

## RECOMMENDED ACTION MEMO

**Agency:** Department of Education  
**Topic:** Prohibiting the Use of Grant Funds to Purchase Firearms  
**Date:** November 2020

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**Recommendation: issue guidance and amend regulations clarifying for state and local education agencies that firearms purchases and training are a prohibited use of Education Department grant funds.**

### I. Summary

#### **Description of recommended executive action**

In 2018, school shootings in Parkland, Florida, and Santa Fe, Texas, increased public discourse on school safety and renewed debate over whether schools should arm staff. President Trump tweeted his support for arming teachers, writing: “Armed Educators (and trusted people who work within a school) love our students and will protect them. Very smart people. Must be firearms adept & have annual training. Should get yearly bonus. Shootings will not happen again - a big and very inexpensive deterrent. Up to States”<sup>1</sup>

Around this time, Texas and Oklahoma asked the US Department of Education (“Education Department” or “the Department”) to clarify whether states could use the Education Department grant funds to purchase firearms or fund firearms training.<sup>2</sup> In particular, the states asked whether the purchase of firearms or firearms training was an allowable use of Student Support and Enrichment (SSAE) grants, a program authorized by Title IV Part A of the Every Student Succeeds Act (ESSA).<sup>3</sup> Texas and Oklahoma are two of nine states that allow employees to be armed on school campuses, but firearms are not currently purchased with federal funds.<sup>4</sup>

Secretary of Education Betsy DeVos did not respond to these inquiries directly. Instead, Secretary DeVos stated in a letter to Congress that she would not “take **any action** that would expand or restrict the responsibilities and flexibilities granted to State and local educational agencies” by the ESSA, which provides the statutory authority for a wide variety of Education Department grant programs (emphasis in original).<sup>5</sup>

The Trump administration’s response has left open the question of whether the Education Department believes states and local education agencies (LEAs) can use SSAE grants to arm

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<sup>1</sup> Elizabeth Landers, “Trump Tweets Support For Arming Teachers, Says ‘Up To States’,” CNN, February 24, 2018, <https://www.cnn.com/2018/02/24/politics/trump-tweet-arming-teachers/index.html>.

<sup>2</sup> Adam Harris, “A Loophole That Could Let States Buy Teachers Guns With Federal Funds,” *The Atlantic* August 23, 2018, <https://www.theatlantic.com/education/archive/2018/08/the-audacity-of-arming-teachers-with-federal-dollars/568387/>; Andrew Ujifusa, “DeVos Ponders Letting Schools Buy Guns Under ESSA in Twist on Federal Law,” *Education Week*, August 23, 2018, <http://blogs.edweek.org/edweek/campaign-k-12/2018/08/devos-schools-buying-guns-essa-twist-federal-law.html>.

<sup>3</sup> Pub. L. 114-95 (December 10, 2015), and most recently amended through Pub. L. 115-224.

<sup>4</sup> Erica L. Green, “Betsy DeVos Eyes Federal Education Grants to Put Guns in Schools,” *The New York Times* August 23, 2018, <https://www.nytimes.com/2018/08/23/us/politics/devos-guns-in-schools.html>.

<sup>5</sup> Secretary Betsy DeVos, “Letter to Rep. Bobby Scott, Ranking Member,” August 31, 2018, <https://edlabor.house.gov/imo/media/doc/Response%20to%20Rep%20Scott.pdf>.

educators. However, the text and intent of the ESSA make clear that Congress did not intend that SSAE or any other Education Department program be used for this purpose. To prevent state and LEAs from abrogating the intent of Congress by using federal funding to arm educators and school staff, the next administration should take two executive actions:

- (1) Issue guidance clarifying that purchasing firearms or funding firearms training is not a permissible use of any Education Department grant funds.
- (2) Issue a rule to amend the Education Department General Administrative Regulations (EDGAR) to clarify that the use of grant funds for purchasing firearms or funding firearms training is prohibited.

## **Overview of process and time to enactment**

Issuing agency guidance is an expedient and discretionary process, and the next administration should take this step immediately as the formal rulemaking process gets underway. The Education Department should draft and finalize a guidance document that clearly states the agency interprets the ESSA to prohibit grant recipients from using funds to purchase firearms or firearms training. To comply with best practices for agency guidance, the document should acknowledge that such guidance does not have legislative authority, and provide details on how the public may submit a complaint seeking the rescission or modification of the guidance. Once finalized, the document should be published on the Education Department's website.

The Education Department should concurrently begin the notice and comment rulemaking process, as required by the Administrative Procedure Act (APA).<sup>6</sup> This multi-phase process will likely extend for about a year and requires the Department to issue a notice of proposed rulemaking (NPRM), provide a period for receiving public comments, issue a response to significant received comments (by either modifying the proposed rule or responding to substantive comments directly), and publish the final rule in the *Federal Register*. A rule generally goes into effect thirty days after it is published.<sup>7</sup>

## **II. Current state**

### **Statutory framework: ESSA and SSAE grants**

The ESSA provides the statutory authority for a wide variety of Education Department grant programs. These grants are often specifically tailored for narrow purposes and uses.<sup>8</sup> However, Title IV Part A of the ESSA, which creates SSAE grants, provides the most flexible statutory uses for grant funds, under which an argument for purchasing firearms could be made.

