

MEMORANDUM

To: US Department of Education
From: Giffords
Date: December 19, 2022
Re: Implementing Bipartisan Safer Communities Act Funding

SUMMARY

Description of Recommended Action

On June 25, 2022, President Biden signed the Bipartisan Safer Communities Act (BSCA) into law—marking the first successful package of federal gun safety legislation in nearly 30 years.¹ The law represents an important first step towards addressing a public health crisis that kills more than 41,000 Americans each year.

This public health crisis is having a devastating impact on children. In 2020, gun violence surpassed motor vehicle crashes to become the leading cause of death for youth in the US.² On average, 3,500 American children and teens are killed by guns each year and more than half of these deaths are homicides.³ This violence has a disproportionate impact on Black youth. Data show that Black children and teens are 14 times more likely to die by firearm homicide than white children and teens, and although Black students represent 15% of the total K–12 school population in America, they make up 25% of K–12 victims of gunfire at school.⁴

In addition to those who are directly impacted, gun violence also has secondary effects on the approximately three million young people who witness a shooting first hand each year.⁵ Kids exposed to Adverse Childhood Experiences (ACEs),⁶ including gun violence in their

¹ Bipartisan Safer Communities Act, Pub. L. No. 117-159, 136 Stat. 1313 (2022).

² Jason E. Goldstick et al., “Current Causes of Death in Children and Adolescents in the United States,” *New England Journal of Medicine*, 386, no. 20 (May 2022): 1955–56, <https://doi.org/10.1056/NEJMc2201761>.

³ Everytown for Gun Safety, “The Impact of Gun Violence on Children and Teens,” May 29, 2019, <https://everytownresearch.org/report/the-impact-of-gun-violence-on-children-and-teens/>.

⁴ *Id.*

⁵ *Id.*

⁶ Centers for Disease Control and Prevention, “Fast Facts: Preventing Adverse Childhood Experiences,” April 14, 2022, <https://www.cdc.gov/violenceprevention/aces/fastfact.html>.

homes, communities, or schools, may experience toxic stress which can negatively affect development, inhibit learning,⁷ and lead to worse mental and physical health outcomes.⁸

America's public schools have an important role to play in keeping our students safe. By advancing economic mobility, education serves as one of the best protective factors against future violence involvement. Moreover, schools offer a critical touch point for connecting young people at risk of gun violence to evidence-informed intervention and prevention programs that help them cope with trauma and keep them safe.⁹

The BSCA provides a historic opportunity to invest in these programs. But new resources made available by the law must be directed towards schools with the highest needs and programs with a basis in evidence. To support State Education Agencies (SEAs) and Local Education Agencies (LEAs) in this effort, the US Department of Education (herein "ED" or "the Department") should update guidance clarifying the allowable uses for funding made available under the Student Support and Academic Enrichment (SSAE) grant program, including the Stronger Connections grant program,¹⁰ and the 21st Century Community Learning Centers (21st CCLC) Program.¹¹ In addition, the Department should issue a Dear Colleague letter providing guidance clarifying the allowable uses for the School-Based Mental Health Services (SBMH) Grant Program¹² and the Mental Health Service Professional Demonstration (MHSP) Grant Program.¹³ Through these programs, all of which received funding through the BSCA, the Department will invest more than \$2 billion in school safety, student health, and educational opportunities over the next five years.

Overview of Process

Updating and issuing agency guidance is an expedient and discretionary process, and ED should take this step immediately. Because the guidance will be released in the form of non-binding policy statements, rather than through new legislative rules, the policy statements do not need to go through notice-and-comment rulemaking (NCRM) proceedings.¹⁴

⁷ Shanta R. Dube, "The Circular Impact of ACEs, Education, and Long-Term Health," Childhood Domestic Violence Association, November 19, 2018, <https://cdv.org/2018/11/the-circular-impact-of-aces-education-and-long-term-health/>.

⁸ Julia Herzog and Christian Schmahl, "Adverse Childhood Experiences and the Consequences on Neurobiological, Psychosocial, and Somatic Conditions Across the Lifespan." *Frontiers in Psychiatry*, (September 9, 2018): 420, <https://doi.org/10.3389/fpsy.2018.00420>.

⁹ See e.g., University of Chicago Crime and Education Labs, "Choose to Change: Your Mind, Your Game," February 2020, <https://urbanlabs.uchicago.edu/attachments/dd47d0bf9f85c9543e871d03b25fa1dcc8ee779f/store/cf2bff02b6f54df79d84cd3c2b20d7bd0ec398cdd7a4de0744e6e8860d6f/Choose+to+Change+Research+Brief.pdf>.

¹⁰ Bipartisan Safer Communities Act, 136 Stat. 1313,1341-42.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ 5 U.S.C. § 553(b)(A).

To comply with best practices for agency guidance, the documents should acknowledge the aforementioned—that such guidance is not a legislative rule, does not have legislative authority, and is simply providing direction on what is allowable under the BSCA—and comply with nonstatutory procedural requirements on the issuance of policy statements, including by providing details on how the public may submit a complaint seeking the rescission or modification of the guidance. Once finalized, the documents should be published on ED’s website.

CURRENT STATE

Gun Violence among School-Aged Youth

In 2020, for the first time in modern history, the leading cause of death for American children and teens was firearms.¹⁵ The lethality of firearm violence among school-aged children had steadily increased throughout the preceding decade—rising from 3.5 deaths by firearm per 100,000 children and adolescents in 2010 to 5.5 deaths per 100,000 children and adolescents in 2020.¹⁶ Since 2000, more than 150,000 Americans under the age of 18 have been killed or injured by a firearm.¹⁷ And as a result, 91% of children killed with guns in high-income countries are killed in the US.¹⁸

This violence is concentrated in under-resourced communities and harms Black and Latino youth at a disproportionate rate. Black youth experience gun-related injuries at a rate that is 10 times higher than their white peers.¹⁹ In addition, among schools where demographic data were available, 64% of school shootings between 2013 and 2019 occurred at schools where more than 50% of the student population identified as a student of color.²⁰

This violence takes a heavy toll on children’s mental and physical health, as well as their ability to perform academically. Research shows that exposure to homicide among youth disrupts their sleep, impairs their ability to concentrate, and negatively impacts their educational outcomes. According to one study, local violence has acute impacts on Black children’s performance on cognitive tests, with more substantial effects when the homicide

¹⁵ Jason E. Goldstick et al., “Current Causes of Death in Children and Adolescents in the United States,” *New England Journal of Medicine*, 386, no. 20 (May 2022): 1955–56, <https://doi.org/10.1056/NEJMc2201761>.

¹⁶ *Id.*

¹⁷ Giffords, “Kids & Guns,” last accessed December 2, 2022, <http://giffords.org/issues/kids-and-guns/>.

¹⁸ Giffords Law Center to Prevent Gun Violence, “Protecting the Next Generation: Strategies to Keep America’s Kids Safe from Gun Violence,” March 6, 2018, <https://giffords.org/lawcenter/report/protecting-next-generation/>.

¹⁹ *Id.* at 38.

