonable interpretation of the agency charged with implementing the law.
- Statutes should be internally consistent. Each section of the statute should not be interpreted in a way that is inconsistent with the rest of the statute.
- When the legislature enumerates an exception to a rule, one can infer that there are no other exceptions.
- When the legislature includes limiting language in an earlier version of a statute, but deletes it prior to enactment of the statute, it can be presumed that the limitation was not intended by the legislature.
- The legislature is presumed to act intentionally and purposely when it includes language in one section but omits it in another.
- Where legislation and case law conflict, courts generally presume that legislation takes precedence over case law.



FEDERAL PRE-EMPTION

IF CONFLICT OF LAWS EXISTS

- When Federal and State or local law cover the same topic.
- Are the statutes clear on their face or is there ambiguity and would legislative history help understand the language of the law.
- Read statutes together in harmony and to give meaning to both, whenever possible
- If cannot be read together in harmony, then generally Federal law overrides State or local law and a grantee must comply with the Federal law if it accepts Federal funds.





Guiding Cost Principles

Allowable

Allocable

Necessary and Reasonable



GUIDING COST PRINCIPLES

ALLOWABLE

To be allowable, a cost must--

- Be necessary and reasonable for the performance of the Federal award and be allocable thereto. **Start with allowable costs in the program statute, the regulations, then reasonable interpretations of law**
- Conform to any limitations or exclusions applicable to the Federal award as to types or amount of cost items.
- Be consistent with policies and procedures that apply uniformly to both Federal and non-Federal activities of the LEA.
- Be accorded consistent treatment with non-Federal costs.
- Be determined in accordance with generally accepted accounting principles except, for state and local governments and Indian tribes only, as otherwise provided for in 2 CFR Part 200.
- Not be included as a cost or used to meet cost sharing or matching requirements of any other Federal program.
- Be adequately documented.

2 CFR § 200.403



GUIDING COST PRINCIPLES

ALLOCABLE

A cost is allocable if the goods or services involved are charged to a Federal program in accordance with relative benefits received. This standard is met if the cost--

- Is incurred specifically for the Federal award;
 - Benefits both the Federal award and other work of an LEA and can be distributed in proportion to the benefits received using reasonable methods; and
 - Is necessary to the overall operation of an LEA and is assignable in part to the Federal award.
- 2 CFR § 200.405



GUIDING COST PRINCIPLES

NECESSARY AND REASONABLE

A cost must be **necessary and reasonable** for the proper and efficient performance of the Federal program.

In determining **reasonableness**, is the cost—

- Generally recognized by a prudent person as ordinary and necessary for the performance of the Federal program?
- Consistent with sound business practices; arm's-length bargaining; Federal, State, local, tribal, and other laws and regulations; and terms and conditions of the Federal program?
- Consistent with market prices for comparable goods or services?
- Prudent under the circumstances, considering the responsibilities of the LEA to its employees, its students or membership, the public at large, and the Federal Government.
- Consistent with the LEA's established practices and policies regarding the incurrence of costs (or does the cost unjustifiably increase the Federal program's cost)?

2 CFR § 200.404



GUIDING COST PRINCIPLES

NECESSARY AND REASONABLE

A cost must be **necessary and reasonable** for the proper and efficient performance of the Federal program.

In determining whether a cost is **necessary**, is the cost—

- Generally recognized by a prudent person as reasonably related and needed to carry out the purposes of and for the proper performance of the program?

2 CFR § 200.404





Flexibilities



FLEXIBILITIES

- Consolidation of local administrative funds
- Operating a schoolwide program in schools below 40% poverty
- Combining funds in schoolwide programs
- Accountability
- Supplement not supplant—new compliance rules
- Locally selected, nationally recognized high school assessment
- Student-centered funding pilot
- Transferability
- Waivers



FLEXIBILITIES

CONSOLIDATION OF LOCAL ADMINISTRATIVE FUNDS

- An LEA, with the approval of its SEA, may consolidate and use for administration of one or more programs under the ESEA an amount equal to or less than the amount the LEA may spend for administration under those programs individually.
 - E.g., an LEA that consolidates administrative funds that includes Title III, Part A may use any of the consolidated funds to administer its Title III, Part A program, even though section 3115(b) of the ESEA limits the amount of Title III, Part A funds that may contribute to the consolidated pool to two percent of an LEA's Title III, Part A allocation.
- An LEA that consolidates administrative funds is not required to keep separate records for each individual program included in the consolidation to account for costs related to the administration of the consolidated programs.

ESEA section 8203



SCHOOLWIDE PROGRAMS

EXCEPTION TO POVERTY THRESHOLD

Generally, an LEA may only operate a schoolwide program in a school with not less than 40% poverty.

- Exception: An LEA may operate a schoolwide program in a school with less than 40% poverty if the LEA receives a waiver from the State to do so.
- A State must take into account how a schoolwide program will best serve the needs of low-achieving students in improving academic achievement and other factors.

ESEA section 1114(a)(1)(B)



FLEXIBILITIES

CONSOLIDATING FUNDS IN A SCHOOLWIDE PROGRAM

- A school operating a schoolwide program may consolidate Federal, State, and local funds to better meet the needs of students in the school.
- Advantages of consolidating funds in a schoolwide program:
 - Flexibility to allocate all available resources effectively and efficiently.
 - A school is not required to meet most of the statutory and regulatory requirements of the specific Federal programs included in the consolidation, provided it meets the intent and purposes of those programs.
 - A school is not required to maintain separate fiscal accounting records by Federal program that identify the specific activities supported by each program's funds.
- For more information on schoolwide programs, see non-regulatory guidance on schoolwide programs, at <https://www2.ed.gov/policy/elsec/leg/essa/essaswpguidance9192016.pdf>.

