



# UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF ELEMENTARY AND SECONDARY EDUCATION

June 15, 2021

The Honorable Frank Edelblut  
Commissioner  
New Hampshire Department of Education  
101 Pleasant Street  
Concord, NH 03301-3860

Dear Commissioner Edelblut,

We share your commitment to ensuring that all students can continue to return to safe in-person instruction and to using American Rescue Plan Elementary and Secondary School Emergency Relief (ARP ESSER) funds to help achieve this critical goal.

As you know, ESSER funds may be used for inspection, testing, maintenance, repair, replacement, and upgrade projects to improve the indoor air quality in school facilities, including mechanical and nonmechanical heating, ventilation, and air conditioning (HVAC) systems, filtering, purification and other air cleaning, fans, control systems, and window and door repair and replacement. The U.S. Department of Education (Department) will continue to work with States and local educational agencies (LEAs) to ensure that this work can be completed expeditiously in order to support students and educators.

In June 2020, the Department informed states that “an LEA may use ESSER funds for construction, subject to prior written approval by its State educational agency (SEA)” and that “approved construction projects must comply with applicable Uniform Guidance requirements, as well as any of the Department’s applicable regulations regarding construction at 34 CFR § 76.600. As is the case with all construction contracts using laborers and mechanics financed by federal education funds, an LEA that uses ESSER funds for construction contracts over \$2,000 must meet all Davis-Bacon prevailing wage requirements...”<sup>1</sup>

The Department has had several productive conversations with your SEA about questions on the implementation of these provisions, and I am writing to provide additional information to you and your LEAs in an effort to support your vital work to improve ventilation in New Hampshire’s schools.

**I emphasize that these clarifications should enable New Hampshire and its LEAs to move forward expeditiously with your planned HVAC projects in advance of the coming school year and to avoid rebidding or any other process delays.**

**1. The process an SEA uses for granting prior approval to an LEA to use ESSER funds for capital expenditures (including HVAC projects) such as minor remodeling, renovation, or**

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<sup>1</sup> “ESSER Fund Office Hours I & II Follow-Up” (June 18-19, 2020). Sent via G-5 to the New Hampshire Department of Education on July 21, 2020.

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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.*

**construction is left to the discretion of the SEA. Neither the Department nor the Uniform Guidance specifies the process that must be used.**

An SEA has the flexibility to establish its own reasonable process that ensures that the expenditures meet the applicable statutory and regulatory requirements, including those in Subpart E of the Uniform Guidance (2 CFR Part 200).

For example, an SEA could:

- Use or modify the current procedures that it already uses for prior approval categories for other Federal programs under the Uniform Guidance.
- Consider getting a building expert (engineer, inspector, architect) who knows applicable State, local, and Federal requirements to assist with its review of prior approval requests. The expert could be acquired on a limited basis through procurement or perhaps an interagency agreement with another State agency, such as a Public Works office or another agency with authority over facilities.
- Consult with other States that have facilities programs for suggestions on how to implement an efficient process for prior approvals for facilities expenditures.
- Develop a checklist of items that an LEA seeking prior approval should provide.

**Please note that some HVAC upgrades may constitute “minor remodeling” and the Department’s applicable regulations regarding construction at 34 CFR §§ 76.600 and 75.600-75.618 would not apply.** Minor remodeling means minor alterations in a previously completed building, for purposes associated with the coronavirus. The term also includes the extension of utility lines, such as water and electricity, from points beyond the confines of the space in which the minor remodeling is undertaken but within the confines of the previously completed building. The term does not include permanent building construction, structural alterations to buildings, building maintenance, or repairs. However, minor remodeling projects that constitute capital assets under the Uniform Guidance still require prior approval consistent with 2 CFR 200.439.

**2. SEA prior approval is not required before LEA bidding is advertised under applicable Department requirements.**

We understand that there has been some confusion about whether an SEA must pre-approve LEA projects before bidding. As your staff and Department staff have discussed, the provisions in 34 CFR §§ 75.600-617 are “as applicable” and every provision does not apply to every project. Some have cited 34 CFR § 75.605, which states in relevant part that: “Before construction is advertised or placed on the market for bidding, the grantee shall get approval by the Secretary of the final working drawings and specifications.”

This provision applies to direct construction projects that require approval from the Department, not those that require approval under the Uniform Guidance from an SEA. Therefore, an LEA ARP ESSER project that an SEA is approving and has been initiated or is already underway should not have to be rebid.

**3. SEA approval can come at any point in the project timeline until the point that reimbursement using ARP ESSER funds occurs.**

As described above, States have the flexibility to develop or refine their own prior approval processes to ensure that an allowable expenditure is reasonable and necessary and is otherwise in line with program, Uniform Guidance, and other applicable requirements. Ideally the SEA review process is

complete as soon as possible on a project’s timeline, but a State may utilize this flexibility at any point in the project process. This continuum includes up until the point when the Federal funds are actually approved for reimbursement—i.e., it is likely that any planned and/or initiated project that qualifies for ARP ESSER funding is in this category since it will not have been reimbursed yet. It is our understanding that none of your State’s pending projects have yet been reimbursed and therefore all of them should fall into this category.

**4. NEPA is not applicable to LEA construction projects that are funded with ARP ESSER funds.**

Another area of concern has been 34 CFR § 75.601, which requires an applicant to submit an environmental assessment of the impact on the proposed construction that is consistent with relevant provisions of the National Environmental Policy Act (NEPA). This provision only applies to construction projects that are operated and managed by the Department and require direct approval from the Department. Due to the nature of the ARP ESSER funds, the Department does not: have a decision-making role in planning the specific projects, or directly manage the implementation or procurement for the LEA projects you have summarized to date such as the HVAC projects, or have the power to act on any environmental effects revealed by an environmental assessment. In addition, the Department does not exercise control over the use of the funds for any individual project, as long as the project continues to meet all statutory and other applicable requirements (such as the Uniform Guidance and the Department’s administrative regulations). As a result, these types of LEA ARP ESSER projects are not considered as a “major Federal action” under the NEPA provisions and are not subject to 34 CFR§ 75.601.

The Department is eager to continue to work with your SEA and its LEAs to address any questions and support the completion of LEA HVAC projects that will promote the health and safety of students and educators. We recommend that you continue to consult with us on applicable provisions in particular when expanding or replacing facilities or if the SEA itself undertakes these types of projects. Please do not hesitate to contact me if there is any additional information or support that we can provide.

Sincerely,



Ian Rosenblum  
Deputy Assistant Secretary for Policy and Programs  
Delegated the Authority to Perform the  
Functions and Duties of the Assistant Secretary  
Office of Elementary and Secondary Education

cc: Office of Legislation and Congressional Affairs  
Office of State & Grantee Relations