



Fall Forum 2023
Bracing For Significant Regulatory Changes




ESSER CONSTRUCTION PROJECTS

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CONSTRUCTION ALLOWABILITY


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USING ESSER/GEER FUNDS FOR CONSTRUCTION

- ESSER and GEER allow construction because:
 - The allowable uses of funds include anything authorized under laws, including ESEA
 - Impact Aid allows construction
 - Impact Aid is part of ESEA
 - Therefore, construction is allowable under ESSER/GEER



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USING ESSER/GEER FUNDS FOR CONSTRUCTION

- Same guiding principles of allowability:
 - Must be necessary/reasonable
 - Must be allocable to ESSER/GEER, meaning:
 - Intended to "prevent, prepare for, and respond to" COVID-19
 - Allowable under one of the listed uses of funds

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WHAT IS "CONSTRUCTION"?

- *Not Defined* in ESSER/ GEER
- Impact Aid: defines "construction" as "(A) the preparation of drawings and specifications for school facilities; (B) erecting, building, acquiring, altering, remodeling, repairing, or extending school facilities; (C) inspecting and supervising the construction of school facilities; and (D) debt service for such activities." (ESEA section 7013(3), 20 U.S.C. § 7713(3))

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ED CAUTIONS


- ED doesn't like new construction generally:
 - "the Department strongly discourages LEAs from using ESSER or GEER funds for new construction because this use of funds may limit an LEA's ability to support other essential needs or initiatives. Extensive remodeling, renovation, and new construction are often time-consuming, which may not be workable under the shorter timelines associated with ESSER and GEER funds."
 - **"the burden remains on grantees and subgrantees to maintain the appropriate documentation that supports the expenditure"**

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ED CAUTIONS



ED especially doesn't like construction on athletic facilities:

- This 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, considering the specific facts and circumstances of a project. ...It is unclear, for example, how constructing a swimming pool is related to the pandemic or otherwise allowable under the CARES, CRRSA, or ARP Act"

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USE OF FUNDS TO ADDRESS NATURAL DISASTER-RELATED DAMAGE

- OK in limited circumstances
- To the extent there are activities that are necessary to meet students' needs in response to the pandemic, including needs exacerbated by a recent natural disaster, ESSER or GEER funds may be used
- Example: To the extent that a natural disaster has caused damage to school infrastructure and buildings that would increase the risk of virus transmission or impact in-person learning, such as flood or fire damage, then ESSER or GEER funds may be used to cover the costs of activities to reduce that risk.
 - It is important for an LEA to maintain documentation and written justification as to how uses of ESSER or GEER funds are related to the COVID-19 response, particularly where costs are closely associated with damage from a natural disaster
- Should also look at available FEMA funding and/or insurance recovery

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ADDITIONAL REQUIREMENTS FOR CONSTRUCTION

- Uniform Grants Guidance Requirements, including
 - Prior written approval by SEA, Governor, or USED (depending on grantee)
 - Procurement requirements
- Timely implementation
- Appendix II to Part 200 (2 CFR 200.327)
 - **Davis-Bacon Act**
 - Contract Work Hours and Safety Standards Act
 - Clean Air Act
 - Federal Water Pollution Control Act
 - Byrd Anti-Lobbying Amendment
- Other federal and state requirements including ADA accessibility, flood mitigation, protected ecosystems, etc.

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EDGAR CONSTRUCTION REQUIREMENTS

- 34 CFR 76.600 / 75.600: EDGAR regulations regarding federal title/interest, historic registration, reasonable time for completion and sufficient operating funds, etc.
- National Historic Preservation Act
 - If it would affect historic properties, review by Advisory Council for Historic Preservation must take place (Updated FAQ B-6.d Dec 2022)
 - Applies to projects funded in whole or in part by federal funds
- Title and Use (34 CFR 75.603)

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CONSTRUCTION: PRIOR WRITTEN APPROVAL

34 CFR 200.439 Equipment and other capital expenditures.

- *(b)(1)Capital expenditures for general purpose equipment, buildings, and land are unallowable as direct charges, except with the prior written approval of the Federal awarding agency or pass-through entity.
- (2) Capital expenditures for special purpose equipment are allowable as direct costs, provided that items with a unit cost of \$5,000 or more have the prior written approval of the Federal awarding agency or pass-through entity.
- (3) Capital expenditures for improvements to land, buildings, or equipment which materially increase their value or useful life are unallowable as a direct cost except with the prior written approval of the Federal awarding agency, or pass-through entity:
 - For SEA/IHE → ED
 - For LEA → SEA

