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Four Important, Overarching Legal Requirements under the General Education Provisions Act (GEPA)

[NOTE: This document was originally drafted as part of a longer CLE analysis of the original CARES Act and makes reference to it. However, these requirements apply equally to the education funding in the second round of CARES Act funding and the American Rescue Plan Act (ARP). It also applies to most other federal programs funded by the U.S. Department of Education.^{1]}

Whatever else appears in the Secretary’s application requirements for CARES Act funds, there are certain conditions under the General Education Provisions Act (GEPA)² that apply to these grants³ and that embody important principles for planning and implementing the grants (including the allocation of funds to the various allowable uses).

1. Participatory Planning and Operation. This is required of both the State and each LEA.

- The SEA must have a signed assurance “that ***the State will provide reasonable opportunities for the participation by local agencies, representatives of the class of individuals affected by each program and other interested institutions, organizations, and individuals in the planning for and operation of each program***” – in this case the ESSER fund.⁴

¹ Requirements in Sections 441 and 442 of GEPA, some of which are discussed below, do not apply to programs that are part of the Elementary and Secondary Education Act, which has its own set of similar requirements.

² This document does not attempt to cover all GEPA assurances and requirements that apply to these grants, but instead identifies four that we believe are particularly important and that may not otherwise receive adequate attention.

³ GEPA applies to *all* “applicable programs,” which “means any program for which the Secretary or the Department [of Education] has administrative responsibility as provided by law or by delegation of authority pursuant to law.” GEPA Section 400(c)(1) [20 U.S.C. Sec. 1221]. The required assurances and descriptions discussed here may appear in separate, already existing “single State applications” and “single local educational agency applications” or in particular State or LEA applications for the programs here. GEPA Sections 441(a) and 442(a) [20 U.S.C. Sec. 1232d(a) and 1232e(a)].

⁴ GEPA Section 441(b)(7) [20 U.S.C. Sec. 1232d(b)(7) (emphasis added)]. The State-level required assurance, unlike the LEA-level one, has additional language:

“(7) that the State will provide reasonable opportunities for the participation by local agencies, representatives of the class of individuals affected by each program and other interested institutions, organizations, and individuals in the planning for and operation of each program, including the following:

“(A) the State will consult with relevant advisory committees, local agencies, interest groups, and experienced professionals in the development of program plans required by statute;

“(B) the State will publish each proposed plan, in a manner that will ensure circulation throughout the State, at least sixty days prior to the date on which the plan is submitted to the Secretary or on which the plan becomes effective, whichever occurs earlier, with an opportunity for public comments on such

- Each LEA must also must have a signed assurance “that ***the local educational agency will provide reasonable opportunities for the participation by teachers, parents, and other interested agencies, organizations, and individuals in the planning for and operation of each program.***”⁵

These assurances for participatory planning and operation need to be taken seriously and must not be short-changed in the rush of the pandemic. The challenges of providing high-quality education, meeting children’s individual needs, and ensuring the safety and well-being of children and staff call for the engagement of all the groups recognized in these two provisions. As we are seeing on the health-care side of things, commitment and ingenuity from many sources are at a premium in meeting new challenges. While democratic principles and experience tell us that deep and broad engagement from this range of involved and affected people results in both better policies and stronger, more informed commitment to implementing them effectively, this is even truer now. And the social isolation required to deal with the pandemic makes attention to ensuring this engagement all the more important, albeit challenging. These requirements apply to choosing among allowable uses of the funds; shaping of the particular programs, strategies, and specifics within those broad uses; and their implementation.

Strong family engagement both in planning for use of the funds and in implementation, important because of what is at stake, educationally and more, for their children, has become even more important as the home has become the place where the child’s education occurs, often with parents or other family members present and trying to support their children’s learning. As a result, family members who may now be home during the day have an even wider window than usual into their child’s learning, which needs to be tapped consistently in order to address the challenges of effective instruction. The experience that family members gain during this period of school closure should continue to be tapped systematically once schools reopen, especially where the inconsistencies of students’ educational services during this time will need to be addressed. Secondary school students, though not explicitly identified in the language above, are certainly “other interested individuals” and should also be engaged in planning and operation at State and local levels.

Organizations that advocate on behalf of students and families also need to participate effectively at both State and local levels, as they too are important sources of information, ideas, and experience with policy-making, its implementation, and its impact. And they play an important role as advocates in making sure the voices and interests of families and students heard and addressed.

