



Fall Forum 2021

Stimulus Funds and UGG, and You and Me, So Happy (Back) Together

IDEA Fiscal Hot Topics

Tiffany Kessler, Esq. & Maddie Cleghorn, Esq.

tkessler@bruman.com; mcleghorn@bruman.com

www.bruman.com

M & BRUSTEIN
MANASEVIT, PLLC
ATTORNEYS AT LAW



Agenda

- 1) IDEA Maintenance of Effort Requirements
 - IDEA Maintenance of State Fiscal Support (MFS)
 - IDEA Local Maintenance of Effort (MOE)
- 2) Braiding ESSER and IDEA Funds to Serve Students with Disabilities
- 3) 2021 Compliance Supplement Auditing Priorities



IDEA Maintenance of Effort Requirements

- IDEA Maintenance of State Fiscal Support (MFS)
- IDEA Local Maintenance of Effort (MOE)



Maintenance of State Financial Support

- State requirement to not reduce the amount of state financial support for special education and related services (MFS) made available for children with disabilities
 - Includes ALL State funds
 - Subsequent years rule
- Waiver permitted under some circumstances
 - May only request a waiver one fiscal year at a time
 - Contact state lead at OSEP for assistance
 - If waiver is granted, ED may conduct additional monitoring
 - See ED's IDEA MFS resources here:
<https://www2.ed.gov/policy/speced/guid/idea/monitor/smfs-partb-waivers.html> (34 CFR § 300.163)



MFS Waiver Request Criteria

Guidance on factors considered in ED's evaluation of a request for MFS waiver issued in March 2021: <https://www2.ed.gov/policy/speced/guid/idea/moe-waivers.pdf>

- 1) Precipitous and unforeseen decline in financial resources, considering:
 - State's revenues and total appropriations for waiver year vs. prior year
 - State's financial support for special education waiver year vs. prior year
 - Whether the State could have supported special education and did not do so (e.g., depositing funds into emergency account v. allocating to sped)
- 2) Natural disaster (consider scope, emergency and non-emergency appropriations, State special education allocations, etc.)
- 3) Other exceptional or uncontrollable circumstances (e.g., public health emergency)
- 4) Might also consider prior results of OSERS' monitoring of the State



OSEP MFS and MOE FAQs (2020)

New OSEP guidance on MOE and MFS flexibility with COVID-19 issued June 2020:

<https://sites.ed.gov/idea/files/qa-fiscal-flexibilities-idea-part-b-06-26-2020.pdf>

- Originally issued MOE FAQs in July 2015:
<https://sites.ed.gov/idea/files/idea/policy/speced/guid/idea/memosdcltrs/osepmemo1510leamoeqa.pdf>

Q. 1 (2020): Is there any flexibility in meeting the requirements for the maintenance of State financial support (MFS)?

- Yes, Secretary may waive MFS if one of the waiver standards is met.
- In addition, States may establish compliance with MFS on a total or a per capita basis, and may switch between the two methods.
- BUT, must establish compliance by applying the same method to the relevant comparison years (i.e., States establish compliance one year by showing that either: total dollar amount was at least equal to total dollar amount of previous year, OR per capita amount was at least equal to per capita amount of previous year).



Failure to Meet State MFS

- Consequences for failure to maintain support:
 - ED reduces allocation for any FY following the FY in which the State fails to comply
 - Reduction is the same amount by which the State fails to meet the requirement
 - Following year reverts back to previous level of effort
- Ability of SEA to reduce its MOE is VERY RARE! (34 CFR § 300.230)



Pending MFS Litigation

- OSERS issued a proposed final determination that Massachusetts allegedly failed to meet the IDEA MFS requirements in 2010 and 2011.
- OSERS first raised these allegations in 2013 with the submission of MA's IDEA application.
- BUT, OSERS only just issued a determination in January 2021 imposing the \$114 million MFS penalty against MA. If enforced, it would cut the state's IDEA funding by a third in 2022.
- Current issue on appeal is whether OSERS proposed final determination is time barred by a statute of limitations.

