

Fall Forum 2021  
Stimulus Funds and UGG, and You and Me, So Happy (Back) Together

## Help Me, ESSER! Hot Topics and Updates

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ATTORNEYS AT LAW

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## Stimulus Funds Summary

| CARES Act                      | CRRSA Act                                  | ARP Act  |
|--------------------------------|--|--|
| ESSER I: \$13.2 billion        | ESSER II: \$54.3 billion<br>• Created EANS | ESSER III: \$122 billion<br>• Continued EANS<br>• Added MOEquity |
| GEER I: \$3 billion            | GEER II: \$1.3 billion                     | GEER: \$0<br>• (Congress did not provide third round of GEER)    |
| Enacted: March 2020            | Enacted: December 2020                     | Enacted: March 2021  |
| Subject Pre-Aug 2020 UGG Rules | Subject Updated UGG Rules                  | Subject Updated UGG Rules  |

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## Agenda

- State Allowable Uses
- MOEquity
- Allowability
- Questions!



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# State ESSER Use of Funds

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## State Set-Asides

- 🚫 New in ARP! 🚫
- At least 90% as subgrants to LEAs (including charter schools)
- At least 5% reserved for state-level learning loss mitigation activities
- At least 1% for summer programs for academic and social needs (targeted to ESEA subgroups), homeless, foster children/youth
- At least 1% for afterschool programs as above
- Not more than 0.5% for administrative costs
- Remainder (about 2%) for “emergency needs” as determined by the SEA “to address issues responding to coronavirus”

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## State Set-Asides

| Category                                   | Percentage |
|--|------------|
| Subgrants to LEAs                          | 90%        |
| Learning loss mitigation                   | 5%         |
| Summer programs                            | 1%         |
| Afterschool programs                       | 1%         |
| Emergency needs as determined by the State | 2%         |
| Administrative costs                       | 0.5%       |

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## State Set-Asides

- Reminder! All ESSER/GEER expenses must go to costs that “prevent, prepare for, or respond to” the pandemic!!!



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## Maintenance of Equity



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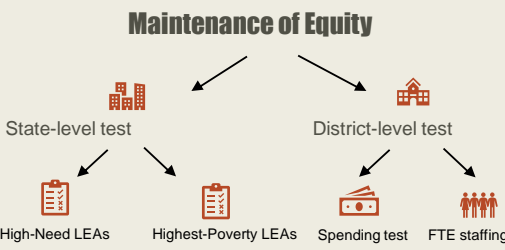
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## Maintenance of Equity