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PRIOR WRITTEN APPROVAL

- Suggested "checklist" for LEAs seeking prior written approval (select items)
 - How the project prevents, prepares for, or responds to the COVID-19 pandemic
 - Identification of the LEA's interest in, or authority over, the school facility involved, such as an ownership interest or a lease arrangement
 - Sources and amounts of funds available for the proposed project
 - A statement signed by an appropriate, independent local official affirming that
 - The project meets applicable Federal, State, and local requirements with respect to health and safety, environmental standards, Historic Preservation, and other requirements (see FAQ B-6 and 34 CFR Part 75); and
 - The renovation or construction is necessary (e.g., current status threatens the health and safety of facility occupants or prevents the use of the facility).


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PRIOR WRITTEN APPROVAL

- Suggested "checklist" for LEAs seeking prior written approval (select items) (cont.)
 - A cost estimate and other details needed to support the reasonableness and allowability of the expenditure under the applicable statute (e.g., ARP Act) and cost principles in the Uniform Guidance (e.g., the original construction date and the dates and descriptions of any other major renovations of the facility)
 - Applicable assurances and certifications (see FAQ B-6 for applicable requirements that must be met for any renovation or construction project)




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TITLE TO CONSTRUCTION SITE

- A district must have and be able to demonstrate title or other interest to the site where the construction is taking place, including right of access, that is sufficient to ensure the grantee's undisturbed use and possession of the site for 50 years or the useful life of the facilities, whichever is longer (34 CFR 75.603).



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FEDERAL INTEREST

- When SEAs or LEAS use federal funds to purchase land, construct a building, or make improvements, they must:
 - Record the federal interest in the title of the property per agency instructions
 - Include a covenant of nondiscrimination during useful life of project
 - Agree not to dispose of, modify use of, or change terms or property without permission and instructions of awarding agency (OMB Form 424D)
 - Report to the pass-through on the status of the property acquired with federal funds annually (unless different time period established) for 15 years (2 CFR 200.313)

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DOMESTIC PREFERENCE

- Buy American does not apply to ESSER/GEER
- However, ESSER/GEER are subject to 2 CFR 200.322: domestic preference
 - "(a) As appropriate and to the extent consistent with law, the non-Federal entity should, to the greatest extent practicable under a Federal award, provide a preference for the purchase, acquisition, or use of goods, products, or materials produced in the United States ... (b) For purposes of this section:
 - (1) "Produced in the United States" means, for iron and steel products, that all manufacturing processes... occurred in the United States.
 - (2) "Manufactured products" means items and construction materials composed in whole or in part of nonferrous metals such as aluminum; plastics and polymer-based products such as polyvinyl chloride pipe; aggregates such as concrete; glass, including optical fiber; and lumber."

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WHAT IS DAVIS-BACON?

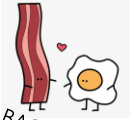
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WHAT IS DAVIS-BACON?

- A federal wage law that applies to all construction contracts over \$2,000 that use federal education funds



WRONG BACON



RIGHT BACON

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BASIC PRINCIPLES


- Projects over \$2,000 financed in any part by federal funds must meet all Davis-Bacon prevailing wage requirements and include language in the contracts that all contractors or subcontractors must pay wages that are not less than those established for the locality of the project (prevailing wage rates).
- Includes minor remodeling, renovation, repair, and/or construction of public buildings or public works
- Administered by Department of Labor's Wage and Hour Division
 - But subject to interpretation and additional administrative requirements by cognizant agency

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WHERE DOES IT APPLY?



- All federally-funded building/construction contracts over \$2,000
 - Funded in whole or in part by federal dollars
 - Once DBA applies to the prime contract, it applies to all subcontractors even if individual subcontracts are under threshold

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WHERE DOES IT APPLY?

- The term "building or work" refers to any construction activity as distinguished from manufacturing, furnishing of materials, or servicing and maintenance work. The term includes, without limitation, *buildings, structures, and other facilities on which construction type improvements are performed*. Some of the construction type improvements are related to facilities, such as: bridges, dams, plants, highways, parkways, streets, subways, tunnels, sewers, mains, power lines, pumping stations, heavy generators, railways, airports, terminals, docks, piers, wharves, ways, lighthouses, buoys, jetties, breakwaters, levees, canals, dredging, shoring, rehabilitation and reactivation of plants, scaffolding, drilling, blasting, excavating, clearing, and landscaping. (2 CFR 5.2(i))

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WHERE DOES IT APPLY?