LEA Maintenance of Effort

The general rule:

- An LEA may not reduce the amount of local, or state and local, funds that it spent for the education of children with disabilities below the amount it spent for the preceding fiscal year.
- Subsequent years rule

Two components:

- Eligibility standard
- Compliance standard



LEA MOE Eligibility Standard

- For purposes of eligibility, the SEA must determine that the LEA has budgeted for the education of children with disabilities at least the same total or per capita amount from either local funds only or state and local funds as the LEA spent for that purpose from the same source for the most recent prior year for which information is available.

(34 CFR § 300.203(a))



LEA MOE Compliance Standard

- An LEA must not reduce the level of expenditures for the education of children with disabilities made by the LEA below the level of those expenditures from the same source for the preceding fiscal year.
- Consequence of failure to meet standard
 - SEA liable to pay back ED with nonfederal funds lesser of the amount of the failure, or the LEA's entire Part B subgrant for that fiscal year.

(34 CFR § 300.203(b))



LEA MOE: Four Ways to Calculate

Comparison
of total
expenditures
using
local funds
only

Comparison
of total
expenditures
using
State and
local funds

Comparison
of the per
pupil amount
using
local funds
only

Comparison
of the per
pupil amount
using
State and
local funds

(34 CFR § 300.203(b))



Allowable Exceptions to LEA MOE

- The voluntary departure or departure for just cause, of special education or related services personnel;
- A decrease in the enrollment of CWDs;
- A CWD with an exceptionally costly program (as determined by SEA) left the LEA, aged out, or no longer needs the program;
- The termination of costly expenditures for long-term purchases (equipment, construction, etc.);
- The assumption of cost by the high-cost fund operated by the SEA.

(34 CFR § 300.204)



OSEP MOE FAQs (2015)

Q. D-3: May an LEA reduce its required level of expenditures by taking more than one exception in the same fiscal year?

- Yes

Q. D-4: How does taking an exception in 300.204 affect the required amount of expenditures that an LEA must make in a subsequent year?

- LEA can use the reduced level to meet MOE in subsequent years!
- Assumes LEA spent the minimum required.



LEA MOE Exceptions

For any fiscal year for which an LEA's IDEA allocation exceeds the amount the LEA received for the previous fiscal year, the LEA may reduce the level of expenditures for the education of children with disabilities otherwise required by not more than 50 percent of the amount of that excess.

- Must use the reduction on ESSA allowable activities

(34 CFR § 300.205(d) & 300.226(a))

Hello American Rescue Plan (ARP)!

**3 Billion FY 2021 (July 1, 2021-Sept 30, 2023) =
supplemental IDEA allocation!**



LEA MOE Exceptions (cont.)

- However, the amount of LEA MOE reduction that an LEA can take is affected by an LEA's use of Part B funds for Coordinated Early Intervening Services (CEIS)
- Therefore, if an LEA elects to set-aside funds for voluntary CEIS, the LEA must subtract any CEIS set-aside from the LEA MOE reduction amount!

(34 CFR § 300.205(d) & 300.226(a))



LEA MOE Exceptions (cont.)

- The LEA, however, is prevented from reducing its MOE, if the LEA is identified as having significant disproportionality:
 - The LEA must set aside 15% of the IDEA funds for comprehensive CEIS (CCEIS) to address factors contributing to significant disproportionality.
- OR, or does not “meet requirements”
(34 CFR § 300.205(d) & 300.646)



Did the LEA receive an increase in its IDEA Allocation?

Yes

No

Did the LEA “meet requirements?”

No MOE reduction

No

Yes

No MOE reduction

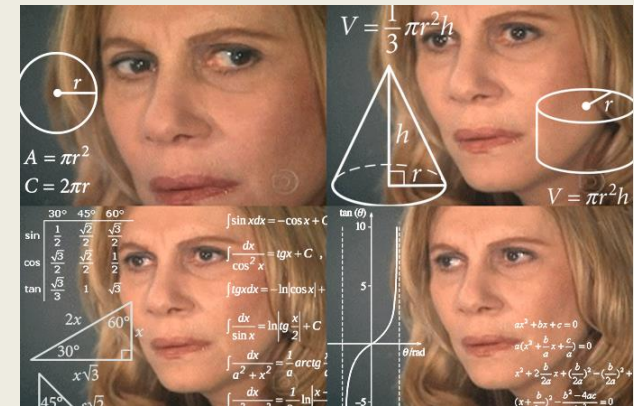
Is the LEA required to set aside 15% for CCEIS?

