



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF ELEMENTARY AND SECONDARY EDUCATION

THE ASSISTANT SECRETARY

MAR 10 2014

Dear Colleague:

On October 31, 2013, the U.S. Department of Education's (Department's) Office of Inspector General (OIG) issued a Management Information Report titled "Fraud in Title I-Funded Tutoring Programs" (see Enclosure). In this report, OIG presented the findings and results of investigations and audits conducted on the provision of Supplemental Educational Services (SES) in multiple States over the past decade. As described in more detail below, OIG found serious instances of fraud, waste, and abuse of Federal funds in the provision of SES. While the OIG's report addresses the results of investigations relating to the provision of SES, it is important to note that identified issues are relevant to any Department program that allows grantees to contract with third parties to deliver services, particularly when services are billed on a per-child basis.

The Office of Elementary and Secondary Education (OESE) is gravely concerned by the nature of the findings presented in the report, and is deeply committed to working with States to prevent fraud, waste, and abuse. As part of these efforts, we are issuing this letter to present the findings outlined in the OIG report and to provide suggested measures that may be useful in preventing and prosecuting fraud and abuse in the use of Federal education funds. Given the threat the activities identified in the report pose to the effectiveness and reputation of our educational system, we encourage you to implement the recommendations provided in this letter within your organization.

Background

Under section 1116(e) of Title I, Part A of the Elementary and Secondary Education Act of 1965, as amended (ESEA), Local Educational Agencies (LEAs) must offer SES to low-income students who attend Title I schools that are in their second year of having been designated as in need of school improvement or are in corrective action or restructuring status.¹ Unless a lesser amount is needed to meet demand, an LEA must spend at least an amount equal to 20 percent of its Title I, Part A allocation on SES and transportation for students who exercise the public school choice option under Section 1116(b)(1)(E) of the ESEA.²

Between School Year (SY) 2007-2008 and SY 2011-2012, the number of students receiving SES and the amount of funding used to provide SES increased markedly. According to the Department's ED Data Express, 927,153 students received SES services during SY 2011-2012, an approximately 60 percent increase from the 580,500 students who received SES in 2007-

¹ See 34 C.F.R. §200.45

² See 34 C.F.R. §200.48

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The Department of Education's mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.

2008. As a result of the increase in the number of students receiving SES, total spending for SES increased during the same period, with SES funding levels rising from over \$800 million in SY 2007-2008 to approximately \$1.04 billion in SY 2011-2012.³

In February 2012, the Department began approving SEAs' requests for ESEA flexibility, a process that provides SEAs with waivers of certain ESEA requirements including, among other things, an LEA's responsibility to provide SES to eligible students. However, several SEAs have not received ESEA flexibility and some SEAs that have received ESEA flexibility have chosen to continue to allow LEAs to provide SES or similar academic services to eligible students, which LEAs may pay for using ESEA funds. Nonetheless, the types of behaviors and activities identified in the OIG report could occur in a multitude of other large Department programs that allow grantees or subgrantees to contract with third parties to deliver services on a per-child basis. As such, we hope that all SEAs and LEAs, irrespective of whether they are still required to provide SES, will appreciate the significance of the report's findings and give appropriate consideration to our suggestions.

OIG Findings

The OIG report covers approximately 10 years of audit work and 5 years of investigative work across numerous States and involves a diverse range of SES providers. OIG previously audited SES implementation in six States from 2003 to 2005⁴ and examined SES providers in five California LEAs in 2005.⁵ In addition, the U.S. Government Accountability Office (GAO) released reports in 2006 and 2007 highlighting concerns regarding SES implementation and encouraging increased Federal and State monitoring of SES services.⁶ However, despite the publication of these OIG and GAO reports detailing concerns regarding SES implementation, the need for additional OIG SES investigations increased substantially in recent years. In 2009, OIG had only one SES investigation; as of August 2013, OIG had received complaints and opened investigations into another 31 individual matters involving over 50 different SES providers. During this time, OIG SES investigations resulted in the criminal prosecution of 13 individuals and one corporation, as well as 8 civil fraud actions.

³ The SY 2011-2012 SES enrollment and spending data are the Department's estimates because, according to ED Data Express, several States had errors in their final data submissions to the Department.