States and LEAs that receive SSAE grants must use the funds for activities that support three goals: (1) providing well-rounded educational opportunities, (2) supporting safe and healthy students, and (3) improving the use of technology in order to improve academic achievement

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<sup>6</sup> 5 U.S.C. § 553.

<sup>7</sup> Congressional Research Service, "An Overview of Federal Regulations and the Rulemaking Process," January 7, 2019, <https://crsreports.congress.gov/product/pdf/IF/IF10003>.

<sup>8</sup> See, e.g., Grants for State Assessments and Related Activities (20 U.S.C. § 6361); Teacher and School Leader Incentive Fund Grants (20 U.S.C. § 6632). The Department also provides a searchable index of ESSA grant programs, available at <https://www2.ed.gov/policy/elsec/leg/essa/legislation/index.html>.

and digital literacy.<sup>9</sup> Proponents of arming teachers argue that the “supporting safe and healthy students” category may give states latitude to use the funding for firearms or firearms training.

In FY19, Title IV Part A grants totaled \$1.17 billion.<sup>10</sup> In applying for this funding, states submit Title IV grant applications to the Education Department. Once the state application is approved, local school districts apply for funding directly from the state. Any local education agency that receives a Title IV grant of \$30,000 or more must spend at least 20% of the funds for activities to support safe and healthy students.<sup>11</sup> Additionally, local education agencies applying for Title IV funds must conduct a comprehensive needs assessment and develop the application in consultation with parents, students, teachers, principals, other school leaders, community-based organizations, and local government representatives.<sup>12</sup>

### **Trump administration interpretation of ESSA**

In 2018, school shootings in Parkland, Florida, and Santa Fe, Texas, caused increased public discourse on school safety and whether school staff should be armed. Around this time, Texas and Oklahoma asked the Education Department to clarify whether states could use Education Department grant funds to purchase firearms or fund firearms training.<sup>13</sup> In particular, the states asked whether the purchase of firearms or firearms training was an allowable use of SSAE grants.

In an August 2018 letter to Congress on the issue, Secretary DeVos stated that Title IV does not grant her the authority to determine the scope of allowable use of funds, as doing so would infringe on the “substantial flexibility” the ESSA provides to school districts to use the grant funds in accordance with their own assessment of their needs.<sup>14</sup> However, the secretary clearly has statutory authority to issue regulations and guidance to implement grant programs under ESSA,<sup>15</sup> a fact the Department has explicitly stated.<sup>16</sup>

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<sup>9</sup> 20 U.S.C. §§ 7117, 7118, 7119.

<sup>10</sup> Council of Urban Boards of Education, “The Opportunity to Increase Equity: A Guide to ESSA Title IV, Part A,” National School Boards Association (2019), 2, <https://www.nsba.org/-/media/NSBA/File/cube-the-opportunity-to-increase-equity-guide-2019.pdf?la=en&hash=7E5ADF16C16E846A1BCA648223291EF2D6955AF9>.

<sup>11</sup> 20 U.S.C. § 7116.

<sup>12</sup> *Id.*

<sup>13</sup> *Supra* note 2.

<sup>14</sup> *Supra* note 5.

<sup>15</sup> *See, e.g.*, 20 U.S.C. § 1221e–3 (“The Secretary, in order to carry out functions otherwise vested in the Secretary by law or by delegation of authority pursuant to law, and subject to limitations as may be otherwise imposed by law, is authorized to make, promulgate, issue, rescind, and amend rules and regulations governing the manner of operation of, and governing the applicable programs administered by, the Department.”); 20 U.S.C. § 3474 (“The Secretary is authorized to prescribe such rules and regulations as the Secretary determines necessary or appropriate to administer and manage the functions of the Secretary or the Department.”).

<sup>16</sup> In 2016, the Department issued a proposed rule under ESSA (Part I, not Part IV) and received comments that argued that this rule was “an overreach” of the agency’s authority and that “any regulatory requirement that is not specifically authorized by the statute and that establishes parameters for how States or [local education agencies] implement the law exceeds the Department’s authority and violates the statute.” The Department responded to these comments by explaining, “given that the Secretary has general rulemaking authority, it is not necessary for the statute to specifically authorize the Secretary to issue a particular regulatory provision.” 81 Fed. Reg. 86076, 86082, “Elementary and Secondary Education Act of 1965, as Amended by the Every Student Succeeds Act—Accountability and State

## Regulatory schema: Uniform Guidance and EDGAR

Title IV Part A grant funds are regulated by two overlapping regulatory schemes: (1) the Uniform Guidance (UG) for federal agency grant programs, promulgated by the Office of Management and Budget (OMB),<sup>17</sup> and (2) the Education Department General Administrative Regulations (EDGAR) for Education Department grants.<sup>18</sup> The UG contains general principles applicable to all grant programs for which agencies have adopted the UG, while the EDGAR provides specific guidance on Education Department grants to current and prospective grantees. Neither the UG nor the EDGAR specifically states whether firearms purchases or training are allowable uses of grant funds.

