SHIFTS WITHIN ED AND NEW BATTLE LINES: PART II

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TOPICS

• Impact of smaller ED: shrinking the federal role?
• Lessons learned from ED program and audit determinations
• What’s next: OMB’s proposed changes
SHRINKING THE FEDERAL ROLE
• New manual released in March 2018
• Allows dismissal of cases that reflect “a pattern of complaints previously filed with OCR by an individual or group against multiple recipients” or “filed for the first time against multiple recipients that … place an unreasonable burden on OCR’s resources.”
• In one month, more than 500 disability rights complaints were dismissed.

• In FY 2016, 41% of the more than 16k complaints came from 3 people; in FY 2017, 23% came from 3 people.
November 2018, after student advocacy groups filed a complaint in district court regarding the manual, OCR reversed its position on dismissing complaints from “mass filers”
Other key changes to the manual:

• Eliminates appeals for OCR decisions
• Drops requirement to look into “systemic” issues (only as appropriate)
• Does not permit complaints to be filed on basis of articles and media reports
• January 2020: OPEN Center is announced
• Outreach, Prevention, Education and Nondiscrimination
  • Technical assistance prior to complaints
TREND?

• Consumer Financial Protection Bureau new policy limits scope on what “abusive” practices CFPB will take enforcement action on

• Higher ed religious freedom regulations judge schools against their own free speech policies
• Congressional Review Act, 1996
• Exec. Order: One-in, two-out (Jan 2017)
• OMB Memo, M-19-14 (April 2019)
  • “Rules” – defined expansively, including guidance
  • Must be sent to Congress for review
Executive Order (October 2019)

- All guidance must be posted, searchable, indexed
- Agencies must review prior guidance and rescind or revise, as appropriate
- Agencies must have regulations on how to issue guidance documents
Equitable Services, Pooling across LEAs

- ED, citing 2003 guidance, says cannot pool across districts (July 2018)
- Draft Equitable Services Guidance (March 2019)
  - Silent on the issue
Equitable Services, Pooling across LEAs (cont.)

• **Final Title I, A Equitable Services Guidance:**

• **B-8, options for providing services**

1. School-by-school
2. Pooling within LEA
3. **Pooling across LEAs**
Supplement Not Supplant

• ESSA Sec. 1601 – negotiated rulemaking required for SNS provision

• ED response: Only if we issue “rules”

  “The Department is not regulating on supplement not supplant.”
Supplement Not Supplant

• Can ED enforce SNS without issuing rules?
  • ED response: Yes

June 2019: “Informational Document” on SNS
Supplement Not Supplant

• How should SEAs enforce SNS?
• ED response: Statute is silent, follow GEPA
  • GEPA, 20 USC 1232c
  • EDGAR, 34 CFR 76.783; 76.401
  • UGG, 2 CFR 200.338
Association of Education Federal Finance Administrator’s (AEFFA) Proposals for Time & Effort Systems (June 2016)

1. Certification of Actual Time Worked
2. Blanket Certification
3. Official Record of Employee Activities
AEFFA Proposed T&E Flexibility (June 2016) (cont.)

4. Electronic Submissions/Approvals
5. Roll-up Time and Effort Tracking
6. Allocation of Effort Using a Basis Other than Time
Cost Allocation Guide (September 2019)

• “More flexible and less burdensome time and effort reporting systems could be implemented”

• “Would not need cognizant agency approval to use these approaches”
Cost Allocation Guide (September 2019)

• “The uniform guidance elevated the role of internal controls”

• “[I]t also establishes critical parameters within which that flexibility must be exercised”

• “[Charges] must be based on records that accurately reflect the work performed, must be supported by system of internal controls, and meet the other general requirements in 2 CFR 200.430(i)”
“Department grantees that do not adhere to these parameters in documenting personnel expenses charged to federal grants could face questioned costs in audit findings”
LESSONS LEARNED FROM ED DETERMINATIONS
Tested 55 purchase orders (POs), 2 of which had invoices that pre-dated the PO

Totaling $55,447

Recommendation: Enhance procurement policies and procedures and related internal controls
INTERNAL CONTROLS, INTERNAL CONTROLS, INTERNAL CONTROLS

Commonwealth of Northern Mariana Islands, OESE (issued Oct 2019)