Real engagement and participation in planning isn’t simply about letting people comment on a plan after it’s been fully drafted. It’s an ongoing process of dialogue and authentic partnership across the spectrum of constituents. It also requires ensuring that those people have all the information, in accessible form, and any supports needed to be full and informed participants.

plan to be accepted for at least thirty days;
“(C) the State will hold public hearings on the proposed plans if required by the Secretary by regulation; and
“(D) the State will provide an opportunity for interested agencies, organizations, and individuals to suggest improvements in the administration of the program and to allege that there has been a failure by any entity to comply with applicable statutes and regulations.”

Assuming that the Secretary does not require the SEAs to submit an actual plan, provisions (A)-(C) will not apply, but (D) will. But in either case, the broader requirement for reasonable opportunities for participation in planning and operation will apply – since everything after that is under “including,” which does not limit the broader requirement (as “by” would).

⁵ GEPA Section 442(b)(5) [20 U.S.C. Sec. 1232e(b)(5)] (emphasis added).

While the elimination of in-person meetings resulting from the pandemic poses additional challenges for participatory planning, organizations are also finding that effective use of technology for virtual meetings, as well as for document sharing, can actually *increase* the number and engagement of people who would find it easier to participate on line than to travel to a meeting, including advocates, community organization staff, and family members -- provided that there is equitable, effective access to the Internet and provision of translators for family members with limited English and use of assistive technology devices and signing for those with disabilities using other modes of communication.

2. Equitable Access and Participation

- The Secretary must “***require each applicant for assistance under an applicable program (other than an individual) to develop and describe in such applicant’s application the steps such applicant proposes to take to ensure equitable access to, and equitable participation in, the project or activity to be conducted with such assistance, by addressing the special needs of students, teachers, and other program beneficiaries in order to overcome barriers to equitable participation, including barriers based on gender, race, color, national origin, disability, and age.***”⁶

This requirement also applies to both the SEA’s application to the Department and the LEA’s application to the SEA.⁷

The specific recognition of barriers based on gender, race, color, national origin, disability, and age is important. And that portion of the requirement reinforces the various civil rights laws that apply. But it is also important to recognize that while barriers based on those characteristics are “included,” the provision is not limited to them. Indeed, it has become widely apparent that the pandemic and the closing of schools have exacerbated challenges and barriers to equitable access and participation for students in low-income families, as well for homeless students and students in foster care, among others.⁸

In allocating resources, attention to individual student needs is always crucial – both in terms of learning needs and in terms of other factors impacting students’ learning. But it has become both more challenging and more important than ever – both now with schools closed and upon their reopening.

Students who were already behind and not meeting grade-level standards before the pandemic – disproportionately from low-income families, of color, with disabilities, learning English, in foster care,

⁶ GEPA Section 427(b)) [20 U.S.C. Sec. 1228a(b)]. The purpose of this requirement is found in subsection (a):

“The purpose of this section is to assist the Department in implementing the Department’s mission to ensure equal access to education and to promote educational excellence throughout the Nation, by—

“(1) ensuring equal opportunities to participate for all eligible students, teachers, and other program beneficiaries in any project or activity carried out under an applicable program; and

“(2) promoting the ability of such students, teachers, and beneficiaries to meet high standards.”

⁷ “Applicant” means a party requesting a grant *or subgrant* under a program of the U.S. Department of Education. [34 C.F.R. Sec. 77.1.]

⁸ Note also that Title I and the Carl D. Perkins Career and Technical Education Act call for attention to that wider set of population groups.

and/or homeless – are at risk of falling further behind and of becoming disconnected from school altogether. Equal effective access to distance learning technology is just one piece of the challenges and needs for these children that must be met.

Further, lower-income families are disproportionately less likely to have jobs that can be done from home. For those who are laid off, there are the family stresses from having even less income with which to meet basic human needs. For those who continue to work outside the home, aside from the greater risks of contracting the virus and of passing it on to their children, they are not available to assist their children in effectively and consistently making use of distance learning.