### A. Uniform Guidance for federal grants, 2 C.F.R. Part 200

The UG is intended to serve as a streamlined, government-wide framework for grants management. The UG stems from OMB statutory authority,<sup>19</sup> and each agency subsequently adopts the UG under its own statutory authority to issue rules and regulations. Federal regulations set out each agency's particular adoption and any applicable exceptions to the UG.<sup>20</sup> Thirty-two federal agencies have adopted the UG.

Congress has delegated authority to the Education Department to issue regulations to implement grant programs at 20 U.S.C. § 1221e-311<sup>21</sup> and 20 U.S.C. § 3474.12.<sup>22</sup> The Education Department adopted the UG with limited exceptions, not relevant here.<sup>23</sup> This means that unless an exception is provided for in EDGAR's adoption of the UG, or a more restrictive provision is provided for elsewhere in EDGAR or in the specific terms of the grant, the list of allowable and unallowable costs in the UG applies to all Education Department grant programs.

Other than those costs specifically disallowed in Subpart E (e.g., alcoholic beverages (§ 200.423), and bad debts (§ 200.426)), the UG provides a list of factors affecting allowability of costs under federal awards—including that costs must be necessary and reasonable for the performance of the award.<sup>24</sup> A cost is reasonable if its nature and amount do

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Plans," Final regulations (November 29, 2016),

<https://www.federalregister.gov/documents/2016/11/29/2016-27985/elementary-and-secondary-education-act-of-1965-as-amended-by-the-every-student-succeeds>.

<sup>17</sup> 2 C.F.R. Part 200 (December 19, 2014); 78 Fed. Reg. 78608 (December 26, 2013), as amended at 79 Fed. Reg. 75882 (December 19, 2014).

<sup>18</sup> EDGAR 34 C.F.R. Part 299 implements the ESEA. The Education Department provides a crosswalk of the UG and the EDGAR, available at: <https://www2.ed.gov/policy/fund/guid/uniform-guidance/index.html>.

<sup>19</sup> 31 U.S.C. § 503.

<sup>20</sup> 2 C.F.R. B.

<sup>21</sup> "The Secretary, in order to carry out functions otherwise vested in the Secretary by law or by delegation of authority pursuant to law, and subject to limitations as may be otherwise imposed by law, is authorized to make, promulgate, issue, rescind, and amend rules and regulations governing the manner of operation of, and governing the applicable programs administered by, the Department." 20 U.S.C. § 1221e-3.

<sup>22</sup> "The Secretary is authorized to prescribe such rules and regulations as the Secretary determines necessary or appropriate to administer and manage the functions of the Secretary or the Department." 20 U.S.C. § 3474.

<sup>23</sup> 2 C.F.R. § 3474.1; 79 Fed. Reg. 75871, 75873-74; (December 19, 2014); 80 Fed. Reg. 67261 (November 2, 2015).

<sup>24</sup> 2 C.F.R. § 200.403.

“not exceed that which would be incurred by a prudent person under the circumstances prevailing at the time that decision was made to incur the cost.”<sup>25</sup> In incurring a reasonable cost necessary for the operation, the grant recipient must have “acted with prudence in the circumstances considering their responsibilities to the non-federal entity, its employees, where applicable its students or membership, the public at large, and the federal government.”<sup>26</sup>

#### B. Relevant EDGAR provisions: 34 C.F.R. Parts 75 and 76

The EDGAR adopts the UG cost principles described above for both direct and state-administered grants, including Title IV Part A of the ESEA.<sup>27</sup> In addition, the EDGAR prohibits two other categories of costs: (1) use of funds for religious worship, instruction, or proselytization, and use of funds for any equipment or supplies to support such activities;<sup>28</sup> and (2) acquisition of real property or construction, which can only be an allowable cost if specifically permitted by the authorizing statute or implementing regulations for the program.<sup>29</sup>

### **III. Proposed action**

To ensure that Education Department funds are not used to provide school employees with guns or firearms training, the next administration should:

#### **(1) issue guidance clarifying that Education Department grant funds may not be used to purchase firearms or fund firearms training**

The next secretary of Education could promptly issue new guidance clarifying that firearms and firearms training are not permissible uses for any type of Education Department grant fund, including Title IV funds. Although such guidance is not legally binding, it is a valuable way to provide clarity to state governments, interested parties, and the public.<sup>30</sup> Moreover, agency guidance is not required to go through notice and comment rulemaking (NCRM). Thus, it is an important interim step to take while the agency begins the NCRM process outlined below.