²⁰ Everytown for Gun Safety, “The Impact of Gun Violence on Children and Teens,” May 29, 2019, <https://everytownresearch.org/report/the-impact-of-gun-violence-on-children-and-teens/>. We use the term “student of color” instead of “minority” to more accurately describe students who identify as Black, Hispanic or Latino, Asian, Pacific Islander, American Indian/Alaska Native, or two or more of the aforementioned races or ethnicities.

occurred close to the child’s home.²¹ Witnessing violence and the ensuing negative mental health outcomes can also be associated with violent behavior.²²

Disengagement from school and lack of educational resources are often precursors to an increased risk of violence involvement.²³ This link between school disengagement and gun violence involvement is partially why Chicago saw a spike in shootings during the COVID-19 pandemic. In 2020, as Chicago Public Schools (CPS) closed and the school district’s enrollment dropped by 16,000 students,²⁴ youth shooting victimization in Chicago rose by 55%.²⁵ But evidence shows quality education and healthy relationships between students, teachers, and counselors can serve as protective factors for youth and reduce the risk of dropout and violence involvement.²⁶

In addition to protective factors such as healthy relationships at home and at school, preventing children from gaining access to guns is an effective way to reduce violence and save lives. Approximately 4.6 million youth in America live in homes with at least one loaded and unlocked firearm—and access to these weapons can lead to unintentional child shootings, youth suicide, and school shootings.²⁷ Meaningful interventions that improve the storage of firearms so that children and youth do not have access to them can make a difference. Estimates suggest that even modest increases in the number of American homes safely storing firearms could prevent almost a third of youth gun deaths due to suicide and unintentional firearm injury.²⁸

²¹ Patrick Sharkey, “The Acute Effect of Local Homicides on Children’s Cognitive Performance,” *Proceedings of the National Academy of Sciences* 107, no. 26 (June 2010): 11733–38, <https://doi.org/10.1073/pnas.1000690107>.

²² Giffords Law Center to Prevent Gun Violence, “Protecting the Next Generation: Strategies to Keep America’s Kids Safe from Gun Violence,” March 6, 2018, <https://giffords.org/lawcenter/report/protecting-next-generation/>.

²³ Centers for Disease Control and Prevention, “Violence Prevention: Risk and Protective Factors,” May 7, 2020, <https://www.cdc.gov/violenceprevention/youthviolence/riskprotectivefactors.html>.

²⁴ Nader Issa and Fran Spielman, “As CPS Enrollment Plummets Again, New CEO Says ‘Tough Decisions’ Lie Ahead,” *Chicago Sun-Times*, October 1, 2021, <https://chicago.suntimes.com/fran-spielman-show/2021/10/1/22704577/cps-enrollment-drop-public-schools-pedro-martinez-data-closings-funding-budgeting>.

²⁵ Phil Rogers, “As Children Die in Chicago, Some Ask: Where Is The Outrage?,” NBC Chicago, October 13, 2021, <https://www.nbcchicago.com/investigations/as-children-die-in-chicago-some-ask-where-is-the-outrage/2635993/>.

²⁶ Lance Lochner and Enrico Moretti, “The Effect of Education on Crime: Evidence from Prison Inmates, Arrests, and Self-Reports,” *The American Economic Review* 94, no. 1 (2004): 155–89, <https://www.aeaweb.org/articles?id=10.1257/000282804322970751>.

²⁷ Giffords Law Center to Prevent Gun Violence, “Protecting the Next Generation: Strategies to Keep America’s Kids Safe from Gun Violence,” March 6, 2018, <https://giffords.org/lawcenter/report/protecting-next-generation/>.

²⁸ Michael C. Monuteaux, Deborah Azrael, and Matthew Miller, “Association of Increased Safe Household Firearm Storage With Firearm Suicide and Unintentional Death Among US Youths,” *JAMA Pediatrics* 173, no. 7 (2019): 657-662, <https://jamanetwork.com/journals/jamapediatrics/fullarticle/2733158>.

Federal Statutory Framework and the BSCA

The primary source of federal aid for elementary and secondary education in the US is the Elementary and Secondary Education Act (ESEA).²⁹ The ESEA was initially enacted in 1965, and was amended and reauthorized by the Every Student Succeeds Act (ESSA) in 2015.³⁰ Title IV of ESSA provides statutory authority for a wide variety of ED programs, including a program to support learning opportunities during non-school hours, a family engagement program, an innovation and research program, programs to provide community support for student success, and activities that support student safety and well-being.

Several components of Title IV are particularly relevant in the context of reducing gun violence among school-aged youth:

- **SSAE Grants:** Title IV-A of ESSA provides the statutory authority for Student Support and Academic Enrichment (SSAE) grants to improve students' academic achievement by increasing the capacity of states, LEAs, schools, and local communities to: (1) provide all students with access to a well-rounded education;³¹ (2) improve school conditions for student learning; and (3) improve the use of technology. Under the program, formula grants are made to SEAs and then SEAs make sub-grants to LEAs. LEAs must use SSAE funds for three broad categories of activities: (1) supporting well-rounded educational opportunities under section 4107 of Title IV-A;³² (2) supporting safe and healthy students under section 4108;³³ and (3) supporting the effective use of technology under section 4109.³⁴

In FY2022, Congress appropriated \$1.28 billion for Title IV-A.³⁵ The BSCA appropriated an additional \$1 billion for section 4108 activities under Title IV-A, which ED designated the Stronger Connections grant program.³⁶ The funding is directed towards one particular type of SSAE activity: those that support “safe and healthy students,” which provides flexibility for school districts to make investments in initiatives including drug and violence prevention programs, mentoring and school counseling, and positive behavioral interventions and supports.

²⁹ Elementary and Secondary Education Act, Pub. L. No. 89-10, 79 Stat. 27 (1965).

³⁰ Every Student Succeeds Act, Pub. L. No. 114-95, 129 Stat. 1802 (2015).

³¹ “Well-rounded education” is defined in Section 8101(52). It means courses, activities, and programming in a variety of subjects with the “purpose of providing all students access to an enriched curriculum and educational experience.”

³² Every Student Succeeds Act, Pub. L. No. 114-95, 129 Stat. 1802, 1977 (codified at 20 U.S.C. §§ 7117).

³³ *Id.* at 129 Stat. 1802, 1978 (codified at 20 U.S.C. §§ 7118).

³⁴ *Id.* at 129 Stat. 1802, 1981 (codified at 20 U.S.C. §§ 7119).

³⁵ Congressional Research Service, “The Elementary and Secondary Education Act (ESEA), as Amended by the Every Student Succeeds Act (ESSA): A Primer,” April 20, 2022, <https://crsreports.congress.gov/product/pdf/R/R45977>.

³⁶ Bipartisan Safer Communities Act, 136 Stat. 1313, 1341-42; US Department of Education, “Bipartisan Safer Communities Act: Stronger Connections Grant Program Frequently Asked Questions,” November 2022, https://oese.ed.gov/files/2022/11/BSCA_Stronger_Connections_FAQs_11-2022-FINAL.pdf.

On September 28, 2022 the Department announced the awarding of nearly \$1 billion through the BSCA in Title IV-A formula funding to SEAs in the west and southwest regions of the US.³⁷ SEAs must award these Stronger Connections funds competitively to high-need LEAs, as determined by the state, to provide students with safer and healthier learning environments. Stronger Connections funds remain available for obligation by SEAs and LEAs through September 30, 2026.³⁸

- **21st CCLC:** Through 21st Century Community Learning Centers (21st CCLC), Title IV-B of ESSA supports activities for school-aged children during non-school hours. Formula grants are made to states, and states subsequently award grants to local entities (e.g., LEAs, community-based organizations) on a competitive basis for a period of three to five years. Local entities may use funds for student-centered activities, such as academic enrichment learning programs, mentoring, tutoring, programs to support a healthy and active lifestyle, programs to support families actively and meaningfully engaging in their child’s education, drug and violence prevention programs, counseling programs, and programs that build career competencies and career readiness.