No

Yes

Can reduce MOE

No MOE Reduction





LEA Flexibility Adjustment to MOE

Examples:

- LEA's FY 21 ARP IDEA Supplemental Allocation provides \$100,000 more IDEA funds to the LEA than in prior fiscal year.
- If the LEA set-aside \$0 on CEIS, then reduction of \$50,000.
- If the LEA set-aside \$25,000 on CEIS, then reduction of \$25,000
- If the LEA set-aside \$75,000 on CEIS, then no reduction permitted.
- If the LEA was disproportionate and set aside \$25,000 on CCEIS, then no reduction permitted.

(34 CFR § 300.205)



LEA MOE Subsequent Years Rule

- If LEA fails to meet MOE requirements, the level of expenditures required of the LEA for the fiscal year subsequent to the year of the failure is the amount that would have been required in the absence of that failure, not the LEA's reduced level of expenditures.

(34 CFR § 300.203(c))



Applying the Subsequent Years Rule: Which is the Comparison Year?

Fiscal Year	Required level of effort	Actual level of effort	Met/Failed
12-13	\$100	\$100	Met
13-14	\$100	\$90	Failed
14-15	\$100	\$90	Failed
15-16	\$100	\$110	Met
16-17	\$110	\$100	Failed



Consequence of the Moving Comparison Year...

- LEAs may need to keep “auditable data” on MOE indefinitely
 - E.g. Must use the last year in which the LEA met the standard under a particular method as the comparison year – even if that was 10 + years ago!



Failing the Eligibility Standard

- SEA payback to ED with nonfederal funds:
 - Lesser of the amount of the failure, or the LEA's entire Part B subgrant for that fiscal year
 - Can use most favorable method
- SEA can use State procedures to recover funds from LEA



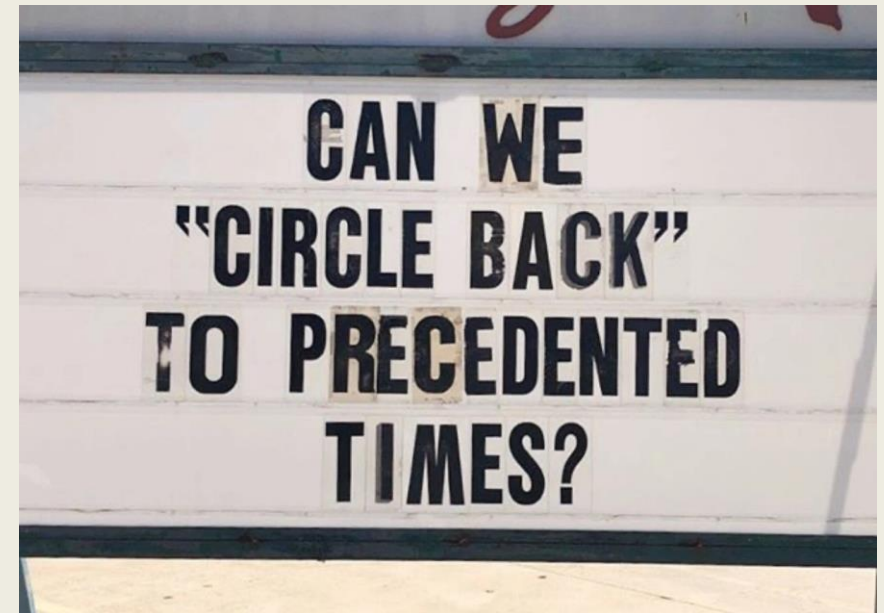
OSEP MOE FAQs (2015)

- Q. A-9: May LEAs use their local, or State and local, funds to meet both LEA MOE requirements and a matching or MOE requirement for a separate federal program (e.g., Medicaid or Vocational Rehab)?
 - Yes!
- In fact, LEAs must include these funds when calculating the IDEA MOE eligibility and compliance standards.



LEA MOE Tips in Challenging Times...