Allowable uses of ESSER funds particularly addressed to equity and meeting needs:

- *Activities to address the unique needs of low-income children or students, children with disabilities, English learners, racial and ethnic minorities, students experiencing homelessness, and foster care youth, including how outreach and service delivery will meet the needs of each population.* [Allowable use #(4)⁹.]
- *Any activity authorized by ESEA, IDEA, the Adult Education and Family Literacy Act, the Perkins CTE Act, and the education provisions of the McKinney -Vento Homeless Assistance Act.* [Allowable use #(1).] Each of these major federal education programs either is either devoted to meeting the educational needs of one or more particular population groups of students or has a substantial focus within it on attending to the needs of a variety of those populations. For instance, the Perkins Career and Technical Education Act has provisions regarding “special populations” (which is defined to include all the populations identified in allowable use #(4) above) for non-discrimination, actions to overcome barriers resulting in unequal rates of participation or success in programs, and services to meet their needs. The federal requirements of these laws remain in effect during the pandemic. This allowable use is a vehicle for channeling more resources to the listed programs where they are working well and for improving them when needed.
- *Providing principals and others school leaders with the resources necessary to address the needs of their individual schools.* [Allowable use #(3).] LEAs will receive ESSER funds in proportion to their Title I funds (i.e., based on their numbers of low-income children). But unlike Title I funds, which then go to higher-poverty schools in the district based on their numbers of low-income students, there is no federal formula for then distributing funds to each school.¹⁰ So the principle in this use of funds is important – providing the resources necessary to address the needs of individual schools, with the recognition (clear in Title I and other federal laws) that schools with higher proportions of low-income students or of students who experience other challenges to learning require more resources to meet their needs. In using these new funds to address those school needs, it is also important to remember that the Title I fiscal requirements remain in effect.¹¹ These requirements seek to ensure that a district’s higher-poverty Title I schools (a) get all the State and local funds that they would otherwise receive in the absence of the Title I funds, so that the federal funds “supplement, not supplant” those State and local

⁹ CARES Act Sec. 18003(d)(4). [Allowable uses in the other bullets also key to parallel numbers in Sec. 18003(d).]

¹⁰ Indeed, given the nature of the educational needs resulting from the pandemic and the impact of school closure, there is, for good reason, no fixed expectation for how much of the resources and services are provided directly from the district and how much from and through individual school administrations.

¹¹ For “supplement, not supplant” and “comparability of services” in section 1118(b) and (c) of ESEA.

funds; and (b) the State and local funds provide services that are comparable to the other schools in the district (again, so that the federal money provides additional resources).

Other allowable uses of ESSER funds speak to needs affecting all students, but draw specific attention to particular students:

- *Planning and implementing activities related to summer learning and supplemental afterschool programs, including providing classroom instruction or online learning during the summer months and addressing the needs of low-income students, students with disabilities, English learners, migrant students, students experiencing homelessness, and children in foster care.* [Allowable use #(11).]
- *Planning for and coordinating during long-term closures, including for how to: provide meals to eligible students, provide technology for online learning to all students, how to provide guidance for carrying out requirements under IDEA, and how to ensure other educational services can continue to be provided consistent with all Federal, State, and local requirements.* [Allowable use #(8).]
- *Purchasing educational technology (including hardware, software, and connectivity) for students who are served by the local educational agency that aids in regular and substantive educational interaction between students and their classroom instructors, including low-income students and students with disabilities, which may include assistive technology or adaptive equipment.* [Allowable use #9.]

**Timing Demands:* The descriptions of the steps to ensure equitable access and participation are required as part of the ESSER applications – both the State’s application to the Secretary and LEAs’ applications to the SEA -- so agencies, educators, families, and advocates will have to participate quickly in developing them, but not at the expense of participatory development of plans that are well thought out to effectively address those needs. At the same time, further planning and refining should not end with the submission of the application.

3. Effective Practices / Learning from Each Other

- The SEA must have a signed assurance “that ***the State will adopt and use proper methods of administering each applicable program, including—***
 “(B) providing technical assistance, where necessary, to such agencies, institutions, and organizations [responsible for carrying out each program],
 “(C) encouraging the adoption of promising or innovative educational techniques by such agencies, institutions, and organizations,
 “(D) the dissemination throughout the State of information on program requirements and successful practices.”¹²
- Each LEA must have a signed assurance “that ***the local educational agency has adopted effective procedures for acquiring and disseminating to teachers and administrators***

¹² GEPA Section 441(b)(3) [20 U.S.C. Sec. 1232d(b)(3)].

participating in each program significant information from educational research, demonstrations, and similar projects, and for adopting, where appropriate, promising educational practices developed through such projects.”¹³

Administrators, teachers, and other education personnel are hungry for ways of meeting students’ needs in this extremely challenging context. There is a lot of variety among the plans and adaptations being undertaken across states and school districts. Some of that variation is part of creative processes, while some of it reflects differences in quality and adequacy, and we have seen that this in turn correlates at least in part with variations between resource-rich and less resource-rich districts. The expectation and capacity for quickly but accurately sharing, learning, and using relevant practice and research is critical, and needs to be addressed now at both State and LEA levels.