⁴ For more details regarding OIG audits of SES implementation, see the following OIG Audit Reports: Delaware (ED-OIG/A03F0002, November 22, 2005, <http://www2.ed.gov/about/offices/list/oig/auditreports/a03f0002.pdf>); Illinois (ED-OIG/A07F0003, August 23, 2005, <http://www2.ed.gov/about/offices/list/oig/auditreports/a07f0003.pdf>); Indiana (ED-OIG/A05E0014, February 18, 2005, <http://www2.ed.gov/about/offices/list/oig/auditreports/a05e0014.pdf>); Michigan (ED-OIG/A05F0007, August 2, 2005, <http://www2.ed.gov/about/offices/list/oig/auditreports/a05f0007.pdf>); Nevada (ED-OIG/A09F0002, July 14, 2005, <http://www2.ed.gov/about/offices/list/oig/auditreports/a09f0002.pdf>); and New Jersey (ED-OIG/A02F0006, September 14, 2005, <http://www2.ed.gov/about/offices/list/oig/auditreports/a02f0006.pdf>).

⁵ For more details regarding the OIG examination of SES implementation in California, see OIG Management Information Report, "Implementation of Supplemental Education Services in California" (ED-OIG/X09G0007, September 21, 2006, <http://www2.ed.gov/about/offices/list/oig/auditreports/x09g0007.pdf>).

⁶ For more details, see "Education Actions Needed to Improve Local Implementation and State Evaluation of Supplemental Educational Services," GAO-06-758, August 2006, <http://www.gao.gov/new.items/d06758.pdf>; "Education Actions May Help Improve Implementation and Evaluation of Supplemental Educational Services," GAO-07-738T, April 18, 2007, <http://www.gao.gov/new.items/d07738t.pdf>.

As a result of these investigations, OIG has recovered more than \$19 million in fraudulently obtained funds through criminal restitution, civil judgments, civil settlements, and fines. Of particular note, over 68 percent of the investigations OIG conducted involve the knowing falsification of attendance and billing records by an SES provider and/or its employees. The recently released OIG report presents details on several of these cases, with the following representing a few notable examples:

- In New York, a national SES provider agreed to a \$10 million civil fraud settlement and two former directors pled guilty and agreed to pay more than \$1 million for their individual roles in the fraud. The fraud in this case involved the SES provider instructing employees, including several public school employees, to falsify student attendance records and submit billings for SES services that it did not provide.
- In Michigan, a former director of State and Federal programs for a school district was convicted on bribery charges and sentenced to 5 years in prison followed by 3 years of supervised probation for receiving money and other items from an SES provider owned by her brother-in-law in exchange for the awarding of a contract for services.
- An SES provider in New York City agreed to a \$1.725 million civil fraud settlement and one of its managers pled guilty and agreed to a \$2.3 million civil judgment in response to civil and criminal fraud complaints alleging that the SES provider defrauded the New York City schools.
- The owner of an SES provider in Ohio was indicted on fraud-related charges after allegedly billing a school district for tutoring sessions that were not provided and submitting more than \$50,000 in fraudulent claims.

As of the date of its report, OIG had 19 open investigations and 6 other complaints involving allegations of fraud in SES that were being evaluated for investigative merit. Representing an especially concerning trend, 36 percent of these investigations and complaints involved allegations that public school teachers working as SES tutors after hours directly and materially participated in SES fraud schemes. For example, an investigation in Arkansas involved an SES provider who allegedly paid a public school teacher to falsify SES billing and student attendance records. Another investigation in Oklahoma produced an initial finding that up to 20 public school teachers who were working as SES tutors submitted false invoices for tutoring services for students who never received any tutoring.

OESE Recommendations

As the OIG report indicates, fraudulent schemes perpetrated through SES have the potential to seriously undermine the public trust, weakening the reputation of our nation's education system within our communities. Given that many of the instances noted in the OIG report involve public school employees, there is a clear threat to parent and student confidence in teachers and administrators, essential prerequisites for successful educational outcomes. Equally important, fraudulent misappropriation of Title I funds directly prevents those funds from being used for their intended purpose: providing essential support for the education of our nation's students with the greatest needs. Taking steps to prevent, detect, and prosecute the types of fraud noted in the OIG report can help SEAs and LEAs ensure that students receive the full benefit of SES and other similar academic services.

Federal regulations require grantees to monitor all grant supported activities, including the provision of SES.⁷ While Federal regulations do not prescribe the exact method or extent of monitoring that SEAs must perform over SES, there is a clear requirement that SEAs must monitor the provision of SES and other grant supported activities. As the OIG report indicates, the extent and nature of the fraudulent schemes uncovered through previous and ongoing investigations raises concerns about the extent of SEA and LEA oversight of SES beyond the initial approval process. To that end, we encourage SEAs to carefully screen SES providers prior to approval and for SEAs and LEAs to invest greater time and resources in monitoring SES activities.