#### A. Process

This type of guidance may appropriately be considered an interpretive rule because it is “issued by an agency to advise the public of the agency’s construction of the statutes and rules which it administers.”<sup>31</sup> The APA’s NCRM requirement “does not apply to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice,” unless another

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<sup>25</sup> 2 C.F.R. § 200.404.

<sup>26</sup> *Id.*

<sup>27</sup> 34 C.F.R §§ 75.530, 76.530. 34 C.F.R. Part 299 provides implementing regulations for Titles I through VII of ESEA, as amended. This Part was most recently amended to clarify that the UG applies to all ESSA programs except for Impact Aid in Title VIII of the ESSA. 84 Fed. Reg. 31660, 31667 (July 2, 2019). Part 299 therefore also applies to Title IV Part A of the ESSA.

<sup>28</sup> 34 C.F.R. §§ 75.532, 76.532.

<sup>29</sup> 34 C.F.R. §§ 75.533, 76.533.

<sup>30</sup> See Blake Emerson and Ronald M. Levin, “Agency Guidance through Interpretive Rules: Research and Analysis,” May 28, 2019, 10, (“Most agencies [] use interpretive rules in adjudication and enforcement processes... Interpretive rules might also be directed towards members of the public, providing clarity or announcing a change in the agency’s position concerning the meaning of regulatory or statutory terms.”).

<sup>31</sup> *Perez v. Mortg. Bankers Ass’n*, 575 U.S. 92, 96 (2015) (quoting *Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87,99 (1995)).

statute provides otherwise.<sup>32</sup> As the Supreme Court observed in *Perez*, issuing interpretive rules is “comparatively easier” than issuing legislative rules.<sup>33</sup> However, “that convenience comes at a price: interpretive rules ‘do not have the force and effect of law and are not accorded that weight in the adjudicatory process.’”<sup>34</sup> This underscores the importance of reinforcing this guidance by issuing a formal rule as soon as practicable.

Unlike notice and comment rulemaking under the APA, there is no uniform process that an agency must follow to issue guidance. Each agency publishes guidance in accordance with internal procedures for the draft, approval, and release of interpretive rules and policy statements. However, agencies are still expected to comply with some general guidelines.

Executive Order 13891, issued by the Trump administration in October 2019, requires agencies to provide increased transparency for their guidance documents by creating “a single, searchable, indexed database that contains or links to all guidance documents in effect from such agency or component.”<sup>35</sup> The Education Department maintains such a database.<sup>36</sup> Executive Order 13891 also requires each guidance document issued by an agency to specify that the guidance is not legally binding, as well as the process by which the public may petition the agency to modify or remove the guidance.

Agencies should also consider the recommendations of the Administrative Conference, most recently updated on June 13, 2019.<sup>37</sup> The most relevant recommendations concern transparency and public participation. These include: (1) providing “members of the public a fair opportunity to argue for modification, rescission, or waiver of an interpretive rule”; (2) stating on the guidance document that the public is entitled to that opportunity and providing detailed information about how and where an individual can submit their complaint;<sup>38</sup> and (3) avoiding the use of mandatory language (such as “shall” or “must”) to accurately reflect the non-legislative nature of the guidance.<sup>39</sup>

## B. Legal justification

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<sup>32</sup> 5 U.S.C. § 553(b)(A). Note that while the APA contains the phrase “interpretative rule,” the phrase “interpretive rule” is more commonly used, including by the Supreme Court. See Administrative Conference of the United States, “Administrative Conference Recommendation 2019-1: Agency Guidance through Interpretive Rules,” June 13, 2019, footnote 1, <https://www.acus.gov/recommendation/agency-guidance-through-interpretive-rules>.

<sup>33</sup> *Perez*, 575 U.S. at 97.

<sup>34</sup> *Id.* (citing *Guernsey*, 514 U.S. at 99).

<sup>35</sup> Executive Office of the President, “Promoting the Rule of Law Through Improved Agency Guidance Documents,” Executive Order 13891, October 15, 2019, <https://www.federalregister.gov/documents/2019/10/15/2019-22623/promoting-the-rule-of-law-through-improved-agency-guidance-documents>.

<sup>36</sup> This database was announced in the *Federal Register* on February 26, 2020: <https://www.govinfo.gov/content/pkg/FR-2020-02-26/pdf/2020-03811.pdf>.

<sup>37</sup> Administrative Conference of the United States, “Administrative Conference Recommendation 2019-1: Agency Guidance through Interpretive Rules,” June 13, 2019, <https://www.acus.gov/recommendation/agency-guidance-through-interpretive-rules>.

<sup>38</sup> *Id.* at 7.

<sup>39</sup> *Id.*

Earlier this year, the Education Department reaffirmed that its “ guidance documents are not binding and do not have the force and effect of law.”<sup>40</sup> The agency stated that it:

...also lacks the power to bind third parties without appropriate Federal Register publication, notice, and comment or by failing to provide constitutional fair notice of its legal requirements before engaging in formal or informal adjudication. The Department believes that it may properly conduct discretionary rulemaking only in the interstices of statutory silence and genuine ambiguity, and that, as a policy matter, it should do so only rarely and cautiously.<sup>41</sup>

None of the applicable statutory or regulatory authorities expressly provide for firearms, so the Education Department can clearly provide guidance on such an ambiguity. Although issuing guidance is not legally binding, issuing guidance will be the most expedient way to affirm the next administration’s position that firearms are not an allowable use of grant funds.

