

# Department of Education

## Recommendations and Actions

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### **ED10: Eliminate the Grantback Statutory Provision of the General Education Provisions Act**

#### **Background**

The General Education Provisions Act (GEPA) gives the Secretary of Education authority, whenever funds are recovered from a grant or cooperative agreement recipient, to repay--or grant back--to the recipient up to 75 percent of the recovered funds provided the recipient agrees to meet certain conditions. Funds are recovered as a result of audit findings of noncompliance with the terms of the grant or cooperative agreement. This provision applies to all recipients of federal education funds except funds received under the Higher Education Act of 1965 and Impact Aid programs.(1) This repayment provision is unique to the Department of Education (ED).

Originally authorized under the Education Amendments of 1978, the grantback considers 75 percent of funds recovered as additional funds available for the program from which ED recouped them; in other words, a recipient found in violation of grant terms ultimately gets back from ED the money the recipient had to pay to the department for violating those terms.(2) Thus, funds appropriated for education purposes which were recovered from a recipient through audit proceedings would not revert to the Treasury but would instead still be spent for educational purposes. States supported this measure for this reason.(3) (The remaining 25 percent which the department cannot grant back reverts to the Treasury.)

The grant recipient might initially spend the funds in noncompliance with program requirements. After funds are repaid to ED and the department grants them back to the recipient, then the recipient spends the funds again. If the law did not provide this second chance, recipients would have a greater incentive to comply with grant requirements from the start of the award. With the grantback provision in place, grantees can take the chance of not complying with requirements in the hope that ED will not audit them and discover the noncompliance. The recipient only risks 25 percent of the final penalty negotiated with ED; that is, the 25 percent that cannot be granted back under the statutory provision.

For example, the department receives an audit report that finds that a state has been charging an excessively high rate for unemployment insurance to ED-funded projects and recommends the state reduce the charges to the same rate charged to non-ED funded projects and repay all excess amounts collected, totalling \$1 million. After receiving the report and supporting documentation, ED program officials decide to accept the audit recommendations and issue a program determination letter that notifies the state of the decision, instructs the state to take the recommended corrective actions, and to repay the excess \$1 million collected. The state must return the \$1 million to ED.

The date of the department's decision, in the form of the program determination letter, begins a three-year period in which the recovered funds remain available for use. (If the grantee appeals the decision to ED's Office of Administrative Law Judges [ALJ], the start date of the availability period is delayed until the appeal decision is issued.)

The state may then request repayment of 75 percent of the funds recovered, in this example a total of \$750,000. ED program officials review the state's request to determine whether:

1. the state repaid the \$1 million;
2. sufficient documentation exists to determine if the state completed the required corrective actions;
3. the state meets all other requirements of the program;
4. a plan for the use of funds exists that achieves the purposes of the program and, to the extent possible, benefits the population affected by the failure to comply; and
5. the state can use the repaid funds as proposed in the plan within the three-year availability period.

If all other aspects of the state's request meet the eligibility requirements, ED program officials may negotiate with the state to improve the project plan to better meet program objectives.

Based on the final project plan and other pertinent considerations, the program officials decide whether to approve the repayment and the amount to repay, or grant back. Program officials then prepare a memorandum to the secretary that explains the circumstances that led to the recovery of funds and recommend repayment of the \$750,000 as requested by the state. A proposed Federal Register notice announcing the department's intention to grant back the funds accompanies the memorandum. The decision memorandum and Federal Register notice then enter the department's internal clearance process for review and comment by other departmental components.

When the decision memorandum and notice are submitted for clearance, program officials notify the ED budget office to submit a request to the Office of Management and Budget (OMB) for an allotment of funds for the grantback. Following resolution of any issues raised during the clearance process, the decision memorandum and notice are submitted to the secretary for final decision.

After the secretary authorizes the repayment of funds, ED publishes the notice in the Federal Register for 30 days. At the end of the 30-day period, ED issues the \$750,000 grantback award to the state.

Upon completion of the project for which the funds were awarded, the state submits a project report to the program office. After the program office accepts the final report, it provides a copy to the ED budget office for transmittal to OMB.(4)

The amount of time the grantback process takes varies by case, depending on the extent of corrective actions needed, whether the recipient appeals the audit decision, and, if there is an appeal, the extent of changes, if any, that the ALJ makes to the plan as a result of the appeal. The department directs a recipient eligible for a grantback to apply no later than five months before the recipient plans to obligate the funds. This five-month period includes the 30 days necessary for the Federal Register notice.(5)

Legislation should not provide recipients of ED funds with a disincentive to comply with program and procedural requirements. Valid audit findings should result in appropriate recovery of misused funds to protect the federal government from future cases of waste, fraud, and abuse.

In addition, the grantback process places an administrative burden on ED that simple recovery of funds as a result of audit action would not.

### **Actions**

1. The grantback provision in the General Education Provisions Act, Part E, Section 459, should be repealed to eliminate the disincentive for grantees to comply with the conditions of a grant or cooperative agreement.

In lieu of the grantback provision, the ED should decide the amount of the disallowance to recover from the recipient according to current program law and regulations. The recipient would then have the right to appeal the disallowance. Once a final decision is reached, the recipient would have to return to ED the sum of the final agency action. All recovered funds would revert to the Treasury. The department would not have the discretion to grant back any portion of the disallowance to the penalized recipient. Sanctioned recipients should receive the necessary assistance from ED or other federal sources to correct the deficiencies cited so that they may remain eligible to receive federal funds in the future. In addition, in cases where grant recipients are found in violation of departmental regulations, but a good-faith effort was made to comply with them, the department should negotiate final audit amounts that do not place an undue burden on the recipient.

2. The department should then notify all affected grant recipients of the change in the law.

Upon repeal of the grantback provision, the department should mount an aggressive campaign to ensure all grant recipients are aware of the change in the law.

### **Implications**

Elimination of the grantback provision would no longer allow a grantee cited for noncompliance with grant requirements a second opportunity to spend some of its funds.

Elimination of the grantback also eliminates the department's administrative burden of going through the grantback application process and monitoring the use of funds granted back.

### **Fiscal Impact**