In FY2022, Congress appropriated \$1.29 billion for Title IV-B.³⁹ The BSCA appropriated an additional \$50 million to expand this grant program, funding that will remain available through September 30, 2023. This funding must be used to increase support for evidence-based practices that increase attendance and school engagement,⁴⁰ both of which are critical to reducing gun violence among school-aged youth given school engagement is one of the best protective factors against crime and violence involvement.⁴¹

- **SBMH Grants and MHSP Grants:** Title IV-F of ESSA authorizes a wide range of “national activities,” such as the Promise Neighborhoods program, the Full-Service Community Schools program, and National Activities for School Safety.⁴²

³⁷ US Department of Education, “Southwest/West Region: Department Awards Nearly \$1 Billion to 56 States and Territories to Provide Students with Safer and Healthier Learning Environments,” September 28, 2022, <https://www.ed.gov/news/press-releases/department-awards-nearly-1-billion-56-states-and-territories-provide-students-safer-and-healthier-learning-environments>.

³⁸ Bipartisan Safer Communities Act, 136 Stat. 1313, 1341-42; US Department of Education, “Bipartisan Safer Communities Act: Stronger Connections Grant Program Frequently Asked Questions,” November 2022, https://oese.ed.gov/files/2022/11/BSCA_Stronger_Connections_FAQs_11-2022-FINAL.pdf.

³⁹ Congressional Research Service, “The Elementary and Secondary Education Act (ESEA), as Amended by the Every Student Succeeds Act (ESSA): A Primer,” April 20, 2022, <https://crsreports.congress.gov/product/pdf/R/R45977>.

⁴⁰ Bipartisan Safer Communities Act, 136 Stat. 1313, 1341.

⁴¹ Lance Lochner and Enrico Moretti, “The Effect of Education on Crime: Evidence from Prison Inmates, Arrests, and Self-Reports,” *The American Economic Review* 94, no. 1 (2004): 155–89, <https://www.aeaweb.org/articles?id=10.1257/000282804322970751>.

⁴² These programs were authorized by the ESEA prior to the enactment of ESSA using authority previously available in Title V-D-1 of the ESEA to create programs of national significance. Congress

The BSCA appropriated \$1 billion over five years to expand two programs within National Activities for School Safety: School-Based Mental Health Services (SBMH) Grants and the Mental Health Service Professional Demonstration (MHSP) Grants.⁴³ The BSCA appropriated \$500 million for SBMH Grants,⁴⁴ which provide competitive grants to SEAs, LEAs, and consortia of LEAs to increase the number of credentialed school-based mental health service providers delivering mental health services to students in LEAs with demonstrated need.

The BSCA also appropriated \$500 million to expand MHSP Grants,⁴⁵ which provide competitive grants to support and demonstrate innovative partnerships to train school-based mental health services providers for employment in schools and LEAs. The grant program aims to address a challenge facing districts and schools across the country: an insufficient supply of school-based mental health professionals to meet the needs of students.

Additional Guidance Is Necessary to Ensure Funding Is Used for Evidence-Informed Programs

- a. The Department has issued guidance for the grant programs in Title IV of ESSA that receive funding through BSCA.

To date, the Department has issued guidance on SSAE grants (including the Stronger Connections grant program), the 21st CCLC grant program, SBMH grants, and MHSP grants:

- SSAE Grant Guidance: The main non-regulatory guidance for SSAE grants was issued by the Department in October 2016.⁴⁶ The Department also issued a Dear Colleague letter on October 25, 2021 (herein “the October 2021 CVI Dear Colleague Letter”).⁴⁷ The October 2021 CVI Dear Colleague Letter explicitly stated that CVI programming is an allowable use of Title IV-A SSAE funds.⁴⁸

used the Title V-D-1 authority to create the programs through the appropriations process. None of the programs had statutory language included in the ESEA prior to the enactment of ESSA. The authority previously included in Title V-D-1 that was used to create the programs was not retained by the ESSA, however, they continue to be funded via the appropriations process.

⁴³ Bipartisan Safer Communities Act, 136 Stat. 1313, 1342.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ US Department of Education, “Non-Regulatory Guidance Student Support and Academic Enrichment Grants,” October 2016, <https://www2.ed.gov/policy/elsec/leg/essa/essassaegrantguid10212016.pdf>.

⁴⁷ US Department of Education, Dear Colleague Letter on CVI, October 25 2021, <https://oese.ed.gov/files/2021/10/21-007415-OESE-CVI-DCL-os-approved.pdf>.

⁴⁸ *Id.*

On September 15, 2022, the Department issued another Dear Colleague letter regarding Stronger Connections grants funded through the BSCA (herein “the September 2022 Stronger Connections Dear Colleague Letter”).⁴⁹ The letter indicates that in determining Stronger Connections grant awards, states should give priority to LEAs which are: “(1) Implementing comprehensive, evidence-based strategies that meet each student’s social, emotional, physical, and mental well-being needs...; (2) Engaging students, families, educators, staff, and community organizations in the selection and implementation of strategies and interventions...; and (3) Designing and implementing policies and practices that advance equity and are responsive to underserved students, protect student rights...”⁵⁰

Additionally, the September 2022 Stronger Connections Dear Colleague Letter notes that, “[u]nder the BSCA, SEAs must award these funds competitively to high-need local educational agencies (LEAs) to fund activities allowable under section 4108 of the ESEA.”⁵¹ The letter outlines suggested criteria for determining whether an LEA is “high-need”; in addition to considering high rates of poverty, SEAs are encouraged to consider LEAs with students who recently experienced a traumatic event, or are exposed to high rates of community and school violence.⁵²

In November 2022, the Department published an FAQ document on the BSCA Stronger Connections Grant Program, detailing how the \$1 billion available through BSCA for section 4108 programs under Title IV-A may be used to support CVI programs.⁵³ The document specifically discusses the importance of collaboration among community organizations and notes that this funding can support “[v]iolence prevention and intervention activities and programs that are culturally and linguistically inclusive, such as individual and group counseling, crisis management, restorative justice practices, trauma-informed practices, and conflict resolution.”⁵⁴

⁴⁹ US Department of Education, Stronger Connections Dear Colleague Letter, September 15, 2022, https://oese.ed.gov/files/2022/09/BSCA-Stronger-Connections-DCL_9.12_signed.pdf?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² US Department of Education, Stronger Connections Dear Colleague Letter, September 15, 2022, https://oese.ed.gov/files/2022/09/BSCA-Stronger-Connections-DCL_9.12_signed.pdf?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=.

⁵³ Bipartisan Safer Communities Act, 136 Stat. 1313, 1341-42; US Department of Education, “Bipartisan Safer Communities Act: Stronger Connections Grant Program Frequently Asked Questions,” November 2022, https://oese.ed.gov/files/2022/11/BSCA_Stronger_Connections_FAQs_11-2022-FINAL.pdf.