Under the APA, agencies do not need to follow notice and comment rulemaking procedures for interpretive rules, even if the new guidance constitutes a significant change or deviates drastically from a previous interpretation adopted by the agency.<sup>42</sup> The Education Department *may* rely on prior agency guidance, but it is not bound to do so.

Moreover, prior agency guidance supports the interpretation that firearms are not allowable use of funds under the ESSA, and the Education Department has not issued new guidance that otherwise interprets Title IV Part A of the ESSA. In fact, the current Education Department has seemingly endorsed the interpretation that funds may not be used for firearms on at least three occasions.

One. In August 2018, the Education Department launched a new funding program, “Grants to States for School Emergency Management (GSEM).”<sup>43</sup> The GSEM grants were designed to enable schools to have “plans in place to keep students and staff safe,” in recognition of the fact that “schools play a key role in taking preventive and protective measures to stop an emergency from occurring or reduce its impact.”<sup>44</sup> The GSEM cited a 2013 “Guide for Developing High-Quality School Emergency Operations Plans,” which states that “the possibility of an active shooter situation is not justification for the presence of firearms on campus in the hands of any personnel other than law enforcement officers.”<sup>45</sup>

In expressing this opinion, the 2013 guide “represent[s] the collective expertise of the federal agencies issuing this document”: the Education Department, the Department of Health and Human Services (HHS), the Department of Homeland Security (DHS), the Department of Justice (DOJ), the Federal Bureau of Investigation (FBI), and the Federal Emergency Management Agency (FEMA).<sup>46</sup> Although Secretary DeVos has favored deferring to local decision makers to determine how to use grant funds, the next administration could

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<sup>40</sup> 85 Fed. Reg. 3190, 3206 (January 17, 2020) (citing *Perez v. Mortgage Bankers Ass’n*, 135 S. Ct. 1199, 1204 (2015)).

<sup>41</sup> *Id.*

<sup>42</sup> *Perez*, 575 U.S. at 95.

<sup>43</sup> 83 Fed. Reg. 37797 (August 2, 2018).

<sup>44</sup> *Id.*

<sup>45</sup> 83 Fed. Reg. 37798 at 66.

<sup>46</sup> *Id.*

reemphasize its reliance on sources like the 2013 guide that represent long-standing inter-agency opinion on this issue.

Two. A 2018 report on school safety and recent school shootings provides some support for the no-funding-for-firearms interpretation.<sup>47</sup> The report, jointly authored by the Education Department and three other agencies, does not directly answer the question of whether Education Department grants may be used for firearms. However, it applauds the passage of the Students, Teachers, and Officers Preventing (STOP) School Violence Act of 2018, describing it as important legislation that “helps school personnel and law enforcement identify and prevent violence in schools” via grant funding.<sup>48</sup> These grants are managed by the DOJ, but the act specifically provides that “[n]o amounts provided as a grant under this part may be used for the provision to any person of a firearm or training in the use of a firearm.”<sup>49</sup> This does not prevent Education Department grants from being used for firearms, but the report does provide a record of the Trump administration’s support for legislation that prohibits funding for firearms in schools.

However, this record is tempered by some of the 2018 report’s specific recommendations that seemingly endorse the view that local communities could, and even should consider opportunities to increase an armed presence in schools, whether through agency grant funding or otherwise. The report notes that “[s]chool districts may consider arming some specially selected and trained school personnel (including but not limited to [School Resource Officers] SROs and [School Safety Officers] SSOs) as a deterrent.”<sup>50</sup> It also suggests local schools consider “whether or not it is appropriate for specialized staff and non-specialized staff to be armed for the sake of effectively and immediately responding to violence.”<sup>51</sup> The report proposes that schools hire military veterans and retired law enforcement personnel for school-based positions to help ensure school safety and security.<sup>52</sup> It goes on to advocate that the Education Department, DOJ, and DHS each explore modifications to existing grants in order to designate a portion of funding “for school security activities, and premise the use of those funds on activities that accomplish enhancements recommended in [agency] guidance or standards.”<sup>53</sup> Notwithstanding these recommendations, a new secretary of education still has the authority to issue clear guidance that purchasing firearms is not an allowable use of grant funds.

Three. In 2019, a House of Representatives Education and Labor Committee hearing referenced an internal, deliberative Education Department memo in which the agency’s own counsel determined that “[i]f the secretary were to permit the use of Title IV Part A funds for the purchase of firearms, it appears that it would be the first time a Federal agency authorized the purchase of weapons for school personnel without specific statutory authorization. It is therefore reasonable for the secretary not to allow this use of funds absent specific congressional

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<sup>47</sup> Department of Education, Department of Justice, Department of Health and Human Services, Department of Homeland Security, “Final Report of the Federal Commission on School Safety,” December 18, 2018, <https://www2.ed.gov/documents/school-safety/school-safety-report.pdf>.