- Department of Transportation includes:
 - Altering, remodeling, installation (where appropriate) on the site of the building or work on items fabricated off-site
 - Painting and decorating
 - Manufacturing or furnishing of materials, articles, supplies or equipment on the site of the building or work
 - Transportation between the site of the work and a facility which is dedicated to the construction of the building or work and deemed part of the site of the work
- ED guidance explicitly includes painting



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WHAT IS THE "PREVAILING WAGE"?

- The wage the DOL has determined is appropriate for the local area, based on publicly available tables
- "Wage" is the combination of the basic hourly rate and any fringe benefits listed in a Davis-Bacon wage determination.
- Prevailing wages, including fringe benefits, must be:
 - Paid on all hours worked on the site of the work
 - Based on job duties performed (e.g. can pay electrician as mechanic if that's the work they do)
- Apprentices/trainees may be paid less *if they are in an apprenticeship program registered with the Department of Labor*

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WHAT IS THE "PREVAILING WAGE"?

U.S. DEPARTMENT OF LABOR
Branch of Wage Survey Teams

Wage and Hour Division

<https://www.dol.gov/agencies/whd/government-contracts/construction/regions>



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WHO BEARS RESPONSIBILITY FOR DAVIS-BACON?

- U.S. Department of Labor:
 - Determines to which programs requirements apply
 - Sets prevailing wage
 - Offers general guidance to other agencies
- U.S. Department of Education:
 - Delegated with implementing and enforcing Davis-Bacon for applicable programs
 - i.e. ESSER/GEER


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WHO BEARS RESPONSIBILITY FOR DAVIS-BACON?

- Contractors and subcontractors must:
 - Pay covered workers weekly
 - Submit weekly certified payroll records to the contracting agency
 - Post the applicable Davis-Bacon wage determination with the [Davis-Bacon poster \(WH-1321\)](#) on the job site in a prominent and accessible place where they can be easily seen by the workers



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WHO BEARS RESPONSIBILITY FOR DAVIS-BACON?

- Contracting agencies must:
 - Ensure contract includes Davis-Bacon provisions where applicable and determine prevailing wage schedule applicable
 - Ensure payroll records are received and align with prevailing wage
 - Confirm poster is visible on work site
 - Confirm those making less than prevailing wage are in qualified apprenticeship programs



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DOL'S LIST OF "TYPICAL PROBLEMS"

- (1) Misclassification of laborers and mechanics
- (2) Failure to pay full prevailing wage, including fringe benefits, for all hours worked (including overtime hours)
- (3) Inadequate recordkeeping, such as not counting all hours worked or not recording hours worked by an individual in two or more classifications during a day
- (4) Failure to maintain a copy of the bona fide apprenticeship program and individual registration documents for apprentices
- (5) Failure to submit certified payrolls weekly
- (6) Failure to post the Davis-Bacon poster and applicable wage determination

(source: <https://www.dol.gov/agencies/whd/fact-sheets/66-dbra>)

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EANS AND DAVIS-BACON

- EANS funds must be administered by the SEA or other public agency
- An SEA that uses EANS funds for a contract over \$2,000 must meet all Davis-Bacon prevailing wage requirements AND include language in the contracts that all contractors or subcontractors must pay prevailing wage rates. (See 20 U.S.C. § 1232b Labor Standards)

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SLFRF AND DAVIS-BACON

- Davis-Bacon DOES NOT APPLY to projects under SLFRF
 - Run through Treasury, not ED
- BUT projects over \$10 million must submit a report that either Davis-Bacon or prevailing wage rates were paid

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ED GUIDANCE TO DATE



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ED RESOURCES

- <https://oese.ed.gov/files/2023/05/Davis-Bacon-Resources-and-Office-Hours.pdf>
- Webinar 4/26/2023
- Office Hours 5/16/2023
- Discussions provided by DOL staff

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DEFINING A PROJECT

- Include all parts in a project
- Dividing into separate contracts does not necessarily cancel out Davis-Bacon requirements
 - E.g. demo and build are both covered by DBA, even if they're separate contracts
 - Breaking up into equipment and installation doesn't break coverage
- All subcontracts covered by the main contract, even if individual subcontracts are under \$2,000

