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MEMORANDUM

DATE : July 16, 2018
TO : Kent Talbert
Senior Advisor, Office of the Deputy Secretary
FROM : Jason Botel
Principal Deputy Assistant Secretary , Office of Elementary and Secondary
Education
SUBJECT : Determine Options for the Allowable Use of Funds for School Safety Measures
Under Title IV, Part A

Issue

The purpose of this memorandum is to help determine the actions and next steps to communicate to States, given questions we have received, about the allowable uses of program funds to support school safety measures, specifically related to the purchase of firearms for school personnel, including teachers; the training of school personnel, including teachers, in the use of firearms to protect students; and whether a State may direct how its local educational agencies (LEAs) use funds under Title IV, Part A of the Elementary and Secondary Education Act (ESEA), as amended by the Every Student Succeeds Act (ESSA).

There are two specific questions for consideration:

- May Title IV, Part A funds be used to purchase firearms for school staff or train school staff to use firearms?
- May an SEA direct its LEAs to use all their Title IV, Part A funds on school safety measures?

Background

In recent months, the Department of Education (Department) has received questions regarding the use of Title IV, Part A funds to purchase firearms for school staff and to train school staff in the use of firearms. Additionally, the Governor of Texas, following the shooting in Santa Fe, TX, on May 18, 2018, requested that its State educational agency (SEA) direct its LEAs to spend any increase in Title IV, Part A funds on school safety measures.

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Title IV, Part A of the ESEA is the Student Support and Academic Enrichment (SSAE) grant program. The SSAE program is a flexible formula grant program administered by the SEA.¹ The SSAE program is intended to improve students' academic achievement by increasing the capacity of SEAs, LEAs and local communities to:

- (1) provide all students with access to a well-rounded education (section 4107);
- (2) improve school conditions for student learning (section 4108); and
- (3) improve the use of technology to improve the academic achievement and digital literacy of all students (section 4109).²

An LEA that receives at least \$30,000³ in Title IV, Part A program funds must spend the funds in the three content areas above consistent with its local needs assessment and within the following parameters, as required by ESEA section 4106(e)(2)(C)-(E):

- C. at least 20 percent of the funds must be used for activities to support well-rounded educational opportunities (ESEA section 4107);
- D. at least 20 percent of the funds must be used for activities to support safe and healthy students (ESEA section 4108); and
- E. a portion of the funds must be used for activities to support effective use of technology (ESEA section 4109).

Further, section 4106(c)(1) provides that during the design and development of its application, an LEA or consortium of LEAs must engage in consultation with certain stakeholders. Specifically, LEAs and consortia of LEAs must develop their SSAE applications through "consultation with parents, teachers, principals, other school leaders, specialized instructional support personnel, students, community-based organizations, local government representatives (which may include a local law enforcement agency, local juvenile court, local child welfare agency, or local public housing agency), Indian tribes or tribal organizations that may be located in the region served by the local educational agency (where applicable), charter school teachers, principals, and other school leaders (if such agency or consortium of such agencies supports charter schools), and others with relevant and demonstrated expertise in programs and activities designed to meet the [purposes of the SSAE program]."

¹ SSAE was first funded in FY 2017. In FY 2017, the program received \$400 million. In FY 2018, the amount was slightly over \$1.1 billion. In 2017 only, Congress authorized States to award subgrants to LEAs using a competitive process and/or the statutory formula. Eight states (IN, MN, NE, NW, NH, NY, OK and UT) used this one-time opportunity.

² States must subgrant at least 95% of their allotment to LEAs. The State may reserve no more than 1% for administrative costs. At least 4% may be used for State-wide activities, including monitoring, training, technical assistance and capacity building for LEAs receiving SSAE subgrants.

³ In the 2018 Consolidated Appropriations Act, there was an increase in the Title IV, Part A funding (approximately \$1.1 billion) provided. There will be considerably fewer LEAs to receive allocations less than \$30,000.

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The SEA's determination about what constitutes an allowable use of SSAE funds depends on a number of factors, starting with whether all statutory requirements are met. In addition to ensuring that proposed activities are informed by a comprehensive needs assessment and stakeholder engagement, as noted above, (ESEA sections 4106(d) and 4106(c)(1)), an SEA will consider whether a proposed activity is consistent with the purposes of at least one of the three content areas in the SSAE program (well-rounded education in section 4107, safe and healthy students in section 4108 or the effective use of technology in section 4109).