<sup>48</sup> *Id.* at 9; H.R. 4909, 115th Cong. (March 15, 2018), <https://www.congress.gov/115/bills/hr4909/BILLS-115hr4909rfs.pdf>.

<sup>49</sup> H.R. 4909 § 2706(a).

<sup>50</sup> Federal Commission on School Safety, “Final Report of the Federal Commission on School Safety,” December 18, 2018, 106, <https://www2.ed.gov/documents/school-safety/school-safety-report.pdf>.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 14, 106, 113–16.

<sup>53</sup> *Id.* at 126.

authorization, and it is unlikely that this interpretation would be subject to a successful legal challenge.”<sup>54</sup> Secretary DeVos has not used this internal conclusion to issue public guidance, but this memo supports the ability of the new administration to issue guidance and a formal rule to clarify that firearms are not an allowable use of grant funds.

## **(2) issue a rule to amend the EDGAR and clarify that the use of Education Department grant funds to purchase firearms or firearms training is prohibited**

The EDGAR currently includes two types of broad prohibitions: (1) an outright prohibition on the use of funds for religious activities, and (2) a prohibition on the use of funds to acquire or construct real property that is subject to exceptions when the authorizing statute or implementing regulations for the program explicitly allow using funds that way.<sup>55</sup>

A new secretary could amend EDGAR to prohibit the use of funds for firearms and firearms training. An outright prohibition, rather than a conditional prohibition is warranted given that, unlike in the context of real property, no federal statute explicitly (or even implicitly) allows for the use of Education Department grant funding for firearms and firearms training.

### **A. Process**

The new rule must go through the NCRM process under the APA.<sup>56</sup>

First, an agency must provide notice that it intends to promulgate a rule by publishing an NPRM in the *Federal Register*. The notice must provide the time, place, and nature of the rulemaking; the legal authority under which the rule is proposed; and either the terms or subject of the proposed rule.

Then the agency must accept public comments on the proposed rule for a period of at least thirty days. The received comments must be reviewed, and the Education Department must respond to significant comments, either by explaining why it is not adopting proposals or by modifying the proposed rule to reflect the input.

Once this process is complete, the final rule can be published in the *Federal Register* along with a concise explanation of the rule’s basis and purpose. Generally, the final rule may not go into effect until at least thirty days after it is published.

### **B. Legal justification**

As noted above, the Education Department has promulgated detailed regulations that speak to acceptable uses for grant funds both by adopting uniform government-wide grantmaking regulations as well as specific regulations that govern state block grant programs, such as SSAE.<sup>57</sup> For both sets of regulations—the uniform grantmaking regulations and the regulations

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<sup>54</sup> Jason Botel, “Determining Options for the Allowable Use of Funds for School Safety Measures Under Title IV, Part A 7,” July 16, 2018; see also Michael Stratford, “DeVos Refused to Bar Federal Money for Guns in Schools, but Internal Memo Said She Could,” POLITICO April 10, 2019, <https://www.politico.com/story/2019/04/10/betsy-devos-block-guns-schools-memo-1342592>.

<sup>55</sup> 34 C.F.R. §§ 75.532, 76.532, 75.533, 76.533.

<sup>56</sup> 5 U.S.C. § 553; 16 U.S.C. § 460d; 33 U.S.C. 1, 28 Stat. 362.

<sup>57</sup> 2 CFR 3473.1; 2 CFR (Part 200).

governing state block grant programs—the department relied on its broad, general rulemaking authority, which it can similarly use here.<sup>58</sup>

The Education Department has used this authority to promulgate regulations restricting the use of funds further than what is provided for in the UG. For example, during the Obama administration, in the NCRM process to issue regulations for the State Vocational Rehabilitation Services Program, a commenter questioned whether the Education Department had authority to exclude/disallow third-party-in-kind contributions as a source of allowable matching funds, given that such contributions *were* permissible under the UG.<sup>59</sup> The Education Department relied on 2 C.F.R. § 200.102(c) to affirm its authority to enforce more restrictive grant requirements than the UG contains: “the federal awarding agency may apply more restrictive requirements to a class of federal awards or non-federal entities when approved by OMB, or when required by federal statutes or regulations.” In that instance, the statute explicitly prohibited third-party in-kind contributions as a source of match.<sup>60</sup> However, ED could promulgate regulations that prohibit firearms purchases given that, as outlined in the risk analysis section below, no federal statute concerning Education Department grant programs allows for their purchase.

