



# The Federal Education Grants Process: An Overview and Update



# **The Federal Education Grants Process: An Overview and Update**

Office of the State Superintendent of Education  
(OSSE)

Federal Grants Management Conference

Friday, September 27, 2013

Marriott Wardman Park

**Michael Brustein, Esq., Presenter**

# Topics



- Legal Authorities
- Funding and Sequestration
- OMB and OIG Proposals to Revise Grants Management



# Legal Authorities

# Hierarchy of Authority



1. Program Statute
2. Program Regulations
3. Administrative / Cost Circulars (EDGAR)
4. Agency Grant Announcement in Federal Register
5. Guidance



# Program Statutes



1. Purpose
2. Allowable Use of Funds
3. Eligibility
4. Accountability
5. Reports



- Example → General Education Provisions Act (GEPA)
  1. Privacy – FERPA
  2. Enforcement
  3. Data Collection
  4. Research

# Program Regulations



- Interstitial
- NPRM / Final Regulation
- Negotiated Rulemaking
  - e.g. “gainful employment”
- 1994 “Reinventing Government” 90% of federal education regulations withdrawn

# Circulars



- A-87, A-21, A-122 (cost)
- A-102, A-110 (Administrative)
- A-133 (Audit)



# EDGAR Adoption of Circulars



- Part 74 – Administrative / Postsecondary
- Part 80 – Administrative / State / Local



- Part 75 – Direct Grants
- Part 76 – State Administered

# Agency Grant Announcement in Federal Register



- Is it a “safe harbor” (e.g. Valencia College Case)?



Federal Register

# Guidance



- Suggested means of achieving compliance
- “Good Guidance” v. “Bad Guidance”

# Guidance



- Phone calls
- Emails
- Letters
- PowerPoint Trainings
- Memos



# Can You Rely on Informal Guidance?



- Estoppel
- Mitigating Circumstances
  - 34 CFR 81.33 (90 Day Letter)



# Case Law



- Equitable remedies
- Each agency provides different procedures
  - e.g. ED vs. NSF