Indeed, SSAE program funds may be used to help make schools safer and more supportive for students and school communities. Title IV, Part A authorizes activities in the three aforementioned areas, one of which includes the improvement of school conditions for student learning, but is not limited to school safety measures like comprehensive school mental health, violence prevention and training on trauma-informed practices.

Assuming that the activity is consistent with the purposes of one of the above three content areas, as applicable, the SEA must make further determinations as to allowable costs in accordance with the cost principles in the Uniform Administrative Requirements, Cost Principles and Audit Requirements for Federal Awards (Uniform Guidance) at 2 CFR Part 200, Subpart E. The cost of an activity is allowable under the SSAE program if it is reasonable and necessary for performance of the grant (i.e., it is of a type generally recognized as ordinary and necessary for operation of the grant) and allocable to the grant (i.e., it is chargeable to the grant award in proportion to the benefits received as a result of the cost).

Also, because section 4110 of the ESEA prohibits supplanting, the proposed use of funds for the activity must supplement, and not supplant, other State or local funds that would otherwise be used to pay for the allowable activity.

Finally, SEAs must check to ensure that the activity is not one of the prohibited activities in section 4001(b) or section 8526 of the ESEA, as amended by ESSA. If the SEA determines a safety measure is an allowable activity consistent with these processes and considerations, it is allowable.

When all statutory requirements are met and safety is an identified need, the flexibility of this program lends itself to many potential ways to address school safety. It is conceivable that funds may be used to make improvements to the physical facility provided such improvements meet the definition of "minor remodeling;" as construction is a prohibited use of funds. Funds may, conceivably, also be used to make technological changes to a school to prevent intruders from entering the school, to ensure students and school personnel may safely enter the school building and exit during an emergency or to protect the life and well-being of students and school personnel.

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Question 1: May Title IV, Part A funds be used to purchase firearms for school staff or train school staff to use firearms?

Analysis for Question 1:

Statutory Analysis

The statute provides LEAs with considerable flexibility and discretion in the use of funds and permits LEAs to use those funds, under the safe and healthy student content area, for “other programs and activities” not expressly authorized. The statute neither clearly authorizes nor prohibits the purchase of firearms or firearms training. Further there is nothing relevant in the legislative history on the issue of whether Title IV, Part A funds could be used for firearms or firearm training. However the definition of “drug and violence prevention” for the Title IV, Part A program references “the creation and maintenance of a school environment that is free of weapons.” (ESEA section 4102(5)(B))⁴

Arguments can be made for and against permitting the use of Title IV, Part A funds for purposes such as firearms for school staff and training for school staff on firearm use. The Department’s Office of the General Counsel has advised that the Secretary has discretion to interpret the broad language of the statute as to its permissiveness regarding the purchase of firearms and training on the use of firearms.

Other Federal Programs

While Title IV, Part A is silent on whether firearms are specifically allowable or prohibited, there is precedent within the Federal government for categorizing the purchase of weapons, ammunition or weapons training as unique items of cost that may be analyzed and treated differently than other types of costs. It is the longstanding policy position of the Federal Emergency Management Agency (FEMA) and the U.S. Department of Justice (DOJ) that

⁴ Definition of “drug and violence prevention” in sec. 4102(5)(B) for the Title IV,A program:

(5) DRUG AND VIOLENCE PREVENTION.—The term “drug and violence prevention” means— ... (B) with respect to violence, the promotion of school safety, such that students and school personnel are free from violent and disruptive acts, including sexual harassment and abuse, and victimization associated with prejudice and intolerance, on school premises, going to and from school, and at school-sponsored activities, **through the creation and maintenance of a school environment that is free of weapons** and fosters individual responsibility and respect for the rights of others.

OGC does not believe this language is intended to preclude all firearms in schools, but rather that it is about preventing unauthorized individuals (primarily students) from having weapons in the school environment. In 2013, the Department along with the Departments of Homeland Security, Justice, Health and Human Services, the Federal Emergency Management Agency, and the Federal Bureau of Investigation issued the “GUIDE FOR DEVELOPING HIGH-QUALITY SCHOOL EMERGENCY OPERATIONS PLANS,” which recommends that “the possibility of an *active shooter* situation is not justification for the presence of firearms on campus in the hands of any personnel other than law enforcement officers.” This guidance which is still on the Department’s website may have been considered when Congress drafted the definition of “drug and violence prevention.”