Other agencies implementing federal grants specifically delineate allowable from unallowable costs in agency guidance beyond the list of specific costs in the UG and the federal statute they are interpreting. For example, as part of the DOJ’s COPS Office School Violence Prevention Program, the agency provides lists of both allowable and unallowable costs.<sup>61</sup> Although the STOP School Violence Act stated specifically that the grant funds may not be used for firearms or firearms training, the guidance extends beyond the statutory authority for the grant by providing an extensive list of unallowable equipment/technology costs.<sup>62</sup>

The Department of Transportation’s (DOT) Safe Routes to School (SRTS) grant program has also gone beyond the UG and the OMB cost principles to outline allowable and unallowable costs. The Safe, Accountable, Flexible, Efficient Transportation Equity Act authorized the SRTS grants and provided general and noncomprehensive guidelines on allowable and unallowable costs.<sup>63</sup> The agency’s interpretation of these guidelines includes prohibitions on certain types of costs not explicitly barred by statute, such as office furnishings, advertising, and promotional items.<sup>64</sup>

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<sup>58</sup> 20 USC 1221e-3; 20 USC 3474.

<sup>59</sup> 81 Fed. Reg. 55630, 55699 (August 19, 2016) (citing 2 C.F.R. § 200.306 which states “that for all Federal awards, any shared costs or matching funds and all contributions, including cash and third-party in-kind contributions, must be accepted as part of the non-Federal entity’s cost sharing or matching when specific criteria are met.”).

<sup>60</sup> 2 C.F.R. § 361.60(b)(2).

<sup>61</sup> Department of Justice, “FY 2020 COPS Office School Violence Prevention,” accessed October 1, 2020, [https://cops.usdoj.gov/pdf/2020AwardDocs/svpp/Allowable\\_Costs\\_List.pdf](https://cops.usdoj.gov/pdf/2020AwardDocs/svpp/Allowable_Costs_List.pdf).

<sup>62</sup> *Id.* at 5–8.

<sup>63</sup> H.R. 3, 109th Cong. (January 4, 2005) § 1404.

<sup>64</sup> Department of Transportation, Federal Highway Administration, “Safe Routes to School,” accessed October 1, 2020, [https://www.fhwa.dot.gov/environment/safe\\_routes\\_to\\_school/guidance/#toc123542201](https://www.fhwa.dot.gov/environment/safe_routes_to_school/guidance/#toc123542201).

## IV. Risk analysis

### Legal vulnerability

Proponents of arming teachers could potentially argue that the ESSA allows for the purchase of firearms or firearms training using SSAE funds, and thus, a rule prohibiting grant funding to that effect would violate the APA.<sup>65</sup>

A court will invalidate a proposed regulation if an agency action or conclusion is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”<sup>66</sup> Under the APA, a court reviews final agency action under the deferential arbitrary and capricious standard, which presumes the agency action to be valid and seeks to determine “whether the agency articulates a rational connection between the facts and choice made.”<sup>67</sup>

However, using SSAE funds for weapons and weapons-related activities is clearly barred by ESSA and existing Education Department regulations. First, the only category of funding that is even relevant to school safety is category two of the SSAE statute, which provides therein for funding “violence prevention” activities only by “the promotion of school safety ... through the creation and maintenance of a school environment that is *free of weapons*.”<sup>68</sup> As part of this gun-free campus goal, the statute provides that schools must impose expulsion periods of at least one year on any student who brings a firearm to school.<sup>69</sup> Second, using SAE funds to arm teachers would be contrary to the UG’s requirement that grant costs be “necessary and reasonable for the performance of the federal award”<sup>70</sup> and that they be allocated to a given award only in proportion to the benefits received from the cost.<sup>71</sup>

Even if a court were to find ESSA ambiguous as to the allowance of SSAE funding to purchase guns, a court would move on to step two of *Chevron* and would normally defer to an agency’s interpretation so long as it is reasonable.<sup>72</sup> The reasonable nature of the agency’s interpretation here is supported by the language and legislative history of the ESSA.<sup>73</sup>

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<sup>65</sup> Gun proponents might also attempt to mount a challenge against Education Department guidance on this topic, however, they would be required to prove such guidance constitutes final agency action under the APA. See, e.g., *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997).

<sup>66</sup> 5 U.S.C. § 706(2)(A).

<sup>67</sup> 384 F. Supp. 3d at 1172.

<sup>68</sup> 20 U.S.C. § 7112(5) (emphasis added).

<sup>69</sup> 20 U.S.C. § 7961.

<sup>70</sup> 2 C.F.R. 200.403(a).

<sup>71</sup> 2 C.F.R. 200.405.