⁵⁴ *Id.*

- The 21st CCLC Program Guidance: The current non-regulatory guidance for the 21st CCLC program was issued in February 2003.⁵⁵ The October 2021 CVI Dear Colleague Letter did provide guidance on the use of Title IV-B funds for CVI programming, stating that “21st CCLC may support CVI efforts by re-engaging disconnected youth and supporting students impacted by the trauma of community violence.”⁵⁶ Additionally, the Department issued a memo on October 27, 2022, providing guidance to states and subgrantees on the potential uses for the \$50 million now available through the BSCA.⁵⁷ The memo encourages states to prioritize subgrantees that implement evidence-based practices, including support for family engagement, trauma-informed practices, and mentoring programs built on strong relationships.⁵⁸
- SBMH Grant and MHSP Grant Applications and Guidance: On October 3, 2022, the Department announced the release of Notices Inviting Applications for SBMH and MHSP grants.⁵⁹ This initial round of BSCA funding (and the Fiscal Year 2022 Omnibus Appropriations) made \$280 million available for SEAs and LEAs to increase the number of school-based mental health professionals in their school districts. ED also published supplementary information about SBMH⁶⁰ and MHSP grants⁶¹ in their respective Notices Inviting Applications.

In these notices, ED outlined their “absolute priorities” and “competitive preference priorities,” and stated that the Department will only consider grant applications that meet absolute priorities and will give preference to grant applications that meet competitive priorities. The two absolute priorities outlined in the Notice Inviting Applications for SBMH grants involved increasing the number of credentialed school-based mental

⁵⁵ US Department of Education, “21st Century Community Learning Centers - Non-Regulatory Guidance,” February 2003, <https://www2.ed.gov/programs/21stcclc/guidance2003.pdf>.

⁵⁶ US Department of Education, Dear Colleague Letter on CVI, October 25 2021, <https://oese.ed.gov/files/2021/10/21-007415-OESE-CVI-DCL-os-approved.pdf>.

⁵⁷ US Department of Education, “21st CCLC BSCA Memo,” October 27, 2022, <https://oese.ed.gov/files/2022/10/21st-CCLC-BSCA-Memo.pdf>.

⁵⁸ *Id.*

⁵⁹ US Department of Education, “Hundreds of Millions of Dollars in Funds to Increase the Number of School-Based Mental Health Providers in Schools Provided Through the Bipartisan Safer Communities Act,” October 3 2022, <https://www.ed.gov/news/press-releases/hundreds-millions-dollars-funds-increase-number-school-based-mental-health-providers-schools-provided-through-bipartisan-safer-communities-act>.

⁶⁰ US Department of Education, “Applications for New Awards; School-Based Mental Health Services Grant Program,” Federal Register, October 4, 2022, <https://www.federalregister.gov/documents/2022/10/04/2022-21631/applications-for-new-awards-school-based-mental-health-services-grant-program>.

⁶¹ US Department of Education, “Applications for New Awards; Mental Health Service Professional Demonstration Grant Program,” Federal Register, October 4 2022, <https://www.federalregister.gov/documents/2022/10/04/2022-21632/applications-for-new-awards-mental-health-service-professional-demonstration-grant-program>.

health service providers.⁶² The two competitive priorities included: (1) professional retraining or respecialization to help mental health service providers qualify to work in LEAs with demonstrated need, and (2) increasing the number of school-based mental health service providers from diverse backgrounds available to work in LEAs with demonstrated need.⁶³

In the Notice Inviting Applications for MHSP grants, the Department had one absolute priority: expand the capacity for training school-based mental health services providers to serve in high need LEAs.⁶⁴ ED also laid out three competitive preference priorities: (1) increase the number of qualified school-based mental health services providers in high-need LEAs who are from diverse backgrounds or from communities served by the high-need LEAs; (2) promote inclusive practices; and (3) partnerships with Historically Black Colleges and Universities, Tribal Colleges and Universities, or other Minority-Serving Institutions.⁶⁵

On October 4, 2022, the Department issued “Final Priorities, Requirements, and Definitions” for both the SBMH grant program⁶⁶ and the MHSP grant program.⁶⁷ The priorities outlined in both the SBMH and MHSP rules focus on increasing the number of school-based mental health providers and increasing diversity among these mental health providers to better serve students. The SBMH rule specifically defines “LEAs with demonstrated need” but does not explicitly address gun violence.⁶⁸

- b. The Department should incorporate recently published guidance into main non-regulatory guidance and issue additional guidance.

⁶² US Department of Education, “Applications for New Awards; School-Based Mental Health Services Grant Program,” Federal Register, October 4, 2022, <https://www.federalregister.gov/documents/2022/10/04/2022-21631/applications-for-new-awards-school-based-mental-health-services-grant-program>.

⁶³ *Id.*

⁶⁴ US Department of Education, “Applications for New Awards; Mental Health Service Professional Demonstration Grant Program,” Federal Register, October 4 2022, <https://www.federalregister.gov/documents/2022/10/04/2022-21632/applications-for-new-awards-mental-health-service-professional-demonstration-grant-program>.

⁶⁵ *Id.*

⁶⁶ US Department of Education, “Final Priorities, Requirements, and Definitions-School-Based Mental Health Services Grant Program,” Federal Register, October 4, 2022, <https://www.federalregister.gov/documents/2022/10/04/2022-21634/final-priorities-requirements-and-definitions-school-based-mental-health-services-grant-program>.

⁶⁷ US Department of Education, “Final Priorities, Requirements, and Definitions-Mental Health Service Professional Demonstration Grant Program,” Federal Register, October 4, 2022, <https://www.federalregister.gov/documents/2022/10/04/2022-21633/final-priorities-requirements-and-definitions-mental-health-service-professional-demonstration-grant>.

⁶⁸ US Department of Education, “Final Priorities, Requirements, and Definitions-School-Based Mental Health Services Grant Program,” Federal Register, October 4, 2022, <https://www.federalregister.gov/documents/2022/10/04/2022-21634/final-priorities-requirements-and-definitions-school-based-mental-health-services-grant-program>.

As outlined in the recommendations below, the Department’s recent guidance on the SSAE grant program (including the Stronger Connections grant program) and 21st CCLC grant programs should be incorporated into the main non-regulatory guidance for both programs. These non-regulatory guidance documents are the primary source for guidance on the Department’s website for the SSAE grant program and the 21st CCLC grant program. However, these documents have not been updated since November 2016 and February 2003, respectively. Updating them with the latest guidance issued by the Department will ensure SEAs and LEAs are able to access the most relevant and recent information in one place.

It is critical that further guidance is shared to ensure SSAE and specifically Stronger Connections grant funding, as well as 21st CCLC grant funding is used effectively to support evidence-informed gun violence intervention and prevention strategies. While the main non-regulatory guidance for both programs discusses the need for evidence-informed programming that supports students, it does not specifically address gun violence or the types of supports that can keep students safe. Yet addressing gun violence in schools and communities was the reason Congress allocated additional funding for both programs as part of the BSCA. Following the passage of the Bipartisan Safer Communities Act, Senator Chris Murphy (D-CT) said, “[f]or three decades, shooting after shooting after shooting, Congress did nothing...The Bipartisan Safer Communities Act will save thousands and thousands of lives by tightening our gun laws, investing in mental health services, and making our schools and communities safer.”⁶⁹

Providing guidance on evidence-informed programs and interventions to reduce gun violence among school-aged youth and address the trauma associated with gun violence exposure is particularly important given that available research and data demonstrate that some efforts to reduce gun violence in schools have little basis in evidence. For example, school safety funding has previously been used to harden school buildings by purchasing things like metal detectors and employing armed security guards.⁷⁰ But the use of metal detectors and other harsh surveillance methods in schools has been found to be racially discriminatory,⁷¹ and the National Association of School Psychologists has argued that armed guards actually increase student fear.⁷² And while research is limited, no compelling

⁶⁹ US Senator Chris Murphy, “Murphy Statement Following White House Celebration for Bipartisan Safer Communities Act,” news release, July 11, 2022, <https://www.murphy.senate.gov/newsroom/press-releases/murphy-statement-following-white-house-celebration-for-bipartisan-safer-communities-act>.