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weapons and ammunition are not allowable under the Homeland Security Grant programs or predecessor programs (prior to 2003). The Homeland Security Grant programs, authorized by Section 2008 of the Homeland Security Act (HSA), include a broad program authorization available for “enhancing school preparedness,” with flexible and open-ended uses of funds.⁵ There is not an express statutory basis for FEMA’s (and previously DOJ’s) prohibition on the purchase of weapons or ammunition, as the statutory language is quite broad. Rather, it is understood that the prohibition on weapons or ammunition is a policy position based on the reasoning that State and local governments should cover the costs associated with weapons and ammunition for its personnel, including law enforcement personnel, and that the Homeland Security Grant programs should fund more specialized preparedness purposes.⁶

Congressional Intent

There is no evidence that Congress contemplated the use of Title IV, Part A funds for firearms or firearms training when it passed ESSA. However, when addressing this specific issue for the first time since the passage of ESSA in the context of a school violence prevention program that includes training for school personnel and law enforcement, the “STOP School Violence Act” (Pub.L. 115–141), Congress included a rule of construction that prohibits the use of grant funds for the purpose of purchasing firearms or training in the use of firearms. Additionally, Senator Lamar Alexander, Chairman of the Senate Health, Education, Labor, and Pensions (HELP) Committee, told the Associated Press in March 2018 that he is not supportive of arming teachers.⁷

Broader Public Policy Debate regarding Guns

More broadly, there are important public policy considerations with respect to federal funding enabling the purchase, training, and potential use of firearms in school by school staff. The issue of firearms in the United States is polarizing, involving flashpoints such as Constitutional rights, safety, and deterrence. A March 2018 Gallup poll⁸ indicated 67% of Americans favor stricter laws controlling the sale of firearms, the highest percentage registered since 1997 and a 20-point

⁵ Section 2008 of the Homeland Security Act of 2002 (HSA), as amended, authorized uses of FEMA grant funds for counterterrorist activities including, but not limited to, purchasing and maintaining equipment, protecting critical infrastructure, **enhancing school preparedness**, and “any other appropriate activity, as determined by [FEMA].” Despite the broad statutory language in HSA, FEMA’s most recent guidance, issued November 1, 2017, reiterated its determination that weapons of any kind and ammunition are unallowable expenses under the grant program. Here is a link to the guidance (FEMA Grant Programs Directorate Information Bulletin No. 426, November 1, 2017); see page 2 - https://www.fema.gov/media-library-data/1509981634187-ff65775f330fb464d5711c3278f80194/ControlledEquipmentRecission_IB_Final_11-1-17.pdf

⁶ This is based upon consultation with the key FEMA attorney for the Homeland Security Grants.

⁷ <https://www.usnews.com/news/best-states/tennessee/articles/2018-03-27/sen-alexander-not-a-big-fan-of-arming-teachers-at-school>

⁸ <https://news.gallup.com/poll/229562/preference-stricter-gun-laws-highest-1993.aspx>

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increase since 2014, although most of the increase came between December 2017 and March 2018. Another Gallup poll from March 2018⁹ surveyed public response to common proposals to stop or reduce mass shootings at schools, with 53% of respondents indicating that having teachers or other school officials with appropriate training carry guns at school would be “not at all effective”, while 47% thought it would be either “very effective” or “somewhat effective”.

Contrast between Parkland and Santa Fe

State and local response to recent school shootings has varied. In the wake of the school shooting in Parkland, FL in February 2018, student activists started a grassroots gun reform movement that culminated in nationwide protests. Pressure on lawmakers resulted in the passage of new gun control legislation in Florida, including raising the minimum age to purchase a firearm from 18 to 21, a waiting period for new firearm purchases and new funding for mental health services. Notably, the legislation also provides for funding to arm some teachers in schools contingent upon both the school and the local sheriff’s office agreeing to the need.