<sup>72</sup> *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

<sup>73</sup> See, e.g., Andrew Ujifusa, “Lawmakers Strike Deal on Education Spending, Omit Ban on Money for Guns,” Education Week September 13, 2018, <http://blogs.edweek.org/edweek/campaign-k-12/2018/09/education-spending-deal-lawmakers-omit-guns-ban-money.html> (“Rep. Tom Cole, R-Okla., the chairman of the House subcommittee that controls federal education spending, said he agreed with DeLauro that ESSA money could not be used for guns. ‘It’s already against the law,’ he said. ‘I think it’s pretty clear, if you read the Every Student Succeeds Act.’”); Andrew Ujifusa, “DeVos Ponders Letting Schools Buy Guns Under ESSA in Twist on Federal Law,” Education Week, August 23, 2018, <https://blogs.edweek.org/edweek/campaign-k-12/2018/08/devos-schools-buying-guns-essa-twist-federal-law.html> (“[Using these funds for firearms] is way outside the scope of what Congress intended for this program,” said Ally Bernstein, the executive director of the Title IV-A Coalition. ‘In our conversations with the department, we were never made aware that they were considering this.’”).

A challenge to the proposed rule may also invoke a provision of the ESSA entitled “Rulemaking,” which states that “[t]he Secretary shall issue regulations under this Act only to the extent that such regulations are *necessary* to ensure that there is compliance with the *specific* requirements and assurances required by this Act” (emphasis added).<sup>74</sup> However, the Department could likely successfully argue that § 7915 does not prohibit the issuance of regulations under SSAE or negate the agency’s general rulemaking authority. Moreover, the previous discussion of the ESSA’s language and legislative history underscores the agency’s argument that this rule is exactly necessary to ensure compliance with the ESSA’s intention and requirements.

### **Other considerations**

If a state or local education agency sought reimbursement for a firearm purchased with Title IV grant funding, the Education Department could rely on prior guidance and its discretion to disallow those costs—before even issuing affirmative guidance or a formal rule on the matter. The Education Department’s 2016 guidance document on Title IV grants provides a table of examples of allowable uses of SSAE funds, and key considerations to determine whether an activity is an allowable use of funds under the SSAE program.<sup>75</sup>

Although these considerations are quite general, a number of SSAE grant funding application requirements apply that would require an extensive community needs assessment of a diverse stakeholder group to determine whether there is a basis to assert that firearms are a purchase for which there is a consensus of community need. A grant applicant would have to successfully show that, based on a comprehensive needs assessment, purchasing firearms or funding firearms training was a reasonable and necessary use of grant funds.<sup>76</sup> Secretary DeVos has consistently left the burden with the grant recipient to justify whether an expense is necessary or reasonable.

Additionally, if the Education Department for some reason did not want to pursue a blanket prohibition on firearms purchases and training (because, for example, such a ban may be overturned by subsequent administrations), it could instead issue guidance designating firearms as equipment requiring prior approval to purchase. It could then reject applications for approval to use grant funds for firearms or firearms training on a case-by-case basis.

The UG provides the opportunity for the awarding agency to require prior written approval in advance of “special or unusual costs.”<sup>77</sup> The UG further stipulates that the “absence of prior written approval on any element of cost will not, in itself, affect the reasonableness or allocability of that element, unless prior approval is specifically required for allowability as described under certain circumstances,” including the purchase of equipment. Equipment is tangible personal property with a useful life of more than one year and a per-unit acquisition cost which equals or exceeds the value established by the agency or \$5,000.<sup>78</sup>

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<sup>74</sup> 20 U.S.C. § 7915.

<sup>75</sup> Department of Education, “Non-Regulatory Guidance: Student Support and Academic Enrichment Grants,” October 2016, <https://www2.ed.gov/policy/elsec/leg/essa/essassaegrantguid10212016.pdf>.

<sup>76</sup> See, e.g., ESSA § 4106(c)(1).

<sup>77</sup> 2 C.F.R. § 200.407 (grant applicants may also seek out prior approval to ensure its intended use of grant funds is allowable).

<sup>78</sup> 2 C.F.R. § 200.33. The price of a particular firearms purchase would impact the analysis set forth here.

The UG provides that general purpose equipment is “equipment which is not limited to research, medical, scientific or other technical activities.”<sup>79</sup> Firearms would presumably fall into this category of equipment, depending on cost. Purchases of general purpose equipment “are unallowable as direct charges, except with the prior written approval of the Federal awarding agency or pass-through entity.”<sup>80</sup> The Education Department could issue guidance that firearms are capital expenditures under 2 C.F.R. § 200.439 and thus require prior approval, or the Department could specifically promulgate a regulation stipulating that firearms purchases require prior approval under the statute.

Further, the agency awarding the grant has the responsibility to review, negotiate, and approve the cost allocation plans of grant recipients.<sup>81</sup> Thus, the Education Department could reject cost allocation plans on an individual basis if applicants indicate they will use funds for firearms. However, the limited focus of this action would require separate action to address firearms training and could prevent the opportunity to consider other security equipment beyond firearms. Additionally, the regulations that address equipment are within 2 C.F.R. Part 200 and promulgated under OMB’s authority. Therefore, the Education Department cannot amend those regulations directly; instead, it would interpret the meaning of those regulations as they apply to Education Department grants.

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<sup>79</sup> 2 C.F.R. § 200.48.

<sup>80</sup> 2 C.F.R. § 200.439(b)(1).

<sup>81</sup> 2 C.F.R. § 200.19.