4. Monitoring

- The SEA must have a signed assurance “that ***the State will adopt and use proper methods of administering each applicable program, including—***
 “(A) monitoring of agencies, institutions, and organizations responsible for carrying out each program, and the enforcement of any obligations imposed on those agencies, institutions, and organizations under law,
 * * * *
 “(E) the correction of deficiencies in program operations that are identified through monitoring or evaluation.”¹⁴

Monitoring is not only about whether funds were spent for allowable purposes. In particular, as part of ensuring that the programs are carried out in accordance with all applicable statutes, regulations, program plans, and applications, attention should be given specifically to the three other GEPA requirements above – participatory planning and operation, equitable access and participation, and effective practice provisions. The monitoring of those three requirements should be built into the planning of them. And that monitoring should be (in the parlance of assessment) not just “summative,” at the end of the programs’ operation, but “formative,” along the way, so that the SEA, LEAs, educators, and advocates can make constructive use of it to improve these three functions. This should be addressed by the State as part of its planning. But regardless of whether and how well the SEA does so,

¹³ GEPA Section 442(b)(8) [20 U.S.C. Sec. 1232e(b)(8)].

¹⁴ GEPA Section 441(b)(3) [20 U.S.C. Sec. 1232d(b)(3)]. GEPA also allows the Secretary to require the State to submit a plan for monitoring local agencies [Section 440(a), GEPA Sec 20 U.S.C. Sec. 1232c(a)].

GEPA also requires other, related State and local assurances:

- That each program will be administered by the SEA and the LEA in accordance with all applicable statutes, regulations, program plans and applications [Sections 441(b)(1) and 442(b)(1), 20 U.S.C. Sec. 1232d(b)(1) and 1232e(b)(1)];
- That the SEA will evaluate the effectiveness of covered programs in meeting their statutory objectives at intervals (of at least once every three years) and with procedures set by the Secretary [Section 441(b)(4), 20 U.S.C. Sec. 1232d((b)(4)];
- That SEAs and LEAs will submit reports and maintain records [Sections 441(b)(6) and 442(b)(4), 20 U.S.C. Sec. 1232d(b)(6) and 1232e((b)(4); and
- That SEAs and LEAs will use of proper fiscal control and fund accounting procedures [Sections 441(b)(5) and 442(b)(3), 20 U.S.C. Sec. 1232d(b)(5) and 1232e(b)(3)].

it should be built in by each LEA as part of its planning.

The Intersection of the Four Key Requirements

The four requirements are mutually reinforcing. Each is important for successful implementation of the others:

- Active, robust participation in the planning and implementation, including by educators, students, families, and their advocates, is important for: Identifying equity-based needs and problems, for devising approaches and solutions, and for ensuring that they are effectively implemented; building and growing a shared knowledge base of effective practice in confronting new and rapidly changing challenges; and successful monitoring that accurately identifies problems and that insists on and contributes effective responses.
- Equity lenses and equity-based resources and expertise are needed for: ensuring that participatory planning and implementation is inclusive and successful; for ensuring that effective practices are aimed at overcoming educational barriers and reach the schools and educators serving students most in need; and as a key focus of effective monitoring;
- Effective monitoring is a critical component in order to turn the requirements and assurances for participatory planning and implementation, equity, and effective practices into reality.

New Thinking Required

It is not enough for the State and LEAs to automatically rely on whatever has been done in the past to comply with these four requirements in regard to other federal programs. First, the quality, effectiveness, and thoroughness of past efforts in these areas -- to build real partnerships with educators, students and families, advocates, and other community resources in the planning and implementation of programs; to ensure equity in access and successful participation and overcome barriers to it faced by the full range of students; to create an ongoing educational culture that successfully creates shares, absorbs, adopts, and adapts effective and innovative practices; and to effectively, critically, and constructively monitor its programs and use the results for real improvement -- has been uneven at best, with varying degrees of attention. These are complex tasks, and the capacity to carry them out effectively has itself been subject to inequalities. Second, doing these tasks successfully during the COVID-19 crisis is both more challenging and more necessary. So yes, we should be learning from what has previously been done in each of the four areas -- both successfully and less so, but with fresh perspective and a determination to fulfill their full meaning. The pandemic, for all its horrible consequences, has also stimulated, in areas beyond education, innovative thinking and a new look at existing structures and fault lines.