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graph TD
    A[Maintenance of Equity] --> B[State-level test]
    A --> C[District-level test]
    B --> D[High-Need LEAs]
    B --> E[Highest-Poverty LEAs]
    C --> F[Spending test]
    C --> G[FTE staffing test]
  
```

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## State-Level Requirement – High-Need LEA

- States cannot reduce funding to “**high need**” LEA in a way that is disproportionate to Statewide average
  - Applies to 2022 and 2023 State funds as compared to 2021
  - Calculated on a per-pupil basis using SAIPE data
- “High-need LEAs” – a group of LEAs that:
  - In rank order, have the highest percentage of economically disadvantaged students
  - Collectively serve at least 50% of the State’s total enrollment of students

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## State-Level Requirement – Highest-Poverty LEA

- States cannot reduce funding to any “**highest-poverty**” LEA below the level of funding provided in FY 2019
  - Applies to 2022 and 2023 State funds
  - Calculated on a per-pupil basis
- “Highest-poverty LEAs” – a group of LEAs that:
  - In rank order, have the highest percentages of economically disadvantaged students in the State based on the most recent SAIPE data AND
  - Collectively serve at least 20% of the total State enrollment

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## ED Guidance for State-level MOEquity

- Guidance updated October 2021
- What expenditures count?
  - Funds **appropriated and allocated** by the State to all LEAs for current expenditures for free public education
  - Does NOT** include dedicated funds for capital outlay and debt service
  - Does NOT** include federal funds, local revenues, or support from private donors.

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## ED Guidance for State-level MOEquity

- Deadlines
  - *States must submit baseline data by July 30*
    - If that is not feasible, States can get an extension to October 15
  - Must include the identification of high-need and highest-poverty districts and their per-pupil funding levels
  - *Should identify high-need and highest-poverty LEAs no later than the spring prior to the relevant school year*

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## LEA-Level Requirement: Funding

- LEA cannot reduce per-pupil funding for "high-poverty school" more than total reduction divided by number of students currently enrolled in LEA
  - *Applies to 2022 and 2023*
    - as compared to 2021
  - *State and local funding combined*



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## LEA-Level Requirement: Staffing

- Cannot reduce the number of **FTE staff per-pupil** by an amount that exceeds the total reduction, if any, in FTE staff per-pupil in all schools served by the LEA in such fiscal year.
  - *Guidance: LEA should include all paid employees and contractual staff, both instructional and non-instructional, when determining whether it maintained staffing equity on an FTE basis*
  - *Applies to 2022 and 2023 as compared to 2021*



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## LEA-Level Requirement: High-Poverty School

- “High-poverty school” is a school that is in the **highest quartile of schools** served by such local educational agency based on the percentage of economically disadvantaged students served, as determined by the State.
  - *Guidance: round up to nearest whole number of schools*
- State selects any measure(s) of poverty authorized under section 1113(a)(5) of the ESEA for LEAs to use. The SEA may permit an LEA to use the measure(s) of poverty it uses to rank its schools under section 1113(a) of the ESEA.

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## New Option for LEAs – Grade Span

- In guidance ONLY
- LEA will identify high-poverty schools on a districtwide basis or by grade span
- LEAs should consider several factors to decide which option to use to identify its high-poverty schools, including:
  - *Total number of high poverty students impacted*
  - *Relative concentration of poverty in schools that would be identified compared to those that would not*
  - *Whether grade spans would capture high schools if they would not otherwise be captured*

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## From the Guidance

- Identification must be done annually
  - *i.e. twice, once each for 2022 and 2023*
  - *Fiscal year can be applicable federal or state fiscal year*
  - *Do not have to re-run the calculation if there are staffing changes*
- States should not withhold funding until compliance can be demonstrated
  - *Compliance is determined after the fact*
- No explicit deadline for LEAs (yet)
  - *But LEA should “consider” making data publicly available*

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## LEA-Level Requirement: Exceptions

- LEA MOEquity exceptions:
  - LEAs with fewer than 1000 students
  - Single-school LEAs
  - LEAs with one school per grade span LEAs that “demonstrate[] an exceptional or uncontrollable circumstance, such as unpredictable changes in student enrollment or a precipitous decline in the financial resources of such agency, as determined by the Secretary of Education.”



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## Updated Guidance: New Exceptions

- “Exceptional Circumstances” may include an LEA that “did not and will not implement an aggregate reduction in combined State and local per-pupil funding in FY 2022 (i.e., is not facing overall budget reductions)”