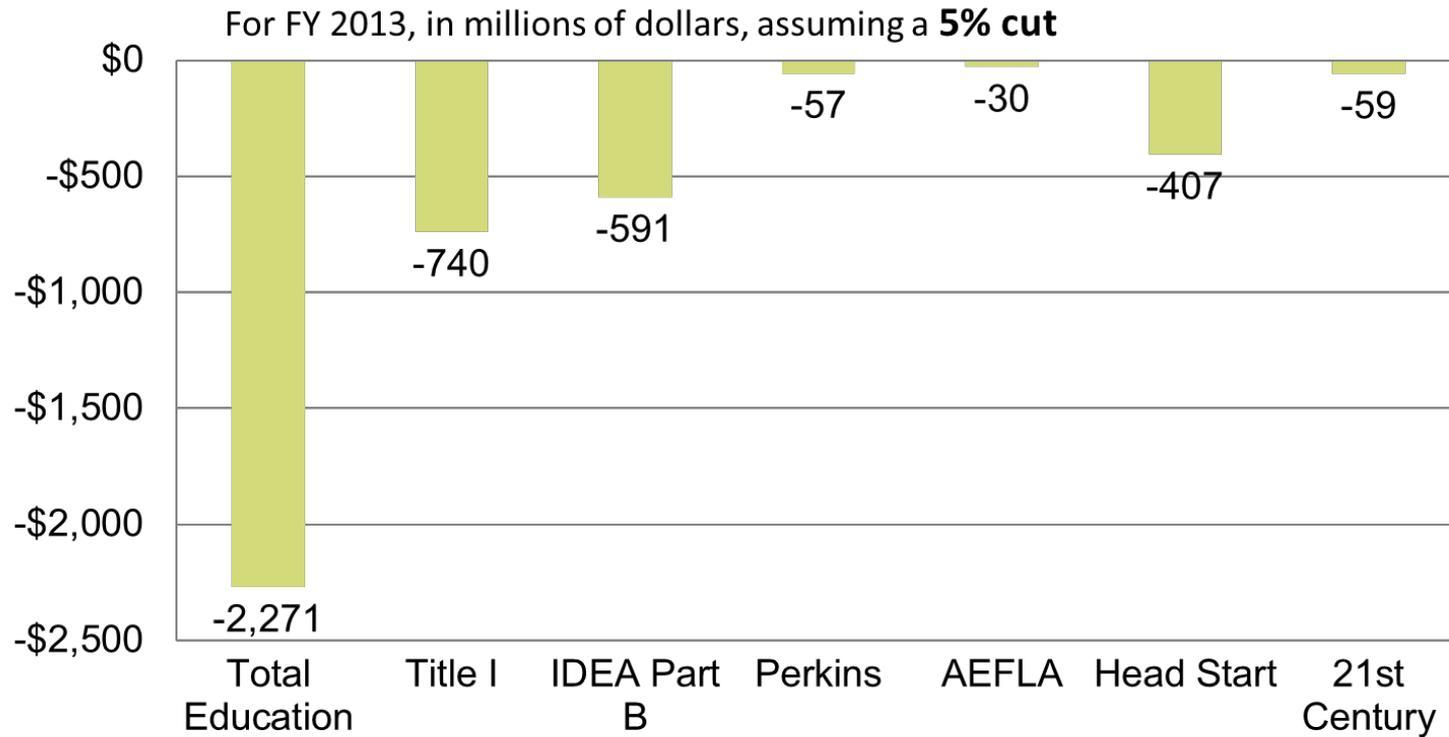
# Sequestration and Federal Funding

# Sequestration, Generally



- Sequestration was triggered by 2011 Budget Control Act (BCA) after failure of Congressional debt “supercommittee”
- Procedure generally follows 1985 Balanced Budget and Deficit Control Act, but specifics are subject to modification by Congress at any time
- This sequester was modified most recently in the American Taxpayer Relief Act of 2012, commonly known as the “fiscal cliff deal.”
  - That law changed the start date of sequester cuts and the amount of cuts for FY 2013
- In FY 2013, cuts are carried out as automatic, across-the-board reductions to all non-exempt programs, projects, and activities

# The Impact of Sequestration



# Sequestration, Generally



- Cuts made at “program, project, or activity” level
  - i.e. individual grant
- Sequestration cuts were implemented with first allocation after March 1, i.e.:
  - For single-allocation programs like Head Start, beginning with programs which receive annual funding on April 1
  - For competitive grant programs, beginning with first competition using FY 2013 funds
    - Agency can decide how implement cuts (smaller grants or fewer grants)
  - For bifurcated funding programs like Title I of ESEA, the first allocation of FY 2013 budget year went out in full; cuts were deducted from the second budget year.

# Some Caveats on Sequestration



- Implementation plans may vary between agencies
  - E.g. Forest Service asked for money back from some grants
- Actual allocations may vary by more or less than 5% sequestration cut
  - Cuts are relative to FY 2013 budget, so changes in program funding levels have outsized impact
  - Budget allocations at State and district level vary due to:
    - New Census/population data
    - “hold harmless” and small State minimum requirements
  - Second 2013 CR made additional 0.2% cut

# Sequestration in FY 2014 (and Beyond)



- In FY 2014 through FY 2021, additional cuts are supposed to be implemented through reductions to 302(b) caps
  - These are internal limits that Congress sets on its own spending. They are set by House and Senate Appropriators in response to total spending goals set by their respective Budget committees
  - House and Senate usually set different limits, then compromise on 302(b) caps and actual spending levels
  - This would function as part of regular annual budget process

# Sequestration in FY 2014 (and Beyond)



- Sequestration still requires Congress to pass a budget in each of the appropriations accounts, and that budget must comply with two major rules of the sequester.
  - (1) Must take cuts equally from defense and non-defense spending
  - (2) Must meet BCA requirements for reductions to spending caps
- Under law, cuts for FY 2014 are supposed to be incorporated into regular appropriations, NOT in addition to any other cuts (differs from 2013)

# FY 2014 Appropriations So Far



- Congress has passed NO appropriations bills for FY 2014 in both House and Senate
- Proposals from House and Senate appropriators in various categories are tens of billions of dollars apart
- Outlook not good for completion of appropriations bills
- Meaning: Continuing Resolution!