ESEA section 1114(a)(2)(B), (3)

ESEA section 1114(a)(1), (3)



FLEXIBILITIES

ACCOUNTABILITY

- Rather than requiring the same “one-size-fits all” interventions for all identified schools, LEAs and schools have autonomy to determine the evidence-based interventions that are best suited to their needs.
 - An LEA has the flexibility to determine the evidence-based interventions it will include in each comprehensive support and improvement plan it develops for its schools.
 - A school that is identified for targeted support and improvement has the flexibility to determine the evidence-based interventions it will include in its school improvement plan.

ESEA section 1111(d)(1)(B), (2)(B)



FLEXIBILITIES

SUPPLEMENT NOT SUPPLANT—NEW COMPLIANCE RULE

- An LEA may demonstrate compliance with the Title I, Part A supplement not supplant requirement by using a methodology to allocate State and local funds to each Title I school that ensures that each school receives all the State and local funds it would otherwise receive if it were not receiving Title I funds.
- The LEA is not required to identify that an individual cost or service supported with Title I, Part A funds is supplemental or provide services through a particular instructional method or setting.
- This provision applies to both schoolwide programs and targeted assistance schools. As a result, the three presumptions of supplanting no longer apply to targeted assistance schools.



FLEXIBILITIES

LOCALLY SELECTED, NATIONALLY RECOGNIZED HIGH SCHOOL ASSESSMENT

- If permitted by the State, an LEA may administer a nationally recognized high school academic assessment in place of the statewide assessment in any subject.
- An LEA that elects to administer a nationally recognized high school academic assessment administers the assessment to all its high school students and makes parents aware of its selection.
- A “nationally recognized high school academic assessment” is an assessment of high school students’ knowledge and skills that is administered in multiple States and is recognized by institutions of higher education in those or other States for the purposes of entrance or placement into courses in postsecondary education or training programs.

ESEA section 1111(b)(2)(H); 34 C.F.R. § 200.3



FLEXIBILITIES

STUDENT-CENTERED FUNDING PILOT

- An LEA may apply for flexibility from school-level program requirements related to eligible Federal programs if the LEA wishes to combine those eligible Federal funds with State and local funds in order to allocate resources to schools based on the number of students and the corresponding levels of need.
- Eligible Federal programs are: Title I; Title II; Title III; Title IV, Part A; Title V, Part B.
- A student-centered funding system uses weights to provide substantially more funding to students from low-income families, English learners, and any other educationally disadvantaged student group identified by the LEA.
- An LEA would receive substantial relief from both fiscal requirements (such as separately tracking Federal funds) and programmatic requirements for those programs the LEA includes in the weighted funding system.
- Additional information, including an application, is available at <https://www2.ed.gov/policy/elsec/leg/essa/scfp/studentcentered.html>.
- The Department will offer this flexibility to LEAs beginning with the 2018-2019 school year.

ESEA section 1501



FLEXIBILITIES

TRANSFERABILITY

- To better address its needs, an LEA may transfer some or all of the funds it receives under Title II, Part A and Title IV, Part A to those programs as well as to—
 - Title I, Part A
 - Title I, Part C
 - Title I, Part D
 - Title III, Part A
 - Title V, Part B

ESEA section 5103(b)



FLEXIBILITIES

WAIVERS

- An LEA may submit a request for a waiver of most statutory and regulatory requirements of the ESEA to its SEA. The SEA may then submit the LEA's request to the Department if the SEA determines the waiver is appropriate.
- A waiver request must—
 - Identify the affected Federal program(s).
 - Identify the requirements to be waived.
 - Describe how the waiver will advance student academic achievement.
 - Describe the methods the SEA, LEA, school, or tribe will use to monitor and regularly evaluate the effectiveness of the waiver.
 - Describe how schools will continue to provide assistance to the same populations served by programs for which waivers are requested.



FLEXIBILITIES

WAIVERS, CONT.

- An LEA must provide notice and a reasonable opportunity to comment on a waiver request to its SEA and the public in the manner in which the LEA customarily provides similar notice.
- The Secretary may not waive any statutory or regulatory requirements relating to—
 - The allocation of funds to States or LEAs.
 - Maintenance of effort.
 - Comparability of services.
 - Supplement not supplant.
 - Equitable services for private school students and teachers.
 - Parental participation and involvement.
 - Civil rights requirements.
 - Requirements for charter schools under Title IV, Part C.
 - Prohibitions in Title VIII, Part F, Subpart 2 and those regarding use of funds for religious worship or instruction; and
 - Eligibility and selection of a Title I school under section 1113, with exceptions.





A Prescription for Implementation



PRESCRIPTION FOR EFFECTIVE IMPLEMENTATION

- Submit questions when you have them; do not be afraid to ask
- Participate in rulemaking; provide comments on guidance
- Keep appropriate contemporaneous records and evidence to demonstrate the appropriateness of your actions for audits, monitoring, and responsiveness to the taxpayer.
- Possibly self audit some of your key decisions to see their appropriateness and where there may be risk.
- Be aware of OIG's work plan and single audit compliance supplement (<https://www2.ed.gov/about/offices/list/oig/workplan.html>
https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A133/2017/Compliance_Supplement_2017.pdf)
- Ask for needed guidance—technical assistance centers, State officials, Federal officials, program office, attorneys.



NEXT STEPS

CONTACT US: WE MAKE HOUSE CALLS

OSS.[State]@ed.gov

Kay.Rigling@ed.gov

Phil.Rosenfelt@ed.gov

We want to stay in touch with you!