- ONLY applies in FY 2022**
  - Must comply with MOEquity in 2023
- Must fill out form in guidance appendix and submit to State

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## Updated Guidance: New Exceptions

- Examples of “uncontrollable circumstances”
  - Increased one-time expenditures in the baseline year (school year 2020-2021) due to the pandemic
  - A “very small school where the MOEquity calculations do not result in meaningful information about resource availability”
  - An uncontrollable circumstance “such as a significant change in the expenses of a school that no longer serves a student whose educational and support needs required services that have a particularly high cost.”

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## NEW: LEA MOEquity Exemptions

- Document issued by ED in October 2021
- For LEAs exempt for reasons of size (less than 1000 students, single school, one school per grade span)
  - → maintain documentation of reason for exemption and share with SEA for "further monitoring and auditing purposes"
- For LEAs with no aggregate reduction in State and local per-pupil funding
  - → fill out Appendix B of MOEquity FAQs and submit to SEA

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## How does an LEA get a waiver?



- Appendix B form only applies to LEAs without a reduction in spending
- The Department anticipates very few "exceptional or uncontrollable circumstances" that prevent an LEA from maintaining equity.
- ED: "each claim of exemption will require a case-by-case review by the Department."

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## NEW: LEA MOEquity Exemptions

- For LEAs with other "exceptional or uncontrollable circumstances," can file a request for exemption
  - → submit request to ED via the State's OESE mailbox (i.e., [Alabama.oese@ed.gov](mailto:Alabama.oese@ed.gov)) and cc State.
  - Request "should provide detailed information on the exceptional or uncontrollable circumstance and how it prevents the LEA from maintaining equity."
  - Case-by-case review by ED
  - "Once the claim has been reviewed, the Department will advise the LEA whether the exception request has been approved and copy appropriate SEA officials."

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**NEW: Federal Register Notice re: Enforcement**

- DRAFT: State must publish data by December 31 each year for EACH LEA including:
  - Whether the LEA is exempt from MOEquity this year
  - If not, which schools are identified as "high-poverty schools"
  - Per-pupil funding and staffing for each identified school and LEA-wide (or by grade span as applicable)
  - Whether LEA did not maintain equity for any identified school
  - Comments due 11/4

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**NEW: MOEquity standard a WIP?**

- Federal Register notice asking questions about special situations
  - What funding aspects haven't we considered?
  - What special circumstances might require a waiver?
  - How to achieve purposes of provision
  - Comments due within 11/4

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**Have you run the numbers on MOEquity yet?**

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## ESSER Allowability FAQs



I knew exactly what to do. But in a much more real sense, I had no idea what to do.

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## When do ESSER funds have to be obligated?

|                    | CARES – ESSER 1                        | CRRSA – ESSER 2                       | ARP – ESSER 3                         |
|--------------------|--|---------------------------------------|---------------------------------------|
| Start date         | March 13, 2020                         | March 13, 2020                        | March 13, 2020                        |
| Statutory end      | September 30, 2021                     | September 30, 2022                    | September 30, 2023                    |
| Tydings Period     | September 30, 2022                     | September 30, 2023                    | September 30, 2024                    |
| Liquidation Period | December 30, 2022<br>January 28, 2023* | December 30, 2023<br>January 28, 2024 | December 30, 2024<br>January 28, 2025 |

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## Can I use my ESSER funds on...

- Building a modular unit
- Installing turf
- Replacing a roof
- Building an aqua therapy pool
- Paving roads between schools
- Installing cameras on buses and in schools
- Upgrading internet and phone systems
- Installing fire/safety security system
- Replacing doors and windows
- Installing HVAC units that are old
- Replacing lighting
- Buying a building to reduce class size
- More air filters
- Custodial equipment
- Bathroom renovation
- Furniture
- Playground equipment
- Buses, vans, other vehicles

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## Can I use my ESSER funds on...(cont.)

### It depends!

All Allowable Uses Must Meet 3 Requirements!

- 1. Prevent, Prepare for, and Respond to Coronavirus**  
(ESSER FAQ B-6)
- 2. Be an allowable use of ESSER funds**
  - Any of the ESSER funds may be used to support all of the allowable uses of funds listed in any of the ESSER Programs (ESSER FAQ A-1)
- 3. Be in approved plan with prior approvals from the SEA, as necessary.**