- CNMI response:
  - Purchasing office had “no knowledge that the services were being procured by the school” prior to PO;
  - Payment was made after PO in place, and services accounted for
Commonwealth of Northern Mariana Islands, OESE (issued Oct 2019)

• OESE Response: Sustain recommendation, required corrective action, no questioned costs.
Commonwealth of Northern Mariana Islands, OESE (issued Oct 2019)

- CNMI implemented following corrective actions:
  - All procurement must be routed through central office
  - Reject/return requests inconsistent with requirements and notify school/office of reason and needed correction
Commonwealth of Northern Mariana Islands, OESE (issued Oct 2019)

- Developed comprehensive procurement procedures
- Procurement office will not accept/authorize after-the-fact ratification and payments; vendors or schools responsible must absorb costs for unauthorized purchases
- Training on procedures
Ohio Dept of Ed, OSERS (not dated)

• Tested internal controls over cash management, including monthly reconciliation for programs between G5 and the State’s accounting system

• 11 of 19 instances tested were not done timely
Ohio Dept of Ed, OSERS (not dated)

• ODE response: will create risk-based assessment process to establish appropriate schedules; higher-risk funds will have reconciliations done more frequently
  • Monthly, quarterly or biannually
• OSERS response: Agree with corrective actions; adequate monitoring of general ledger
TIME AND EFFORT

Nebraska, OESE (issued July 2019)

- NDE did not require T&E for LEAs for Title II-A
  - Lack of supporting documentation: $2,099,723
  - Alternative documentation, reduced to: $115,824

OESE: Closed with no repayment or further action.

- NDE submitted new T&E guidance and monitoring protocols
Nebraska, OSERS (issued Sept 2019)
• Tested 28 payments totaling $666,104
• Questioned $577,262
  • No T&E documentation
  • No support of hours or rates billed
“NDE has noted that most school districts have not been completing time and effort documentation in a manner that is satisfactory. We have noted many errors on the completion of the documentation, whether that be utilizing the right form, documenting all hours, correct signatures, etc. NDE has not noted any indication of unallowable time and effort being charged to federal grants.”
TIME AND EFFORT

Nebraska, OSERS (issued Sept 2019)

• Acknowledge corrective actions, but maintained questioned costs of $577,262
• “We require evidence of the results of NDE’s investigations into the full costs questioned by the auditors to determine if the expenditures were for allowable purposes under IDEA.”
IMPACT OF OMB PROPOSED CHANGES
Federal agencies cannot reference nonbinding guidance as part of the terms and conditions of an award.

- 2 CFR 200.210
THE POTENTIAL IMPACT

- Restrictions on food??
- FAQs on food at conferences
- 2 CFR 200.432
THE PROPOSED CHANGE

Risk-based specific conditions: federal agencies or pass-through entities may impose more or less restrictive requirements as specific conditions.

• 2 CFR 200.208 (previously 200.207)
THE POTENTIAL IMPACT

Permit advance payments
Less evidence requested on implementation
Less frequent reporting
Less monitoring
Do not require prior approvals
THE POTENTIAL IMPACT

But how far can we take this?

• Time and effort???
THE PROPOSED CHANGE

Micro-purchase and small purchase procurement thresholds may be set higher or lower by cognizant agency for indirect costs.

• 2 CFR 200.319 (formerly 200.320)
THE POTENTIAL IMPACT

• SEAs are delegated as “cognizant agency for indirect” of LEAs – can SEAs authorize changes to procurement thresholds for districts?
  • Still must meet state/local requirements
THE PROPOSED CHANGE

Subrecipients must prepare closeout reports and final accounting within 90 days after period; pass-through entities have 120 days

• 2 CFR 200.343
THE POTENTIAL IMPACT

• Issue in several ED Performance Reviews
• Gives districts more time to complete liquidations
• BUT – costs still must be “incurred” (obligated?) within period (2 CFR 200.402)
De minimis indirect cost rate (10% MTDC) may be awarded to any nonfederal entity (except a state/local government with $35 million or more in direct federal funding)

- 2 CFR 200.414
Can districts use de minimis indirect cost rate?

- Not for programs with SNS provision (restricted rate programs)
- Each SEA “shall” approve an indirect cost rate for each LEA “that requests it to do so”
- 34 CFR 76.561
THE POTENTIAL IMPACT
SAVE THE DATE!
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APRIL 29 – MAY 1, 2020
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