However, the public response to the shooting in Santa Fe, Texas in May 2018 was different than what followed the events in Parkland, Florida. Whereas in Parkland the student activists confronted elected officials about stricter firearm control measures, students in Santa Fe asked Senator Ted Cruz (R-TX) to help arm qualified teachers in the aftermath of the shooting, as reported by the *New York Times*¹⁰. Texas Governor Greg Abbott (R) introduced a school safety plan in May 2018 that prominently featured resources and funding for the hardening of schools with both physical upgrades to school facilities and making available additional armed school resource officers under the State’s optional school marshal programs.

It seems reasonable to attribute the different responses to violence to differences in the dominant cultural viewpoints between the two locations. Santa Fe is rural, working-class and located in Texas. Parkland is urban, affluent and located in Florida. The two locations naturally hold different perspectives on firearms, firearm culture, and violence prevention. For purposes of this analysis, it is assumed the two different responses in Parkland and Santa Fe are indication that different regions of United States respond differently to violence and to violence prevention. As such, like with many complex and polarizing issues, it is difficult to identify common solutions that will find equal support across the different regions of the country.

⁹ “Broad Agreement on Most Ideas to Curb School Shootings”, <https://news.gallup.com/poll/229805/broad-agreement-most-ideas-curb-school-shootings.aspx>

¹⁰ “Anti-Gun Backlash From School Shooting? Probably Not in Texas”, *New York Times*, May 20, 2018
<https://www.nytimes.com/2018/05/20/us/texas-school-shooting-guns.html>

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Conclusions

The polarization of public opinion generally on the topic of guns and the variations in local response to violence could be viewed as support for keeping the use of funds a local decision in a flexible program such as Title IV, Part A. Alternately, the position of other Federal agencies regarding the use of Federal funds for purchasing firearms as well as the inclusion of language in the program statute regarding a weapon-free environment could support the view that Federal Title IV funds not be used for guns, and ammunition, and State and local government should use State and local funds to support such purchases.

As a matter of substance, only a small percentage of school districts would be likely to utilize Title IV, Part A funds to purchase firearms. It would further require the SEA to concur such a purchase is an allowable use. Currently 9 States allow for school staff to possess or have access to firearms, but none mandate arming school staff¹¹. It's estimated that several hundred school districts, most of them small and rural, actually provide school staff access to firearms, and usually as part of a layered approach to school hardening or security¹². In most cases this Secretarial administration has provided States' maximal discretion where the law suggests flexibility.

However, the use of Federal funds for firearms and firearm training is unique, as evidenced by FEMA and DOJ's treatment of this issue. If the Secretary were to permit the use of Title IV, Part A funds for the purchase of firearms, it appears that it would be the first time a Federal agency has authorized the purchase of weapons for school personnel without specific statutory authorization. It is therefore reasonable for the Secretary to disallow this particular use of the funds absent specific Congressional authorization, and it is unlikely that this interpretation would be subject to a successful legal challenge.

One possible compromise to enable those school districts that wish to use their Title IV funding to support the arming of school staff with firearms without directly allowing the purchase of firearms would be to allow the use of funds to support firearms training. There is a consensus in the field that arming school staff necessitates a training program. Allowing the funds to be used for training would support one necessary component of arming school staff but not expose the Department to the political liability were the funds to be allowed to purchase weapons themselves.

¹¹ "State Policy Responses to School Violence", Education Commission of the States, May 2018, <https://www.ecs.org/wp-content/uploads/State-Policy-Responses-to-School-Violence.pdf>

¹² "Trump Wants to Arm Teachers. These Schools Already Do.", *New York Times*, March 1, 2018 <https://www.nytimes.com/2018/03/01/us/armed-teachers-guns-schools.html>

Question 1

May Title IV, Part A funds be used to purchase firearms for school staff or train school staff to use firearms?