# Predictions for FY 2014



- Most likely that Congress will pass a temporary spending measure in September
- This will mean ED will send out funding for bifurcated programs at same levels as FY 2013, pushing back cuts until July
- Congress must then either:
  - Pass a budget that complies with sequestration requirements
  - Change sequestration requirements to accommodate budget
  - Ignore requirements and trigger automatic cuts

# What Happens Under A CR?



- Under law, cuts do not have to be in place until the end of the Congressional session
  - This means they do NOT have to be finalized by the start of the new fiscal year on October 1
  - Effective deadline is end of calendar year, though Congressional session can end anywhere from late November to early January
- If Congress adjourns (ends session) without passing a budget that meets the requirements of sequestration, automatic, across-the-board cuts will be triggered under same rules as FY 2013
  - Estimated at 7.2% of non-defense discretionary spending

# A Battle Over the Future Direction of Federal Grants Management OMB vs. OIG





**Who?**

**What?**

**Why?**

**When?**

# Who?



- OMB did not issue 2/1/13 NPRM (Super Circular) in vacuum. Drafters from Council of Finance Assistance Reform (COFAR)

HHS, ED, DOL, NSF, AG, HS, DOT, HUD, Energy

# Who?



- But did “COFAR” include “CIGIE”?
    - Council of Inspectors General for Integrity and Efficiency
- 
- 20 Federal Agencies 94% of \$1.2 trillion in direct federal awards covered by A-133

# What?



- Substantive revisions to:

A-87

A-102

A-133

A-21

A-110

A-122

# Why?



- OMB Goal:
  1. Greater Simplicity
  2. Greater Consistency
  3. Elimination of Requirements
  4. Shifting of Burden

# Why? OIG Goal:



1. Promote accountability
2. Eliminate fraud, waste, abuse and improper payments

# Why?



- Because goals are not aligned, OIG disagrees, strongly disagrees, and extremely disagrees with many of the proposed OMB changes.

# When?



- Gil Tran (OMB) promised the final regulation by late fall 2013

# When?



- Prediction: The OIG comments will either delay the final regulation or result in issuance of the new NPRM

# When?



- EDGAR must be revised within 12 months of final regulation
- Since changes must be prospective, effective date may be 7/1/16, not 7/1/15

# First Battleground

Time and Effort Certifications



# OMB Proposal



- Eliminate reference to PARs
- Now “Certified Reports”
- Reports may be electronic
- Semi-Annual for single cost objective – same

# Time and Effort Management



- After the fact, unless mutually satisfactory alternative approved by awarding agency
- Certification periods cannot exceed 12 months
- Activities may be expressed as percentages

# Time and Effort Management



- Certified Reports on 2 or more cost objectives certified by employee or individual responsible for verification



# Time and Effort Management



- No additional support other than certification is necessary

# Time and Effort Management



- Substitute systems may be used if approved by cognizant agency
- Federal agencies are encouraged to approve alternative proposals based on outcomes

# Time and Effort Management



- Awarding agencies may approve “blended funding” where multiple programs involved, and “performance-oriented metrics” are used



- All certifications must reference consequences of false certification
  - By signing this report... I am aware that any false, fictitious, or fraudulent information, or the omission of any material fact may subject me to criminal, civil, or administrative penalties.

# OIG Rebuttal-Time and Effort



- Any relaxation of time and effort rules would have “significant detrimental impact on government’s ability to protect from fraud, waste, abuse, improper payments

# OIG Rebuttal-Time and Effort



- NPRM proposed standards “would seriously undermine our community’s ability to identify and question unallowable and even fraudulent charges.”

- Do not issue final rule until results from four national pilot projects are considered





- OMB should provide uniform language:
  1. Time charged reflects time actually worked on project
  2. Alerts signer that he/she subject to federal laws on submission of false information



- Retain A-87 language:
  - “Where employees work on multiple activities or cost objectives, a distribution of their salaries or wages will be supported by personnel activity reports or equivalent documentation.”

# OIG Rebuttal-Time and Effort



- Payroll distributions are based on budget estimates that do not focus on actual activity



- 12 month certifications do not provide adequate oversight it is too extensive a period for persons to identify actual activity performed (unless supported by additional source documentation)

# OIG Rebuttal-Time and Effort



- Drop phrase “mutually satisfactory alternative” in lieu of “after the fact certifications.” According to OIG, there are “no mutually satisfactory alternatives.”

# OIG Rebuttal-Time and Effort



- How would quarterly adjustments be validated using 12 month certifications?