⁷⁰ Valerie Strauss and John S. Carlson, “Expert: There’s no evidence that the fortune being spent to ‘harden’ schools against shooters will work. But here’s what will.” *Washington Post*, October 29, 2019, <https://www.washingtonpost.com/education/2019/10/29/expert-theres-no-evidence-that-fortune-being-spent-harden-schools-against-shooters-will-work-heres-what-will/>.

⁷¹ Melinda D. Anderson, “When School Feels Like Prison,” *The Atlantic*, September 12, 2016, <https://www.theatlantic.com/education/archive/2016/09/when-school-feels-like-prison/499556/>.

⁷² Alex Yablon, “Do Armed Guards Prevent School Shootings?” *The Trace*, April 6, 2019, <https://www.thetrace.org/2019/04/guns-armed-guards-school-shootings/>.

evidence currently exists showing metal detectors⁷³ or armed security guards⁷⁴ actually make schools safer.

Meanwhile, research shows that cognitive behavioral therapy, social supports, and trauma-informed programming help to reduce violence involvement among school-aged children and teens. For example, in Chicago, Choose to Change (C2C) and Becoming A Man (BAM) connect students at risk of gun violence with trauma-informed therapy and mentoring. Randomized control-trial evaluations of the programs by the University of Chicago Crime Lab and the University of Chicago Education Lab found they help keep youth safe. Participants in C2C had 48% fewer violent crime arrests and 32% fewer school misconduct incidents than their control group peers.⁷⁵ Results from BAM showed the program reduced the number of violent crime arrests among participants by 45–50% and increased their high school graduation rate by 12–19%.⁷⁶ SEAs and LEAs need guidance on how to best implement and scale these types of programs through the SSAE grant program and 21st CCLC grant program.

Additionally, SEAs and LEAs would benefit from further guidance on the SBMH grant program and the MHSP grant program. While the “Final Priorities, Requirements, and Definitions” issued for both programs on October 4, 2022, are helpful, they provide no specific mention of gun violence or the associated trauma it causes children. As a result, they provide SEAs and LEAs little guidance on how to use the programs to address the very issue Congress funded the programs to address. To date, ED has issued no further guidance on the programs.

PROPOSED ACTION

Substance of Proposed Agency Action

In order to ensure BSCA funding is used for evidence-informed programming aimed to reduce gun violence among youth most at-risk of gun violence involvement, the Department should update or issue the following types of guidance:

⁷³ Jaclyn Schildkraut and Kathryn Grogan, “Are Metal Detectors Effective At Making Schools Safer?” WestEd Justice & Prevention Research Center, 2019, <https://files.eric.ed.gov/fulltext/ED595716.pdf>.

⁷⁴ Alex Yablon, “Do Armed Guards Prevent School Shootings?” The Trace, April 6, 2019, <https://www.thetrace.org/2019/04/guns-armed-guards-school-shootings/>.

⁷⁵ See e.g., University of Chicago Crime and Education Labs, “Choose to Change: Your Mind, Your Game,” February 2020, <https://urbanlabs.uchicago.edu/attachments/dd47d0bf9f85c9543e871d03b25fa1dcc8ee779f/store/cf2bff02b6f54df79d84cd3c2b20d7bd0ec398cdd7a4de0744e6e8860d6f/Choose+to+Change+Research+Brief.pdf>.

⁷⁶ Sara Heller et al., “Thinking, Fast and Slow? Some Field Experiments to Reduce Crime and Dropout in Chicago,” *National Bureau of Economic Research*, May 2015, <https://urbanlabs.uchicago.edu/attachments/0bd9bbdea840ff8faddf10f8b30a372863ae1938/store/234ef5222cf43a9b9165d47d18ae984df8cc08279122e99cb4f287c4918a/Thinking%2BFast%2Bband%2BSlow%2B-%2BNBER.pdf>.

- Update the Department’s non-regulatory guidance document for the SSAE program, to include additional allowable uses for SSAE funds and details about the Stronger Connections grant program. In October 2016, the Department issued non-regulatory guidance for the SSAE grant program to provide “key information on the provisions of the...SSAE program including a discussion of the allowable uses of funds, role of the SEA, fiscal responsibilities, and the local application requirements.”⁷⁷ This document serves as the primary source of guidance on the Department’s website for the SSAE program.⁷⁸ Given the need to provide guidance to SEAs and LEAs on how to best leverage new SSAE funding made available by the BSCA, the non-regulatory guidance for SSAE grants should be updated to:
 - Incorporate ED’s October 2021 CVI letter. As noted above, on October 25, 2021, the Department issued a Dear Colleague letter clarifying that CVI programs were an allowable use for SSAE grant funds.⁷⁹ This letter should be incorporated into the Department’s non-regulatory guidance on SSAE grants.
 - Incorporate ED’s September 2022 Stronger Connections Dear Colleague Letter. As noted above, on September 15, 2022, ED issued a Dear Colleague letter encouraging states to prioritize funds for LEA applicants that demonstrate a strong commitment to: (1) implementing comprehensive, evidence-based strategies that meet each student’s social, emotional, physical, and mental well-being needs; create positive, inclusive, and supportive school environments; and increase access to place-based interventions and services; (2) engaging students, families, educators, staff, and community organizations in the selection and implementation of strategies and interventions to create safe, inclusive and supportive learning environments; and (3) designing and implementing policies and practices that advance equity and are responsive to underserved students, protect student rights, and demonstrate respect for student dignity and potential.⁸⁰ These priorities for the Stronger Connections grant program should be included in ED’s non-regulatory guidance on SSAE grants.
 - Incorporate the Department’s FAQ document on the BSCA Stronger Connections Grant Program. As noted above, ED published an FAQ document in November 2022 that provided specific information about how Stronger Connections funding, which is

⁷⁷ US Department of Education, “Non-Regulatory Guidance Student Support and Academic Enrichment Grants,” October 2016, <https://www2.ed.gov/policy/elsec/leg/essa/essassaegrantguid10212016.pdf>.

⁷⁸ US Department of Education, “Legislation, Regulations and Guidance -- Student Support and Academic Enrichment Program,” June 28, 2017, <https://www2.ed.gov/programs/ssae/legislation.html>.

⁷⁹ US Department of Education, Dear Colleague Letter on CVI, October 25 2021, <https://oese.ed.gov/files/2021/10/21-007415-OESE-CVI-DCL-os-approved.pdf>.

⁸⁰ US Department of Education, Stronger Connections Dear Colleague Letter, September 15, 2022, https://oese.ed.gov/files/2022/09/BSCA-Stronger-Connections-DCL_9.12_signed.pdf?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=.

directed towards section 4108 programs within SSAE, can be used to support CVI programs. This information should be incorporated into the Department’s non-regulatory guidance on SSAE grants.