Considerations:

- Title IV, Part A is permissive, broad and relatively flexible regarding allowable uses of funds. The statute provides an extensive list of authorized programs and activities.
- The statute, under section 4108 (Activities to Support Safe and Healthy Students), has been interpreted to permit the use of funds for school safety and security measures such as metal detectors and door locks.
- The Department has not previously considered whether Federal funds may be used to purchase firearms or to train school staff to use firearms.
- The statute neither expressly authorizes nor prohibits the use of funds to purchase firearms or train school staff to use firearms. Under section 4108, a long illustrative list of allowable uses of funds is provided, but it does not include the purchase of firearms or the training of school staff to use firearms.
- ESEA section 4102(5)(B) refers to “the creation and maintenance of a school environment that is free of weapons,” but that has been thought to mean keeping weapons out of the hands of students, as it is included in the definition of the term “drug and violence prevention” for purposes of Title IV, Part A.
- There is nothing in the legislative history to indicate that Congress considered these issues at the time ESSA was enacted.
- Senator Lamar Alexander, Chairman of the Senate Health, Education, Labor, and Pensions Committee, is not supportive of arming teachers.¹³ However, Senator Alexander’s views specifically on the use of Title IV funds for this purpose are not clear.
- In March 2018, Congress passed the “Stop School Violence Act,” which provides State and local governments with competitive grants to train local law enforcement, school personnel and students in evidence-based practices that improve early intervention and stop violence in our schools. The statute contains a specific rule of construction prohibiting the use of grant funds for the purpose of purchasing firearms or training in the use of firearms. This is a Department of Justice grant program.
- The use of Federal funds for firearms and firearm training is unique, as evidenced by FEMA and DOJ’s treatment of this issue. If the Secretary were to permit the use of Title IV, Part A funds for the purchase of firearms, it appears that it would be the first time a Federal agency has authorized the purchase of weapons for school personnel without specific statutory authorization. It is reasonable for the Secretary not to allow this use of

¹³ <https://www.usnews.com/news/best-states/tennessee/articles/2018-03-27/sen-alexander-not-a-big-fan-of-arming-teachers-at-school>

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funds absent specific Congressional authorization, and it is unlikely that this interpretation would be subject to a successful legal challenge.

- It should be noted that even if LEAs are permitted to use Title IV, Part A funds to buy firearms for school staff, possession and/or use would have to be consistent with all applicable Federal, State and local laws.

Options for Question 1:

Option 1

YES, funds may be used to purchase firearms for teachers and to train teachers on the use of firearms.

Option 2

YES, funds may be used to train school staff on the use of guns but NO, funds cannot be used to purchase guns

Option 3

NO, funds may not be used to purchase firearms or to train school staff on the use of firearms.

Recommendation for Question 1: Option 2

Question 2

May an SEA direct its LEAs to use all their Title IV, Part A funds on school safety measures?

Analysis for Question 2:

- There is no specific statutory authority for an SEA to direct or restrict an LEA's use of Title IV, Part A funds.
- The Title IV, Part A program is primarily based upon local decision making, as shown by the importance of the local needs assessment and local stakeholder input. The needs assessment informs the activities an LEA must include in its application to the State, along with its program objectives and intended program outcomes.
- The LEA's application is submitted to its SEA for review. The SEA approves the applications that meet the statutory requirements, monitors program implementation and provides training and technical assistance.
- An SEA may request an application from the LEA; however, this does not appear to mean that the LEA must commit to use the funds as directed by the SEA, because this would be inconsistent with the flexibility afforded to LEAs to determine their Title IV, Part A activities according to the local needs assessment, consultation with stakeholders, program objectives and intended program outcomes.
- The SEA may reserve up to 5% of its allotment for State-wide activities including training, technical assistance and capacity building to LEAs.

Final decisions about the use of funds under Title IV, Part A at the local level would appear to rest with the LEAs as approved by the SEA, based upon the statutory application and implementation requirements that focus on local needs and local input.

Options for Question 2:

Option 1

___ YES, a State may direct its LEAs to use all their Title IV, Part A funds for school safety measures.

Option 2

___ NO, a State may not direct its LEAs to use all their Title IV, Part A funds for school safety measures.

Recommendation for Question 2: Option 2

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Title IV, Part A Use of Funds Issue Summary
July 18, 2018

Title IV, Part A Program

- Title IV, Part A (T4PA) is the Student Support and Academic Enrichment (SSAE) grant program. It was first funded in FY 2017 in the amount of \$400M. In FY18, it was funded for \$1.1B.
- T4PA is a block grant program intended to be used in support of well-rounded education (min. 20%), safe and healthy students (min. 20%), and effective use of technology (a “portion”, no min requirement)
- SEAs subgrant funds to LEAs by formula. SEAs determine allowable use of funds, ensuring use meets statutory requirements and that an LEA’s proposed use has been adequately informed by required stakeholder engagement and a comprehensive needs assessment