- Plan, Plan, Plan!
- Monitor, Monitor, Monitor!
- Identify Exceptions
- Consider LEA flexibility to adjust MOE based on ARP supplemental allocation
- Carefully consider funding sources
- Make it across the finish line...without a sweat!





Braiding ESSER and IDEA Funds to Serve Students with Disabilities





Braiding Funds – ESSER FAQs

- New ESSER FAQs (May 2021): [ESSER/GEER FAQ Link](#)
- Q. A-17. May ESSER and GEER funds be used in combination with (“braided with”) other funding?
 - Yes. ESSER and GEER funds may be used in combination with, but not blended with, funding under ESEA, IDEA, AEFLA, Perkins V, and McKinney-Vento, or any other education funds. Therefore, an SEA or LEA may use ESSER and GEER funds to expand participation in an activity or services it is currently conducting or plans to conduct under these programs.



Braiding Funds – ESSER FAQs

- ESSER FAQs Q. A-17 Cont.
- “Braiding” funds occurs when different funding streams are used together to leverage the support provided for different needs for educators and students while maintaining documentation to support the charging and allocation of costs to multiple separate funding streams or programs.
- Each funding stream maintains its identity and continues to be subject to the relevant statutory requirements, including eligibility criteria and scope of authorized activities. 2 CFR § 200.405(d).



ESSER Allowability

- All costs must be necessary, reasonable, and allocable.
- ESSER funds must be used to prevent, prepare for, or respond to COVID-19.
 - If braiding ESSER funds with IDEA funds, ESSER funds must still relate back to this purpose.



ESSER Allowability

- ESSER FAQs Q. A-3: Allowable uses of ESSER funds
 - Addressing the academic impact of lost instructional time among an LEA's students, including low-income students, students with disabilities, English learners, racial and ethnic minorities, students experiencing homelessness, and children and youth in foster care, including by—
 - Using high-quality assessments to accurately assess students' academic progress and assist educators in meeting students' academic needs, including through differentiating instruction.
 - Implementing **evidence-based activities** to meet the comprehensive needs of students.
 - Providing information and assistance to parents and families on how they can effectively support students, including in a distance learning environment.
 - Tracking student attendance and improving student engagement in distance education.



ESSER Allowability

- ESSER FAQs Q. A-10: What does it mean for a program to be **evidence-based**?
 - An activity, strategy, or intervention that demonstrates a statistically significant effect on improving student outcomes or other relevant outcomes based on—
 - Strong evidence from at least one well-designed and well-implemented experimental study (“tier 1”);
 - Moderate evidence from at least one well-designed and well-implemented quasi-experimental study (“tier 2”); or
 - Promising evidence from at least one well-designed and well-implemented correlational study with statistical controls for selection bias (“tier 3”); or
 - Demonstrates a rationale based on high-quality research findings or positive evaluation that such activity, strategy, or intervention is likely to improve student outcomes or other relevant outcomes and includes ongoing efforts to examine the effects of such activity, strategy, or intervention (“tier 4”).



ESSER Allowability - OCR Report June 2021

- What is necessary and reasonable?
- OCR released a report assessing COVID's impact on education, particularly on the deepening divide in educational opportunities.
- “Although the pandemic's effects will be studied for many years to come, we know from early studies that for many students, the educational gaps that existed before the pandemic—in access, opportunities, achievement, and outcomes—are widening. And we can see already that many of these impacts are falling disproportionately on students who went into the pandemic with the greatest educational needs and fewest opportunities—many of them from historically marginalized and underserved groups.”
- OCR Report: <https://www2.ed.gov/about/offices/list/ocr/docs/20210608-impacts-of-covid19.pdf>



ESSER Allowability - OCR Report June 2021

- “OBSERVATION 4 (K-12): For many elementary and secondary school students with disabilities, COVID-19 has significantly disrupted the education and related aids and services needed to support their academic progress and prevent regression. And there are signs that those disruptions may be exacerbating longstanding disability-based disparities in academic achievement.”