In addition to more rigorous subrecipient monitoring, SEAs and LEAs should consider taking steps to strengthen protections against fraud and corruption. The suggestions we provide below, if effectively implemented, may help prevent the types of situations noted in the OIG report from occurring, and would greatly facilitate identification, prosecution, and recovery of funds where fraud is committed. By implementing some or all of these suggestions, we believe that SEAs and LEAs will be better able to ensure that students receive the full benefit of SES or other similar services.

1. Facilitating Fraud Reporting

Beyond actively increasing monitoring of SES providers, OESE strongly believes that the most important step SEAs and LEAs can take to detect and facilitate the prosecution of fraud is to support whistleblowers. The types of actions and schemes noted in the audit report are by their very nature predicated on deception and subterfuge, making it essential for individuals who become aware of the fraud to come forward with any information they might have. Given the importance of whistleblowers in recognizing these types of fraudulent schemes, it is essential that SEAs and LEAs take steps to help members of their organizations and communities understand the significance of their role in reporting fraudulent behaviors to protect the interests of the victims of these schemes – the children who are the beneficiaries of the services. To assist that process, if they have not done so already, SEAs and LEAs should consider creating a whistleblower hotline and implementing other policies and procedures intended to encourage whistleblowers.

In addition to encouraging reporting of fraud to SEAs and LEAs, it is also important to ensure that allegations of fraud in the provision of SES are reported to the OIG, as the Department has a critical interest in the outcomes of any investigations. The OIG has the potential to provide valuable assistance and resources for investigations that it considers as having investigative merit. Thus, SEAs and LEAs should also consider creating policies and procedures to ensure that allegations of fraud are reported to the OIG, particularly where there have been falsifications of applications, attendance and billing data, or theft, embezzlement, and other improper use of Federal education funds.⁸

⁷ See *Education Department General Administrative Regulations (EDGAR)* §80.40(a) (34 C.F.R. §80.40(a)); *Office of Management and Budget (OMB) Circular A-133*, Subpart D, §.400(d)(3).

⁸ To promote reporting of suspected fraud to the OIG, SEAs and LEAs should consider publicizing contact information for the OIG Hotline, which is available for anyone to use for reporting suspected fraud, waste or abuse of Department funds. Complaints may be made through the OIG Hotline by calling the OIG Hotline's toll-free

2. Minimizing Conflicts of Interest

As described in the report, OIG's investigations have frequently found that public school employees are directly involved in the falsification of SES records and billings. In general, when public school employees are also employed by an SES provider, or have a private interest in entities offering SES, there is an increased potential for actual or perceived conflicts of interest. As OIG highlights in its report, this is particularly true where the SES provider employs public school employees in non-instructional positions such as managing tutoring programs, recruiting students and other school districts for the provider, or completing other administrative functions.

While OESE recognizes the value of having educators participate in SES, we suggest that SEAs and LEAs consider taking steps to ensure that public school employee participation in SES does not create any conflicts of interest that could result in harm to the programs or the public interest. An example of a step an SEA or LEA could take would be to prohibit an employee's participation in SES activities if there is the potential for the employee to influence the award or administration of Federal education funds in a way that would benefit the financial interest of the employee (or someone closely related to the employee, such as a spouse, child, or other relative). By minimizing the potential for conflicts of interest, SEAs and LEAs can limit the impetus for public school employees to participate in fraudulent schemes.

3. Defining Limitations on Incentives for SES Participation

As noted in the OIG report, the Department does not prohibit SES providers from providing financial or other types of incentives to students, their families, or school and LEA personnel to encourage student enrollment in SES. Rather, in the 2009 "Supplemental Educational Services Non-Regulatory Guidance," the Department stated that an SEA may develop its own policies regarding financial incentives under which an SEA could, for example, allow SES providers to offer "nominal incentives to parents or students to attend information sessions and provider fairs, for regular student attendance, or for student academic achievement." While the Department has not defined "nominal" or established limitations on the practice of offering incentives, the current non-regulatory guidance does caution against allowing financial incentives or gifts to be provided to students or parents in exchange for initial enrollment or changing providers. In addition, the guidance suggests that SEAs "prohibit [SES] providers from offering cash or other incentives to schools for signing up students for their program."⁹