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### Can we use ESSER funds to update our exterior doors and the electromagnetic locks (badge system)?

- Probably yes ...
  - If show links "to prevent, prepare for and respond to the coronavirus"



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### Can I charge construction costs to ESSER funds?

- Yes, but many requirements must be met beyond UGG requirements!
- Prior written approval from SEA (200.439)
- Construction regulations 34 CFR 76.600 (including Davis-Bacon)

Be careful to ensure timely implementation!! (CARES-2022, CRRSAA-2023, ARP-2024)



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### Can I charge new construction costs to ESSER funds?

"Yes ... However, the Department discourages LEAs from using ESSER and GEER funds for new construction because this use of funds may limit an LEA's ability to support other essential needs or initiatives. Remodeling, renovation, and new construction are often time-consuming, which may not be workable under the shorter timelines associated with ESSER and GEER funds." ESSER FAQ B-6



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### Does Davis-Bacon only apply to construction?

- No.
  - Applies to all federally-funded contracts in excess of \$2,000 related to construction, alteration, repairs, painting, decorating, etc.
  - Must pay workers no less than the locally prevailing wage & fringe benefits for corresponding work in the area. ESSER FAQ B-6

<https://www.dol.gov/agencies/whd/governmentscontracts/construction/regions>



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### Can we use ESSER funds to pay for HVAC replacement contracts entered into prior to March 13, 2020?

- No.
- If additional or changed expenses due to COVID, then yes, but ...
  - Prior approval, 200.439 (permitted later if no reimbursement);
  - May need to amend contract terms and conditions (i.e. Davis-Bacon, etc.)
  - Necessary, reasonable and allocable;
  - Must "prevent, prepare for and respond to the coronavirus"



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### Can we purchase new/more buses?

- Maybe. Proceed with caution.  
*Must tie the purchase to the coronavirus (e.g., necessary for social distancing measures)*  
*Must consider other, less expensive alternatives (leasing? Travel vouchers?)*  
*Must have prior approval from the state 200.439*



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### Can we convert unused space into classrooms?

- Yes, but ... same requirements may apply as for construction depending on the work.  
*Includes: replacing old carpet with tile, bringing unused space into compliance for social distancing, creating more space for social distancing, replacement, repair, upgrading HVAC systems, window and door repair and replacement, etc. ESSER FAQ B-7*



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### Can we use ESSER funds to pay architect/engineer for bathroom renovation project?

- Probably yes ...  
*Keep in mind, must still "compete" A/E contracts; although can select solely based on qualifications, and subject to negotiating a fair price 200.320(c)(2)*



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**Will we be able to purchase touchless water fountains and under sink water heaters?**

- It depends ...
  - While the touchless water fountains have a clear tie to the overarching purpose to prevent, prepare for and respond to the coronavirus, it is less clear if water heaters are necessary in response to the pandemic.



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**Can we fix or replace broken windows to increase ventilation and improve air quality?**

- Probably yes ...
  - May needs prior approval depending on extent of repairs
  - If repairing / fixing the windows is more cost effective and gets to the same result, then that would be the more "reasonable" way forward.



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**Can we construct new waiting room areas for visitors in school lobbies?**

- Maybe...
  - Would need to demonstrate how the cost prevents, prepares for and responds to the coronavirus.



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**Can we add space to our nurses offices to create sick waiting room areas for students versus students needing other assistance?**

- Probably yes ...
  - Additional expense directly tied to the pandemic; still requires prior-approval, etc.

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**Will we be able to fix or replace our leaking roof?**

- Probably no ...
  - Repairing leaks to the roof is routine maintenance and is not a result of the pandemic
- UNLESS**
  - Show link to pandemic and demonstrate how that will "reduce risk of virus transmission and exposure to environmental health hazards."

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**Can we purchase portable classrooms for social distancing and class size reduction?**

- Probably yes ...
  - If necessary to create more safe learning spaces due to COVID
  - Needs prior approval (equipment; capital expenditures)

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**Can we buy land or buildings so that we have the room for more classrooms?**

- It Depends ...
  - Must have prior written approval
  - 200.311: Title vests in nonfederal entity; use for programmatic purposes; when no longer needed, disposition may include refunding the federal share
  - Are there less expensive alternative available? Consider rental costs: 200.465