- Clarify that funding for safe and secure gun storage notifications is an allowable use for SSAE funding, specifically Stronger Connections grant funds. The September 2022 Dear Colleague Letter indicates that Stronger Connections funding should be prioritized for LEA applicants that demonstrate a strong commitment to “[e]ngaging students, families, educators, staff, and community organizations in the selection and implementation of strategies and interventions to create safe, inclusive and supportive learning environments.”⁸¹ Creating a safe learning environment is vitally important to children’s academic success.⁸² Safe and secure gun storage notifications is an example of a gun violence prevention measure that can help achieve greater safety for students and should be considered allowable uses for Stronger Connections funding. Safe and secure gun storage notifications are sent to school households to educate parents and guardians about the need for safe and secure gun storage, and methods for such storage. Safe and secure gun storage not only help to keep students safe at school, home, and in their community, but these notifications are detached from the criminal legal system and limit harm to historically marginalized students.
- Clarify that funding for state Extreme Risk Protection Order (ERPO) implementation is an allowable use for Stronger Connections funding. Given the language in the September 2022 Dear Colleague Letter, the implementation of state ERPO programs should be considered allowable uses for Stronger Connections funding because these programs help create safer and more secure learning environments for children. ERPO programs empower family and household members, and in some states school administrators and employees or teachers at a secondary or postsecondary school,⁸³ to petition courts for a civil (non-criminal) order to temporarily suspend a student’s (or former student’s) access to firearms before they commit violence against others or themselves. Funding should be made available to, at a minimum, support efforts to publicize and train relevant stakeholder groups on ERPOs, including those eligible to petition. ERPO laws have been used to remove access to firearms from a number of would-be school shooters,⁸⁴ but these laws are

⁸¹ *Id.*

⁸² Sarah D. Sparks, “Social-Emotional Needs Entwined with Students’ Learning, Security,” Education Week, January 4, 2013. <https://www.edweek.org/leadership/social-emotional-needs-entwined-with-students-learning-security/2013/01>.

⁸³ California, Hawaii, and New York authorize certain school personnel to seek extreme risk orders. Cal. Pen. Code §§ 18150, 18170, 18190; Haw. Rev. Stat. Ann. § 134-61; N.Y. Civil Practice Law & Rules Law § 6340.

⁸⁴ Ovetta Wiggins, “Red-flag Law in Maryland Led to Gun Seizures From 148 People in the First Three Months,” *Washington Post*, January 15, 2019, <https://wapo.st/2KfXwwh> (At least four individuals who made threats of violence against schools were disarmed in just the first three months after Maryland

only effective if they are utilized, i.e., if members of the community know about them and use them to have firearms removed in appropriate cases.

- Clarify that gun violence rates in schools, and in the community surrounding a school, can be used as a factor when identifying which schools are persistently dangerous as defined by section 8532 of the ESEA. Under SSAE grants, LEAs must prioritize the distribution of funding to schools based on one or more of several factors, including public schools that are considered “persistently dangerous,” as defined by section 8532 of the ESEA.⁸⁵ The Department should clarify in its non-regulatory guidance that SEAs and LEAs are to take into account the rates of gun violence in the school itself or in the community surrounding the school, when identifying schools that are persistently dangerous. Taking community gun violence rates into consideration when providing SSAE grants, and specifically Stronger Connections grants, will help ensure individual schools at high risk for gun violence have access to SSAE funding for evidence-informed CVI programming and other gun violence prevention measures.
- Include additional direction in the SSAE Non-Regulatory Guidance, and specify guidance that applies to Stronger Connections funding. The Department should include detailed information on how SSAE funds generally, and more specifically Stronger Connections grant funding, may be used to support CVI strategies. Additionally, the Department should encourage states to prioritize funds for LEA applicants that demonstrate a strong commitment to the following:
 - Evidence-informed strategies to reduce and prevent gun violence involvement among school-aged children
 - Community-based gun violence intervention and prevention programs
 - Mental health resources and academic support for students who are exposed to gun violence in their communities
- Update the Department’s non-regulatory guidance document for the 21st CCLC grant program. As noted above, in February 2003, the Department issued non-regulatory guidance to “help State educational agencies (SEAs) and eligible public and private schools and organizations throughout the country understand how they can successfully participate in [the 21st Century Community Learning Centers program].”⁸⁶ Nearly two

implemented its extreme risk law); Melissa Korn, “Vermont Police Thwart Potential School Shooting,” *Wall Street Journal*, February 16, 2018, <https://on.wsj.com/2HRpvAZ> (firearm removed from a Vermont resident who kept a diary titled “Journal of an Active Shooter”); Garen J. Wintemute et al., “Extreme Risk Protection Orders Intended to Prevent Mass Shootings: a Case Series,” *Annals of Internal Medicine*, 2019 (firearm removed from a high school student who threatened to commit a mass shooting at a school assembly).

⁸⁵ US Department of Education, “Non-Regulatory Guidance Student Support and Academic Enrichment Grants,” October 2016, <https://www2.ed.gov/policy/elsec/leg/essa/essassaagrantguid10212016.pdf>.

⁸⁶ US Department of Education, “21st Century Community Learning Centers - Non-Regulatory Guidance,” February 2003, <https://www2.ed.gov/programs/21stcclc/guidance2003.pdf>.

decades later, this document still serves as the primary source of guidance on the Department's website for the program.⁸⁷ Given the dramatic shift in our understanding of what supports students need for their academic and emotional well-being,⁸⁸ the non-regulatory guidance for 21st CCLC should be updated to:

- *Incorporate ED's October 2021 CVI letter.* ED's guidance in the October 25, 2021, Dear Colleague letter indicated that CVI programs were an allowable use for 21st CCLC grant funds.⁸⁹ Specifically, the updated non-regulatory guidance should state the availability of 21st CCLC funding to support CVI efforts that serve students and include specific information on how these funds may be used to support CVI strategies, as exemplified in the letter.
- *Incorporate the Department's October 2022 21st CCLC BSCA Memo.* ED's guidance in the October 2022 21st CCLC BSCA Memo provided information to states and subgrantees about the potential uses for the new 21st CCLC funding available through the BSCA.⁹⁰ States are encouraged to prioritize subgrantees that support family engagement, implement trauma-informed practices, and establish mentoring programs.⁹¹ Information from this memo should be included in the Department's non-regulatory guidance for the 21st CCLC grant program.
- *Issue a "Dear Colleague Letter" providing guidance on how SBMH grants and MHSP grants can be leveraged to address trauma associated with gun violence.* On October 4, 2020, the Department issued "Final Priorities, Requirements, and Definitions" for both the SBMH grant program⁹² and the MHSP grant program.⁹³ However, as noted above on page 11, the rules make no mention of gun violence. In order to provide districts guidance on how these programs can be leveraged to address the trauma students

⁸⁷ US Department of Education, Office of Elementary and Secondary Education, "Legislation, Regulations and Guidance," March 30, 2022, <https://oese.ed.gov/offices/office-of-formula-grants/school-support-and-accountability/21st-century-community-learning-centers/legislation-regulations-and-guidance-21st-century-community-learning-centers/a>.

⁸⁸ See e.g., Ming-Te Wang and Jessica L. Degol, "School climate: A review of the construct, measurement, and impact on student outcomes," *Educational Psychology Review* 28, no. 2 (2016): 315–352.