- Certifications from supervisory personnel must include review of labor distribution reports to ensure effort being charged is reasonable.



## **Second Battleground: Employee Morale, Health and Welfare Costs**

A-87 / A-21 currently allows for expenses incurred in accordance with the entity's "established practice or custom for the improvement of working conditions, employer – employee relations, employee morale

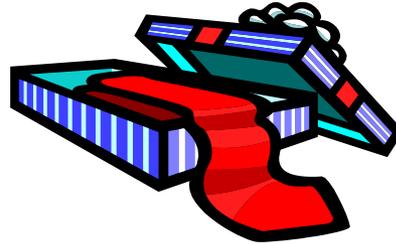


# OMB - Proposal



- No Change

- Do not allow expenses for recipient's established practices → could result in purchase of:
  - Groceries
  - Pizza parties
  - Toiletries
  - T-shirts
  - Gifts
  - Jewelry
  - Flowers
  - Balloons
- Funds must be closely related to grant purposes





## Third Battleground

Food / Meetings / Conferences

3 Way Battle

OMB / OIG / ED

? ? ? ?

# Current Law: A-87/A-21



- Costs of meals and transportation if primary purpose of meeting / conference is dissemination of technical information

# OMB Proposal



- Cost of Meetings
  - Costs from meetings and conferences “beyond the recipient entity” are allowable





- Travel Costs
  - Grantee must retain documentation
    - Participation of individual is necessary to the federal award
    - Costs are reasonable and consistent with entity's established travel policy

# Cost Principle Changes



- Travel
  - If no institutional travel policy, GSA rates apply  
-48 CFR 31.205



# OIG Rebuttal-Meetings and Conferences



- OIGs have found conferences held by recipients where per-person cost of daily catering was between 189% and 400% of applicable location's federal per diem for meals and incidental expenses

# OIG Rebuttal-Meetings and Conferences



- OMB should limit meal costs to federal per diem rates and document a cost comparison of at least three sites to determine most cost-advantageous location

# New ED Guidance on Using Federal Funds for Conferences and Meetings



- Very high burden of proof to show that paying for food is necessary
- Grantee should structure agenda so there is time for participants to purchase own food; use location with easy access to food





- Grantees should not use grant funds to pay for food and beverages for receptions and networking sessions



- When grantees contract with a hotel, food and beverage costs should be “backed out”



## Fourth Battleground: Single Audit Thresholds

Current Law → \$500,000

OMB → Increase to \$750,000

# OIG Rebuttal-Single Audit Thresholds



- Increasing threshold from \$500,000 to \$750,000 loses audit coverage of 6400 auditees
- But these smaller auditees have more non-compliance and material weaknesses on internal control

# OIG Rebuttal-Audit Quality



- OIG recommends language that auditor engagement not exceed five consecutive years.

# OIG Rebuttal-Submission of Audit Reports



- Do not eliminate requirement for subrecipients to submit audit reports to their “pass-through” entities. This would adversely impact the monitoring function.

# OIG Rebuttal-Questioned Costs



- Revise the proposed guidance to require the reporting of all known questioned costs, not just those over \$25,000.



# **Fifth Battleground**

Should Computers be Classified as “Supplies?”



- 34 CFR 80.3
  - Tangible personal property having a useful life of more than one year and an acquisition cost of \$5,000 or more per unit. A grantee may use its own definition of equipment provided such definition would at least included all equipment defined above



- Costs of computing devices classified as “supplies.”

# Reclassifying Computing Devices As “Supplies” – OIG Opposes



- Accounting definition of “supplies” are general purpose consumable items with shorter life span than machines
- Computers would not be subject to basic inventory controls although “misuse” is high
- Federal agencies would not know if computers are being used for intended purposes or kept on entity’s premises

# Sixth Battleground

## Cash Management



# OMB-Cash Management

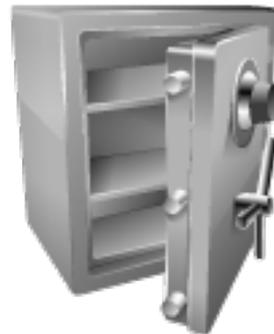


- Recipient shall maintain advances of federal funds in interest bearing accounts unless...
  - Recipient receives less than \$120,000 in federal \$ per year
  - Interest will not exceed \$500
  - Bank requires minimum balance