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**Can we add on a new gymnasium or athletic fields for more social distancing for sports?**

- Maybe...
  - Consider improvements to the gymnasium to facilitate social distancing and a safer environment may be reasonable, in light of the pandemic.

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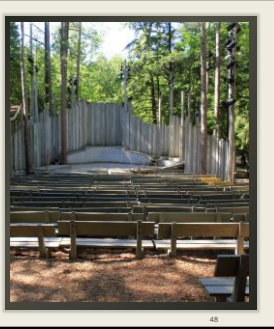
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**Can we convert an outdated outdoor auditorium for other sports use?**

- (i.e. replace flooring, weather appropriate equipment, outdoor seating etc.)
- Probably yes...
  - Needs prior approval (equipment; capital expenditures)
  - More cost-effective alternatives?

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### Can we repave our school parking lots?

- Probably no ...
  - *How does this expense tie out to overall purpose: "to prevent, prepare for and respond to the coronavirus"?*



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### Can I pay for transportation to/from school?

- Likely ok!
- Can take the form of gas cards, mileage reimbursement, or other incentives
- Make sure any incentives:
  - *Are allocated equitably*
  - *Are appropriately targeted*
  - *Are reasonable in scope/amount (in the aggregate and for individuals)*
- *Don't raise any other concerns re: allowability*



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### Can I spend ESSER on vaccination programs and incentives?

- Yes! ED broadly interprets response to pandemic to include vaccination programs/clinics and incentives
- Outreach efforts
  - *Clinics and related fees, incentives, partnership and awareness activities*
- Incentives
  - *Must be reasonable, not violate any principles of UGG*
  - *Can go to staff, students, household members*
  - *Can include entry in drawings, cash equivalent or gift card, paid time off (for staff)*



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# ESSER Performance Monitoring and Oversight



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## SEA Monitoring

200.329(d) Performance Monitoring

- SEAs must monitor performance of construction projects!
- To ensure performance, use:
  - Onsite technical inspections
  - Certified percentage of completion data

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# STOP CARES ACT FRAUD

Theft of CARES Act funding for schools robs our students.

**Be on the lookout for signs of fraud, waste, and abuse:**

- Financial conflicts of interest
- Suspicious or unverifiable vendors
- Missing school property or records
- Defective or low-quality products and services
- Irregularities in contract awards or procedures
- Nonexistent students

*If you think something is amiss, it may well be. Report your suspicions to the Office of Inspector General and we'll evaluate for fraud, waste, and abuse!*

We can provide confidentiality.

**IF YOU SUSPECT ANY WRONGDOING, REPORT IT AT [OIGHotline.ed.gov](https://oighotline.ed.gov) or call 1-800-ALLS-USED**



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## ESSER Cash Management

- Defers to general cross-cutting cash management requirements.
- Non-federal entities that are paid on a reimbursement basis, supporting documentation shows that the costs for which reimbursement was requested were paid prior to the date of the reimbursement request.

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## ESSER Equipment/Real Property Management

- For capital equipment or improvements to land, buildings, or equipment that were purchased with grant funds, the governor or SEA pass-through agency must provide prior approval to subrecipients.
- For construction, the pass-through entity must have considered applicable ED construction requirements as part of the prior approval process for construction.
  - *For construction contracts over \$2,000 must meet Davis-Bacon prevailing wage requirements*
- Determine whether the non-federal entity maintains proper records for equipment, adequately safeguards and maintains equipment, and follows proper disposition requirements – including federal compensation when required.

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## ESSER Subrecipient Monitoring

- Obtain an understanding of internal control, assess risk, and test internal control as required by 2 CFR section 200.514(c).
- Determine whether the PTE identified the subaward and applicable requirements at the time of the subaward (or subsequent subaward modification) in the terms and conditions of the subaward and other award documents sufficient for the PTE to comply with federal statutes, regulations, and the terms and conditions of the federal award.
- Determine whether the PTE monitored subrecipient activities to provide reasonable assurance that the subrecipient administered the subaward in compliance with the terms and conditions of the subaward

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## ESSER Reporting and Special Tests

- ESSER Reporting:
  - Recipients who make first-tier subawards of \$30,000 or more are required to register in the Federal Funding Accountability and Transparency Act (FFATA) Subaward Reporting System (FSRS) and report subaward data through FSRS.
- ESSER Special Tests:
  - Equitable services – follow equitable services under Title I,A
  - EANS

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## Questions

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