⁸⁹ US Department of Education, Dear Colleague Letter on CVI, October 25 2021, <https://oese.ed.gov/files/2021/10/21-007415-OESE-CVI-DCL-os-approved.pdf>.

⁹⁰ US Department of Education, "21st CCLC BSCA Memo," October 27, 2022, <https://oese.ed.gov/files/2022/10/21st-CCLC-BSCA-Memo.pdf>.

⁹¹ *Id.*

⁹² US Department of Education, "Final Priorities, Requirements, and Definitions-School-Based Mental Health Services Grant Program," Federal Register, October 4, 2022, <https://www.federalregister.gov/documents/2022/10/04/2022-21634/final-priorities-requirements-and-definitions-school-based-mental-health-services-grant-program>.

⁹³ US Department of Education, "Final Priorities, Requirements, and Definitions-Mental Health Service Professional Demonstration Grant Program," Federal Register, October 4, 2022, <https://www.federalregister.gov/documents/2022/10/04/2022-21633/final-priorities-requirements-and-definitions-mental-health-service-professional-demonstration-grant>.

experience from gun violence exposure, the Department should issue a Dear Colleague letter on both programs. The Dear Colleague letter should:

- Outline the significant trauma associated with gun violence exposure, and its impact on student health and academic success. The Department should highlight research that explains the link between “Adverse Childhood Experiences” (ACEs), such as early exposure to violence, and negative psycho-social effects⁹⁴ and academic performance.⁹⁵ For example, the letter could discuss the association between violence in schools and neighborhoods and lower scores on reading and math assessments for school-aged children,⁹⁶ as well as the severe impact of violence exposure on behavioral and mental health outcomes for youth.
- Specify that a high rate of gun violence is a sufficient basis for an LEA to demonstrate a significant need for additional school-based mental health services providers under the SBMH grant program. While the Department’s “Notice Inviting Applications” for the SBMH program identified “high rates of community violence” as a sufficient factor for an LEA to demonstrate need under the program, it did not specify that gun violence in particular was relevant.⁹⁷ The Dear Colleague letter should make clear that, as Congress intended in passing the BSCA, high rates of gun violence are relevant for making such a determination.
- Specify that a high rate of gun violence is a sufficient basis for an LEA to be considered “high-need” under the MHSP grant program. The MHSP “Final Priorities, Requirements, and Definitions” document defines a “high-need LEA” as “a local educational agency — (a)(1) for which at least 20 percent of the children served by the agency are children from low-income backgrounds; (2) that serves at least 10,000 children from low-income backgrounds...”⁹⁸ The Department should consider including a high rate of gun violence in a school or community as sufficient basis for

⁹⁴ Julia Herzog and Christian Schmahl, “Adverse Childhood Experiences and the Consequences on Neurobiological, Psychosocial, and Somatic Conditions Across the Lifespan.” *Frontiers in Psychiatry*, (September 9, 2018): 420, <https://doi.org/10.3389/fpsy.2018.00420>.

⁹⁵ Patrick Sharkey, “The Acute Effect of Local Homicides on Children’s Cognitive Performance,” *Proceedings of the National Academy of Sciences* 107, no. 26 (June 2010): 11733–38, <https://doi.org/10.1073/pnas.1000690107>.

⁹⁶ A.J. Milam, C.D.M. Furr-Holden, and P.J. Leaf, “Perceived School and Neighborhood Safety, Neighborhood Violence and Academic Achievement in Urban School Children.” *The Urban Review* 42, (2010): 458–467, <https://doi.org/10.1007/s11256-010-0165-7>.

⁹⁷ US Department of Education, “Final Priorities, Requirements, and Definitions-School-Based Mental Health Services Grant Program,” Federal Register, October 4, 2022, <https://www.federalregister.gov/documents/2022/10/04/2022-21634/final-priorities-requirements-and-definitions-school-based-mental-health-services-grant-program>.

⁹⁸ US Department of Education, “Final Priorities, Requirements, and Definitions-Mental Health Service Professional Demonstration Grant Program,” Federal Register, October 4, 2022, <https://www.federalregister.gov/documents/2022/10/04/2022-21633/final-priorities-requirements-and-definitions-mental-health-service-professional-demonstration-grant>.

an LEA to qualify as “high-need” given the significant link between trauma related to gun violence exposure and poor mental health outcomes.

- *Specify that trauma-informed counseling programs that aim to reduce the trauma associated with gun violence exposure are an allowable activity under the SBMH grant program.* School-based mental health programs that address trauma exposure among young people have been found to be incredibly effective at reducing mental health symptoms and keeping kids safe. For example, the program Working on Womanhood (WOW), run by the nonprofit Youth Guidance, provides in-school trauma-focused counseling and support to girls in Chicago public schools. Estimates suggest that 38% of school-aged girls in neighborhood high schools on Chicago’s south, west, and northwest sides exhibit signs of PTSD, meaning that the prevalence of probable PTSD among these young women is twice that of service members returning from Iraq and Afghanistan.⁹⁹ However, after only a few months of participating in WOW programming, researchers observed a 22% decrease in PTSD symptom severity scores among participants, a 38% decrease in the number of youth whose scores indicated “moderate trauma-related distress,” and significant decreases in measures of anxiety and depression for young girls.¹⁰⁰

Process

a. APA Procedural Requirements

Under Section 553, the APA requires agencies issuing legislative rules, or rules made pursuant to congressionally delegated authority that carry the force and effect of law, to provide the public with notice of a proposed rulemaking and an opportunity to comment on the rule.¹⁰¹ However, there are several exceptions to these procedural requirements. While “legislative” or “substantive” rules that bind the public or an agency must comply with Section 553, “interpretive rules” and “general statements of policy,” often known as “guidance documents”¹⁰² are exempt from these strictures.¹⁰³

Agencies release a variety of documents that may not qualify as legislative rules that can, among other things, guide the actions of agency staff or inform prospective grantees

⁹⁹ University of Chicago Urban Labs, “Working on Womanhood: WOW,” last accessed December 2, 2022, <https://urbanlabs.uchicago.edu/programs/working-on-womanhood-wow>.

¹⁰⁰ *Id.*

¹⁰¹ 5 U.S.C. § 553(b), (c).

¹⁰² See, e.g., M. Elizabeth Magill, “Agency Choice of Policymaking Forum,” 71 U. CHI. L. REV. 1383, 1386 (2004); Connor N. Raso, “Strategic or Sincere? Analyzing Agency Use of Guidance Documents,” 119 YALE L.J. 782, 788 n.17 (2010).

¹⁰³ 5 U.S.C. § 553(b)(A), (d)(2).

seeking federal funding.¹⁰⁴ However, whether an agency action is considered a “legislative rule” versus an “interpretive rule” or “statement of policy” is critical.¹⁰⁵

The guidance documents recommended in this memo would not be considered legislative rules because the guidance would allow ED officials to retain discretion in selecting grants and overseeing funding allocations under the BSCA, a characteristic of guidance.¹⁰⁶ As the US Court of Appeals for the DC Circuit has explained, a guidance document must “genuinely leave the agency and its decisionmakers free to exercise discretion.”¹⁰⁷ Here, the guidance documents would simply provide direction on what is allowable under the BSCA, not what is required. Issuing guidance on grant solicitations is standard practice at the Department.¹⁰⁸

b. Non-APA Procedural Requirements

Given the guidance at issue here is clearly not a legislative rule, there is no uniform process under the APA that ED must follow in issuing it. However, recent presidential administrations have placed additional, nonstatutory procedural requirements on the issuance of a limited subset of policy statements.