# OMB-Cash Management



- Unrecovered indirect costs may be included as match only with approval of federal agency



# OMB-Cash Management



- New general rule on program incomes “program income shall be deducted from total allowable costs to determine the net allowable costs,” unless federal agency indicates otherwise

- Request OMB require recipients and subrecipients to provide interim financial statements
- Such statements must contain basic line item information on how federal funds are spent
- Without such interim statements pass-throughs and federal agencies cannot effectively monitor grantees

# OIG-Cash Management



- Recommend specific time frames for which recipient can draw cash
- Terms such as “minimize” or “anticipated needs” are too general and not auditable



- Clarify the type of working capital analysis that is required of federal agencies prior to providing advance payments

# OIG-Cash Management



- All recipients should account for program income using the “deduction method” unless federal agency indicates otherwise



- Align Circular with Compliance Supplement on “Reimbursement”
- Compliance Supplement requires that costs must be paid by the recipient before reimbursement is requested.
- Under accrual accounting, a cost could be expensed on an award that has not been paid.

# OIG-Cash Management



- Recommend that federal funds never placed in non-insured depository accounts



- Do not allow program income to meet matching requirements because it could skew equitable cost sharing

# OIG-Cash Management



- Clear language is needed to assure “profit” is prohibited from all grants and cooperative agreements

# Seventh Battleground

## Administrative Costs



# OMB Proposes



- Salaries of administrative and clerical staff should be treated as indirect, unless
  - Services are integral to project, and
  - Individuals can be specifically identified, and
  - Costs are explicitly set out in budget, and
  - Costs are recovered as indirect

# OIG Rebuttal-Administrative Costs vs. Indirect



- Circular must explicitly state that it is recipient's responsibility to prove through verifiable means that direct charging of administrative and clerical salaries are reasonable, necessary, allocable.

# OIG Rebuttal-Administrative Costs vs. Indirect



- OIG “would have a very difficult time auditing to determine whether administrative clerical salaries were charged both indirectly and directly, as indirect costs are not always identified by position.”

# OIG Rebuttal-Administrative Costs vs. Indirect



- OIG demands more detailed reporting to justify charging administrative and clerical salaries as a direct cost - demonstrating that such costs “are so integral to a project or activity to warrant direct charging.”

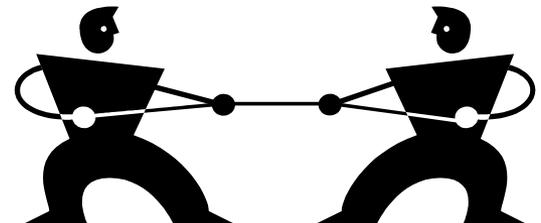
# OIG Rebuttal-Janitorial Costs



- Circular must clarify how janitorial costs charged - directly or indirect. OIG has same concerns on clerical salaries.

# **Eighth Battleground**

Audit Resolution, Attorney Fees



# OMB Proposes



- Costs for services of counsel (in-house or Bruman) for administrative proceedings (OALJ) may not be charged if the ALJ imposes a “monetary penalty.” Legal expenses are allowable if the proceeding is resolved by consent or compromise.

# OIG Rebuttal-Attorney Fees



- All costs related to administrative proceedings should be completely unallowable, regardless of disposition

# OMB-Audit Follow-Up



- Federal awarding agencies shall use “cooperative audit resolution mechanisms” to improve federal program outcomes through better audit resolution, follow-up and corrective action

# Cooperative Audit Resolution



- Improve communication, foster collaboration, promote trust, and develop understanding between auditor and auditee

# Cooperative Audit Resolution



- This approach is based upon “Federal agencies offering appropriate amnesty for past noncompliance when audits show prompt corrective action”



# Agency Determination Letters



- The federal agency or pass-through entity may request additional information from auditee as a way of mitigating disallowed costs

# Enforcement



- Agencies that do not provide an opportunity to challenge suspension or terminations until after the action is taken (NSF) should be permitted to do so

# Internal Controls



- Do not delete A-21 control
  - “ensure that no one person has complete control overall aspects of a financial transactions.”

# Questions



# Disclaimer



This presentation is intended solely to provide general information and does not constitute legal advice. Attendance at the presentation or later review of these printed materials 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.