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DEFINING A PROJECT

- What if we use...
 - Volunteers?
 - If they're volunteering outside the contract, may be ok
 - Someone who "volunteers" for the contractor is still covered by DBA
 - Employees?
 - If they are not performing work under a separate contract, not covered by DBA
 - Independent contractors?
 - Must receive at least prevailing wages and fringe benefits owed to them for their classifications of work for all hours worked

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HOW TO FIND WAGE DETERMINATION


- Based on local area, available in sam.gov
 - Some specific wage determinations for types of jobs
 - "Heavy" wage determinations for certain types/portions of projects
- Can request a specific project determination from DOL's Wage and Hour division
- DOL recommends that you incorporate actual wage determination (or ID number) into contract

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TIMING OF WAGE DETERMINATION



- Wage determination must be made within 10 days of bid opening
- Contract must be awarded within 90 days of bid opening or wage determination needs to be updated
 - Can get an extension from DOL based on undue hardship or injustice

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INDIVIDUAL WAGE DETERMINATION

- Contractor decides what kind of work needs to be on each contract
- Each classification or worker is paid based on work done
 - i.e. pay as an electrician if they do electrical work
 - Can split rate if they perform multiple jobs in a pay period
- No federal definitions for each job - based on local industry and practice
 - If there is no local determination, ask for one with DOL

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CONTRACTOR RECORD-KEEPING

- Keep payroll records
 - Must do certified weekly payroll for DBA contracts even if normal practice is biweekly pay
- Keep records in support of certified payrolls
 - Time records
 - Additional payroll records
 - Records of fringe benefit contributions and how calculated
 - Records showing apprentices are properly registered and paid
- Make these records available to DOL, pass-through entities, and grantees who wish to inspect

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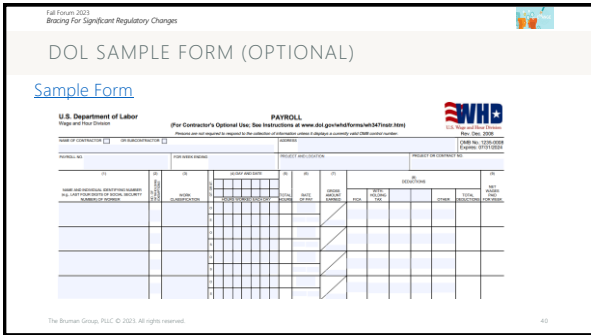
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WHAT IS A "CERTIFIED" PAYROLL?

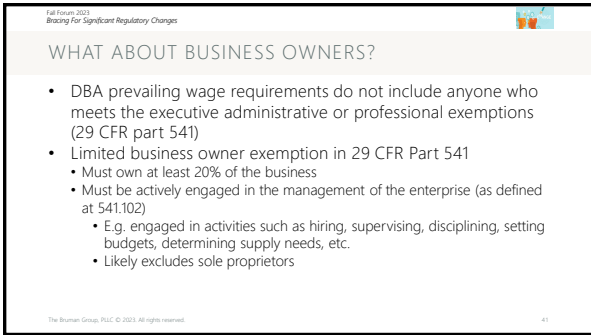
- Signed and certified as accurate by the contractor, subcontractor, or authorized officer
 - Someone in a position to know information is complete and accurate
 - E-signatures are ok
 - Felony to submit falsified records or ask employees to return a portion of their certified wage
- Submitted to grantee within 7 days of completion
- Any deductions from wages (e.g. for healthcare) require employee approval

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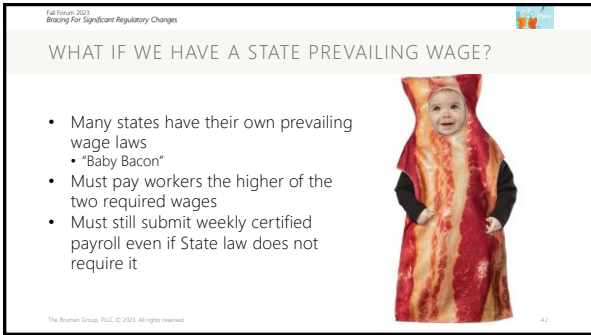
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HOW DO GRANTEES MONITOR COMPLIANCE?

- Ensure that payroll records are filed timely
- Check payroll records for any inconsistencies; interview workers if needed to confirm
 - Includes "cross-interviews" (ask about each other)
 - Enough interviews to determine scope and scale of issue
- Ensure prevailing wage information is appropriately posted on job site
- Site visits "ideal"
 - Allows inspection of work, gathering contact information for employees

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WHAT DO WE DO WITH PAYROLL RECORDS?