ESSER Allowability - OCR Report June 2021

- Early indications that the pandemic has exacerbated academic achievement disparities for students with disabilities.
- Data from fall 2020:
 - In a Maryland district, the number of sixth graders with disabilities earning failing marks in English doubled from the previous year.
 - A Virginia district saw a 111% increase in the number of students with disabilities receiving Fs in two or more subjects in the first quarter of the 2020-21 school year.
 - In California, a district similarly reported an across-the board jump in fall 2020 in the number of Ds and Fs given to students with disabilities in its middle and high schools.



ESSER Allowability

ESSER FAQs Q. C-2: How may an LEA use ESSER and GEER funds to support students who have lost instructional time due to the COVID-19 pandemic?

- Implementing evidence-based approaches to accelerating learning, high-dose tutoring, leveraging technology to provide embedded assessment and differentiated instruction, diagnostic and curriculum-embedded assessments, extending the school day or year to provide additional time for student learning, enrichment, and support.
- Supplementing the salaries of educators and other qualified personnel to perform additional services.
- Hiring additional teachers and teacher aides to provide intensive support to students.
- Provide professional development to educators on research-based strategies for meeting students' academic, social, emotional, mental health, and college, career, and future readiness needs.



ESSER Allowability

ESSER FAQs Q. C-5: How may an LEA use ESSER and GEER funds to support the needs of children with disabilities under the IDEA?

- Eliminating evaluation backlogs;
- Addressing the loss of instructional time and loss of skills for children with disabilities, determining whether compensatory services may be needed for a child with a disability;
- Providing extended-school-year services as determined on an individual basis by a child's IEP Team to be necessary to provide FAPE to the student;
- Monitoring, enforcement, complaint investigations, and the mediation process, including providing for the costs of mediators and support personnel;



ESSER Allowability

ESSER FAQs Q. C-5 Cont. (non-exhaustive list)

- Providing positive behavioral interventions and supports and mental health services for children with disabilities;
- Improving the use of technology in the classroom and/or in a remote setting for children with disabilities to enhance learning;
- Supporting the use of technology to maximize accessibility to the general education curriculum for children with disabilities;
- Assisting LEAs in meeting personnel shortages including by hiring additional personnel to provide special education and related services and reducing caseloads in key areas;
- Supporting capacity-building activities and improving the delivery of services by LEAs to improve results for children with disabilities.



ESSER Allowability

- Additional resources for using ESSER funds to combat learning loss:
 - Strategies for Using American Rescue Plan Funding to Address the Impact of Lost Instructional Time:
<https://www2.ed.gov/documents/coronavirus/lost-instructional-time.pdf>
 - Promising Practices to Accelerate Learning for Students with Disabilities During COVID-19 and Beyond:
<https://www.nclld.org/reports-studies/promising-practices-to-accelerate-learning-for-students-with-disabilities-during-covid-19-and-beyond/>



2021 Compliance Supplement



https://www.whitehouse.gov/wp-content/uploads/2021/08/OMB-2021-Compliance-Supplement_Final_V2.pdf



2021 Compliance Supplement Compliance Requirements

1. Activities Allowed or Unallowed
2. Allowable Costs/Costs Principles
3. Cash Management
4. Eligibility
5. Equipment & Real Property Management
6. Matching, Level of Effort, Earmarking
7. Period of Performance
8. Procurement and Suspension & Debarment
9. Program Income
10. Reporting
11. Subrecipient Monitoring
12. Special Tests & Provisions



6



2021 Compliance Supplement

Allowable Activities

- “IDEA, Part B – An LEA may only use federal funds under IDEA, Part B for the excess costs of providing special education and related services to children with disabilities.”
- “Excess costs are those costs for the education of an elementary school or secondary school student with a disability that are in excess of the average annual per student expenditure in an LEA during the preceding school year.”



OSEP MFS and MOE FAQs (2020)

Q. 3: Is there any flexibility in meeting the “excess cost” requirement under IDEA because of potential budget cuts and school closures as a result of COVID-19?

- No. Excess costs means those costs that are in excess of the average annual per pupil expenditure (APPE) in an LEA during the preceding school year for a student (computed in accordance with 34 C.F.R. § 300.16).
- To meet the excess cost requirement, an LEA must spend at least the APPE on the education of each student with a disability before using IDEA Part B funds to pay for the excess costs of providing special education to students with disabilities.
- If an LEA expends less funds on the education of all students (including students with disabilities), and if the APPE is then reduced, the amount the LEA must expend on students with disabilities to meet the excess cost requirement would also be reduced.