¹⁰⁴ Peter L. Strauss, “Publication Rules in the Rulemaking Spectrum: Assuring Proper Respect for an Essential Element,” 53 ADMIN. L. REV. 803, 808 (2001) (“Agency administration is aided when central officials can advise responsible bureaucrats how they should apply agency law.”)

¹⁰⁵ Jared P. Cole, and Todd Garvey, “General Policy Statements: Legal Overview,” Congressional Research Service, April 14, 2016, <https://sgp.fas.org/crs/misc/R44468.pdf>. (“Because individuals may bring suit in federal court challenging an agency’s action as violating the APA’s procedural provisions, parties may allege that an agency document should have gone through notice and comment procedures. Consequently, judicial review of challenges to a document released by an agency often turns on whether the agency statement is actually a legislative rule, or could more properly be described as an interpretive rule or general statement of policy.”)

¹⁰⁶ See, e.g., *Vietnam Veterans v. Secretary of the Navy*, 843 F.2d 528, 539 (D.C.Cir.1988); *McCarthy*, 758 F.3d 243 at 252; *Catawba County v. E.P.A.*, 571 F.3d 20, 33-34 (D.C.Cir. 2009); *Ctr. for Auto Safety v. Nat’l Highway Traffic Safety Admin.*, 452 F.3d 798, 809 (D.C. Cir. 2006); *Sec. Indus. & Fin. Markets Ass’n v. U.S. Commodity Futures Trading Comm’n*, 67 F. Supp. 3d 373, 416 (D.D.C. 2014).

¹⁰⁷ *Cnty. Nutrition*, 818 F.2d at 952-53 (D.C. Cir. 1987).

¹⁰⁸ See, e.g., US Department of Education Office of Career, Technical, and Adult Education, “One-Stop Operations Guidance for the American Job Center Network,” June 16, 2017, <https://www2.ed.gov/about/offices/list/ovae/pi/AdultEd/octae-program-memo-17-4.pdf>; US Department of Education, “Non-Regulatory Guidance for Title II, Part A: Building Systems of Support for Excellent Teaching and Leading,” September 27, 2016, <https://oese.ed.gov/files/2020/07/essatitleiipartaguidance.pdf>; US Department of Education, “Charter School Program Non-regulatory Guidance,” January 2014, <https://www2.ed.gov/programs/charter/nonregulatory-guidance.html>.

In 2019, President Donald Trump issued Executive Order 13891¹⁰⁹ which gave agencies specific instructions on the management of guidance and significant guidance documents.¹¹⁰ However, on January 20, 2021, President Biden issued Executive Order 13992, which revoked Executive Order 13891, among other things, and also directed the Office of Management and Budget (OMB) and agency heads to “rescind any orders, rules, regulations, guidelines, or policies” implementing the prior executive order.¹¹¹

Nevertheless, ED must take certain steps in issuing guidance documents. First, ED must determine if the guidance document in question is “economically significant.” This standard was first established via a 2007 Bush Administration OMB bulletin governing agency practices for issuing guidance documents and is entitled “Final Bulletin for Agency Good Guidance Practices” (herein Agency Good Guidance Practices).¹¹² Under the Agency Good Guidance Practices bulletin, guidance documents deemed “economically significant” must be posted in the Federal Register for public notice and comment.¹¹³ To qualify, the guidance document in question, “may reasonably be anticipated to lead to an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy or a sector of the economy.”¹¹⁴ However, the Agency Good Guidance Practices bulletin also notes that “economically significant guidance documents do not include guidance documents on Federal expenditures and receipts.”¹¹⁵ For this reason, the guidance recommended in this memo would not be considered “economically significant.”

Second, ED must determine if the guidance document in question is a “significant guidance document” under the Agency Good Guidance Practices bulletin.¹¹⁶ Such a determination

¹⁰⁹ Executive Office of the President, “Promoting the Rule of Law Through Improved Agency Guidance Documents,” Federal Register, October 15, 2019, <https://www.federalregister.gov/documents/2019/10/15/2019-22623/promoting-the-rule-of-law-through-improved-agency-guidance-documents>.

¹¹⁰ Executive Order 13891 directed each agency to: (1) Establish a publicly available database of its guidance; (2) Review its guidance documents and rescind those that it determines should not be in effect; and (3) Finalize rules establishing procedures for issuing guidance, including procedures for the public to petition for withdrawal or modification of a guidance document. For significant guidance documents, agencies were directed to require: (1) Notice-and-comment procedures except for good cause; (2) Approval by the agency head or a component head appointed by the President; (3) Centralized OIRA review; and (4) Compliance with the applicable requirements for regulations or rules set forth in several additional executive orders.

¹¹¹ Executive Office of the President, “Revocation of Certain Executive Orders Concerning Federal Regulation,” Federal Register, January 25, 2021, <https://www.federalregister.gov/documents/2021/01/25/2021-01767/revocation-of-certain-executive-orders-concerning-federal-regulation>.

¹¹² Management and Budget Office, “Final Bulletin for Agency Good Guidance Practices,” Federal Register, January 25, 2007, <https://www.federalregister.gov/documents/2007/01/25/E7-1066/final-bulletin-for-agency-good-guidance-practices>.

¹¹³ *Id.* at IV(1).

¹¹⁴ *Id.* at I(5).

¹¹⁵ *Id.*

¹¹⁶ *Id.* at I(4).

would require the Department to post the guidance on its website and “establish and clearly advertise on its Web site a means for the public to submit comments.”¹¹⁷ However, unlike with “economically significant” guidance documents, comments received in response to “significant” guidance documents “are for the benefit of the agency, and no formal response to comments by the agency is required.”¹¹⁸

Guidance is considered “significant” if it “[m]aterially alter[s] the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof.”¹¹⁹ However, under the Agency Good Guidance Practices bulletin, “grant solicitations” and “discretionary grant application packages” are “not significant guidance documents.”¹²⁰ As a result, the guidance documents recommended by this memo would likely not be considered “significant.”

There is an argument that because the Department’s main non-regulatory guidance for SSAE was considered “significant” guidance at the time of its publication in 2016, an amendment to that guidance should also be considered “significant.” However, the exact nature of the updates recommended above do not alter the “rights and obligations of recipients,” they simply clarify new potential uses for SSAE funding. Therefore, updating the guidance in such a way should not be deemed “significant.” If the amended guidance is deemed “significant,” the Department should post the amended guidance on the website, and provide an appropriate method for interested parties to comment on the changes.

Legal Authority

The Secretary of Education is vested with statutory authority to issue regulations and guidance to implement grant programs under ESSA.¹²¹

ABOUT GIFFORDS

Giffords is a nonprofit organization dedicated to saving lives from gun violence. Led by former Congresswoman Gabrielle Giffords, Giffords shifts culture, changes policies, and challenges injustice, inspiring Americans across the country to fight gun violence.

¹¹⁷ *Id.* at III(2)(a).

¹¹⁸ *Id.*

¹¹⁹ *Id.* at I(4)(a)(iii).

¹²⁰ *Id.* at I(4)(b).

¹²¹ *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.”).