- Ensure they are being collected weekly
- Check for red flags, "face of record" violations (e.g. no signature, wrong date)
- Keep them stored and accessible for at least 3 years after the end of the project



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WHAT ARE RED FLAGS?

- Are the numbers "too perfect?"
 - Does the person work exactly 32.5 hours every week?
 - Are the hours a perfect multiple of hourly wage?
 - Are they just under 40 hours weekly?
 - Are there disproportionate overtime amounts/rates?
- Misclassification of employees
 - Too many apprentices
 - All "laborers" on a project with skilled labor required (e.g. electrical contract)
- Contractor doesn't allow further inspection of records

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POSTING REQUIREMENTS

- Contractors must post DBA employee rights poster somewhere visible
- Must also post wage determinations and categories
- This is a big area of findings!
- <https://www.dol.gov/agencies/whd/posters/dbra>

EMPLOYEE RIGHTS UNDER THE DAVIS-BACON ACT

FOR LABORERS AND MECHANICS EMPLOYED ON FEDERAL OR FEDERALLY ASSISTED CONSTRUCTION PROJECTS

PROBLEM: The contractor is not providing the required weekly payroll information to the LEA.

ISSUE: The contractor is not providing the required weekly payroll information to the LEA.

ENFORCEMENT: The contractor is not providing the required weekly payroll information to the LEA.

APPLICABLE: The contractor is not providing the required weekly payroll information to the LEA.

FINED BY: The contractor is not providing the required weekly payroll information to the LEA.

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HOW SHOULD THE STATE MONITOR?


- ED is delegating responsibility for monitoring to SEA
 - DOL: ED will do "spot monitoring" of contractors
- Ensure LEAs are meeting contracting and other requirements
- May do "reasonable spot checks" of payroll
- Ensure records are being reviewed by LEA and maintained for at least 3 years
- Notify ED if a grantee or subcontractor has not followed requirements

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WHAT TO DO IF NONCOMPLIANCE IS IDENTIFIED?



- If payroll is not being provided:
- Can withhold payments to contractor until the certified weekly payroll are provided
- Must include written statement of compliance to be certified

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WHAT IF NONCOMPLIANCE IS IDENTIFIED AFTER PROJECT IS OVER?

- If contract fails to include Davis-Bacon requirements
 - Incorporate retroactively to the beginning of the contract
 - If payroll is filed correctly, ensure records are completed and append a statement outlining circumstances
 - As long as workers were paid at least DBA wages, DOL does not customary use a monetary penalty
 - ED may impose requirements that LEA improve contract practices (or other)

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WHAT IF NONCOMPLIANCE IS IDENTIFIED AFTER PROJECT IS OVER?

- If contractor fails to pay Davis-Bacon wages
 - LEA should work with them to figure out how to correct practices
 - Payments can be withheld until issues rectified, and can be terminated for significant noncompliance
 - Contractor should pay back wages to workers – there is no statute of limitations
 - Grantee should hold any remaining funds for direct payment – takes precedent over all other costs
 - If contractor fails to pay prevailing wage in violation of contract in a way that is "egregious," can be debarred

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CONSEQUENCES FROM ED TO LEA

- Likely:
 - Require updating of internal policies and procedures
 - Retroactively update current contracts
 - Determine scope of issue
 - Require LEA to allocate additional funds for payment of DBA wages
- Possible:
 - Require payback of funds

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CONSTRUCTION MONITORING

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COMPLIANCE SUPPLEMENT – PRIOR APPROVAL

Governors, SEAs, and subrecipients must receive prior approval for capital expenditures for equipment acquisition or improvements to land, buildings, or equipment

- For capital equipment or improvements to land, buildings, or equipment that were purchased with grant funds, the Governor or SEA must receive prior approval from ED
- For capital equipment or improvements to land, buildings, or equipment purchased with grant funds, the Governor or SEA, as the pass-through entity, must provide prior approval to subrecipients

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COMPLIANCE SUPPLEMENT – CONSTRUCTION ALLOWABILITY

For construction, the pass-through entity must have considered applicable ED construction requirements as part of the pass-through entity's prior approval process for construction

- For example, if an LEA proposed renovating a school building to increase the filters or ventilation to its HVAC system, the pass-through entity must ensure compliance with applicable construction regulations (such as 34 CFR 75.609 (Safety and Health standards) and 75.616 (Energy Conservation))?

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