2021 Compliance Supplement

Allowable Activities

- “Special education includes specially designed instruction”
 - No cost to the parent, to meet the unique needs of a child with a disability, including instruction conducted in the classroom, in the home, in hospitals and institutions and in other settings, and instruction in physical education.
 - Related services include transportation, and such developmental, corrective and other supportive services as may be required to assist a child with a disability to benefit from special education.
- “A portion of these funds, under conditions specified in the law, may also be used by the LEA (1) for services and aids that also benefit nondisabled children; (2) for early intervening services; (3) to establish and implement high-cost or risk-sharing funds; and (4) for administrative case management.”



2021 Compliance Supplement

Allowable Costs/Cost Principles

- The use of IDEA funds by a state, for the acquisition of equipment, or the construction or alteration of facilities, must be approved by ED based on a determination by ED that the program would be improved by allowing funds to be used for these purposes (20 USC 1404).



2021 Compliance Supplement Equipment and Real Property Management and Procurement and Suspension and Debarment

- Acquisition of equipment and construction or alteration of facilities by the IDEA Part B programs must meet the prior approval requirements in, and be consistent with, the IDEA-specific requirements in 20 USC 1404 and 1412(a)(10)(B); and 34 CFR sections 300.144 and 300.718.



Equipment Definitions (200.1)



Equipment: tangible, non-expendable, personal property having a useful life of more than one year and an acquisition cost of \$5,000 or more per unit.



Supplies: All tangible personal property other than equipment



Computing Devices: If less than \$5,000 per unit, defined as supplies

Note: Equipment purchases require prior written approval under 34 C.F.R. § 300.718(a). See June 2020 OSEP IDEA Use of Funds guidance for more information: <https://sites.ed.gov/idea/files/qa-part-b-use-of-funds-06-25-2020.pdf>



Use of Equipment for Accessibility

- OSEP IDEA use of funds FAQs Q. 3: Are SEAs and LEAs able to use IDEA Part B funds to purchase equipment necessary to increase their capacity to support remote learning for students with disabilities?
 - Yes, but with prior written approval
 - “OSEP acknowledges that, particularly during the COVID-19 pandemic, SEAs and their LEAs may need to purchase equipment and other assets (such as software, mobile hot spots, or devices like laptops and tablets⁶), including related assistive technology, in order to support increased accessibility to remote learning platforms for students with disabilities.”
 - Must be expended in accordance with IDEA and comply with OMB’s Uniform Grant Guidance (procurement, reporting, financial management, reasonable, necessary, allocable, etc.)



2021 Compliance Supplement

Matching, Level of Effort, Earmarking

- Level of Effort
 - *State MFS*
 - *Local MOE*
- Earmarking
 - *State administration*
 - *Other state-level activities set-aside*
 - *LEA Risk Pool*
- Earmarking (cont.)
 - *Formula Grants to LEAs*
 - SW Consolidation
 - Base Payment Adjustments
 - CEIS funding calculations



2021 Compliance Supplement Period of Performance

- LEAs and SEAs must obligate funds during the 27 months, extending from July 1 of the fiscal year for which the funds were appropriated through September 30 of the second following fiscal year. This maximum period includes a 15-month period of initial availability, plus a 12-month period for carryover.
- An obligation is not necessarily a liability in accordance with generally accepted accounting principles. When an obligation occurs (is made) depends on the type of property or services that the obligation is for (34 CFR section 76.707).



2021 Compliance Supplement





Legal Disclaimer

This presentation is intended solely to provide general information and does not constitute legal advice or a legal service. This presentation does not create a client-lawyer relationship with Brustein & Manasevit, PLLC and, therefore, carries none of the protections under the D.C. Rules of Professional Conduct. Attendance at this presentation, a later review of any printed or electronic materials, or any follow-up questions or communications arising out of this presentation with any attorney at Brustein & Manasevit, PLLC does not create an attorney-client relationship with Brustein & Manasevit, PLLC. You should not take any action based upon any information in this presentation without first consulting legal counsel familiar with your particular circumstances.