Given the findings stated in the OIG report, OESE is deeply concerned about the potential impacts of the use of incentives by SES providers, especially the potential practice of offering cash and other financial incentives to public school employees for encouraging or arranging student participation in their services. As a result, we will consider whether further guidance regarding limitations on the use of these types of incentives is necessary. However, in the absence of further guidance from the Department regarding the use of incentives by SES providers, we encourage SEAs to take affirmative steps to establish meaningful limitations on the use of incentives to avoid the potential for fraudulent schemes. We also strongly recommend

number, 1-800-MIS-USED (1-800-647-8733); emailing a complaint through the ED OIG Hotline internet page; or submitting a special complaint form by mail. For more information about the ED OIG Hotline and the complaint submission process, please visit <http://www2.ed.gov/about/offices/list/oig/hotline.html>.

⁹ U.S. Department of Education, "Supplemental Educational Services, Non-Regulatory Guidance," January 14, 2009, p.6 (Question B-4). Available at: <http://www2.ed.gov/policy/elsec/guid/suppsvcsguid.doc>.

that SEAs give serious consideration to prohibiting or limiting the use of financial incentives for SES recruiters – especially where those recruiters are also public school employees – as the use of financial incentives in those situations can create potentially problematic conflicts of interest and lead to fraud or abuse by SES providers.

4. Inclusion of Certification Language in Contracts for Services

As the OIG report highlights, SEAs and LEAs should consider including language in applications or contracts that would require recipients of Federal funds to certify that they are not committing fraud in their applications or requests for payment. In one noted OIG investigation, the LEA's requirement that all SES providers sign a certification holding the provider and its representatives subject to criminal prosecution if they knowingly submitted false information to the LEA was instrumental in OIG's successful prosecution of a provider and two of its employees.

In its report, the OIG provides a model of certification language that OIG believes would be useful for facilitating the prosecution of individuals or entities that have committed fraud in the use of Federal education funds.¹⁰ As shown in the OIG model certification, the key elements of an effective certification are: clear acknowledgement of the use of Federal funds; certification of the accuracy and veracity of statements and information provided by applicants; and details as to the range of penalties for knowingly falsifying statements or information. Adding this type of certification language to applications, contracts, and requests for payment for SES would significantly facilitate Federal, State, and local investigations as well as civil and criminal judgments against individuals and providers who commit fraud related to the provision of SES.

5. Extending Records Retention Periods to Match Federal Statutes of Limitations Periods

Finally, SEAs and LEAs should consider expanding their records retention period beyond the 3-year minimum required under the Department's regulations.¹¹ A records retention period of 5 or 6 years would more closely match Federal criminal and civil statute of limitations periods. By making such a change, SEAs and LEAs could greatly facilitate investigation and prosecution of cases where fraud and corruption has occurred in the use of Federal funds.

Conclusion

Ensuring that children receive the full benefit of the services and resources provided for them is the responsibility of the entire educational system. As such, we strongly believe that, by taking these steps, we can work together to protect against the occurrence of fraud in the provision of SES and to hold the individuals who commit any fraudulent acts responsible for the harm they cause. While OESE is planning to explore further actions to strengthen protections against fraud

¹⁰ The model certification developed by OIG is as follows: "I understand that providing a false certification to any of the statements above makes me liable for repayment to [the] U.S. Department of Education for funds received on the basis of this certification, for civil penalties under 31 U.S.C. §3729, and for criminal prosecution under 18 U.S.C. §§1001, 641, 666, and other relevant Federal statutes, and/or State criminal statutes if applicable, and punishable by fines and prison. I certify that the information contained above is true and accurate and may be relied upon by the U.S. Department of Education." (See Enclosure, p. 14)

¹¹ See 34 C.F.R. §80.42.

in SES, we sincerely hope that you will read the enclosed report and consider immediately taking the measures suggested above within your own organization.

If you have any questions or would like any other information, please do not hesitate to contact John Keefer, Management and Program Analyst, OESE-Management Support Unit (MSU) at (202) 401-1518 or via email at John.Keefer@ed.gov. We look forward to continuing to work with you to ensure that the resources intended to enrich the education of our students are devoted solely to providing the highest quality educational services.

Sincerely,

A handwritten signature in black ink, appearing to read "Deborah S. Delisle". The signature is fluid and cursive, with a large, stylized initial "D".

Deborah S. Delisle
Assistant Secretary for Elementary and
Secondary Education

Enclosure