Use of T4PA Funds for Purchase of Firearms and Training School Staff in the Use of Firearms

- At least 1 LEA and at least 1 SEA have asked the Department about whether T4PA funds can be used for purposes of purchasing firearms and training school staff on the use of firearms.
- OESE has drafted a guidance document for SEAs and LEAs regarding Title IV use of funds generally. A question is should the Department include information in the document regarding whether a SEA may allow T4PA funds to purchase firearms and/or to train school staff on the use of firearms.

Options for ED’s Policy Position

Option 1: As the statute does not include any prohibition on the purchase of firearms or training school staff on the use of firearms, it is not impermissible for T4PA funds to be used for the purchase of firearms and training school staff in the use of firearms (contingent upon the SEA approving such use for LEAs.)

- Consistent with the broad flexibility intended by law
 - Respects State autonomy in determining appropriate use of funds
 - Consistent with Secretary DeVos’ public comments that the issue of guns in schools should be left up to States and schools
 - Exposes Department to potential political liability
 - Would allow Federal program funds to be used to purchase firearms for school personnel without explicit statutory authority
 - Could be viewed as inconsistent with ESEA section 4102(5)(B), which refers to “the creation and maintenance of a school environment that is free of weapons” (although that has traditionally been thought to mean keeping weapons out of the hands of students.)
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Option 2: Treat firearms as a unique item and do not allow T4PA funds to be used for purchase, consistent with the position some other federal agencies have taken with regard to purchasing firearms with Federal funds. Allow T4PA funds to be used for training school staff in the use of firearms (contingent upon the SEA approving such use for LEAs.)

- Provides some flexibility
 - Allows for Federal funds to support 1 of 2 components generally understood to be necessary for the effective arming of school staff (i.e., firearms training but not firearms themselves)
 - Consistent with DOJ and FEMA position that weapons and ammunition are not allowable uses under Homeland Security Grant programs, which are designed to help “enhance school preparedness”
 - Treats firearms uniquely, which could be viewed as subjective (although consistent with DOJ and FEMA’s position)
 - Consistent with ESEA section 4102(5)(B), which refers to “the creation and maintenance of a school environment that is free of weapons” (although that has traditionally been thought to mean keeping weapons out of the hands of students.)
 - Mitigates some potential political liability for Department
 - Inconsistent with recent language included in the STOP School Violence Act, a March 2018 law which explicitly rules out the use of funds for purchase OR training on firearms for school staff
 - Arguably inconsistent with the broad flexibility intended by the T4PA
 - Arguably inconsistent with Secretary DeVos’ public comments that the issue of guns in schools should be left up to States and schools
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Options for Communicating Policy Position

Option 1: Make explicit reference in Title IV Use of Funds guidance that T4PA funds can be used for the purchase of firearms and/or the training of school staff in the use of firearms

Example 1

Can Title IV, Part A funds be used to purchase firearms and/or train school personnel in the use of firearms?

As there is no prohibition in the law regarding purchase of firearms or the training of school staff in the use of firearms, and consistent with the broad flexibility intended under Title IV, Part A, it is not impermissible for an SEA to allow Title IV, Part A funds to support the purchase of firearms or the training of school personnel in the use of firearms, after an LEA has met all its requirements under the law regarding use of funds (such as stakeholder engagement and needs assessment), and consistent with all applicable Federal, State and local laws.

Option 2: Make oblique reference in Title IV Use of Funds guidance that T4PA funds can be used for the purchase of firearms and/or the training of school staff in the use of firearms

Example 2

Can Title IV, Part A funds be used for school safety measures that include the purchase of firearms and/or the training of school personnel in the use of firearms?

So long as all statutory requirements under Title IV, Part A are met, including stakeholder engagement and a comprehensive needs assessment, an SEA has the discretion to allow LEAs to fund any and all activities designed to help support safe and healthy students, including violence prevention strategies and training for school personnel, consistent with all applicable Federal, State and local laws.

Option 3: Make no reference in Title IV Use of Funds guidance that T4PA funds can be used for the purchase of firearms and/or the training of school staff in the use of firearms.
