



THE STATE EDUCATION DEPARTMENT / THE UNIVERSITY OF THE STATE OF NEW YORK / ALBANY, NY 12234

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December 16, 2021

TO: BOCES District Superintendents  
School District Superintendents  
School District Business Officers  
Charter School Leaders

FROM: Phyllis D. Morris, Chief Financial Officer

RE: **Council of Chief State School Officers Document on Use of ESSER Funds for School Construction**

The Council of Chief State School Officers (CCSSO) developed the attached document on the use of federal Elementary and Secondary School Emergency Relief (ESSER) funds for school construction, renovation, and minor remodeling projects. The document details federal rules and regulations that apply to ESSER funds and provides citations to guidance and technical assistance issued by the U.S. Department of Education.

Please direct questions to the Office of ESSA-Funded Programs via e-mail at [CARESAct@nysed.gov](mailto:CARESAct@nysed.gov).

Attachment

cc: Commissioner Betty A. Rosa  
Sharon Cates-Williams  
Jim Baldwin  
Kim Wilkins  
Christina Coughlin  
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Ed Lenart

# ESSER Funds for Construction

December 2021



The Council of Chief State School Officers (CCSSO) has received many questions from states about using ESSER funds to pay for construction, renovation, and minor remodeling projects. With support from the Federal Education Group, PLLC, this document lays out considerations to help states analyze the allowable use of ESSER funds for such projects. This is not legal advice. If you have additional questions, please consult your legal counsel. Chiefs and SEA staff also may contact [Peter.Zamora@ccsso.org](mailto:Peter.Zamora@ccsso.org) for additional information and supports.

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## Background: ESSER Three-Part Spending Analysis Framework

U.S. Department of Education (ED) guidance suggests a three-part framework for analyzing ESSER spending:

1. Is the use of funds intended to prevent, prepare for, or respond to the COVID-19 pandemic, including its impact on the social, emotional, mental health, and academic needs of students?
2. Does the use of funds fall under one of the authorized uses of funds?
3. Is the use of funds permissible under the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (Uniform Guidance, 2 CFR Part 200)? In particular, is it necessary and reasonable for the performance of the ESSER award?<sup>1</sup>

Each of these questions is discussed below.

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<sup>1</sup> U.S. Department of Education, [Frequently Asked Questions Elementary and Secondary School Emergency Relief Programs Governor’s Emergency Education Relief Programs](#), May 2021, p. 9 (this will be referred to as *ED May 2021 ESSER and GEER FAQs* for the rest of this document).

## I. Preventing, Preparing for, or Responding to COVID-19

ED has confirmed that many types of construction, renovation, and minor remodeling projects are consistent with the goal of preventing, preparing for, or responding to COVID-19, and therefore, are consistent with the first step in ED's recommended spending analysis framework.

Such projects include improving indoor air quality, increasing access to the outdoors, facilitating cleaning and sanitization efforts, and facilitating physical distancing. Specific examples highlighted by ED include:

- Servicing or upgrading HVAC systems consistent with applicable federal, state, and local standards and industry standards,<sup>2</sup>
- Repairing windows and/or doors so they can open to let fresh air in,<sup>3</sup>
- Installing or upgrading indoor air quality tools like filtering, purification, fan, and control systems,<sup>4</sup>
- Roof repairs or replacement to improve indoor air quality (for example, to address leaks that lead to mold and diminished air quality),<sup>5</sup>
- Mold, radon, and asbestos remediation,<sup>6</sup>
- Creating outdoor spaces for learning and other activities like eating lunch,<sup>7</sup>
- Replacing carpet with easier-to-clean flooring,<sup>8</sup>
- Renovations to facilitate physical distancing,<sup>9</sup> and
- Constructing new schools when renovations to an existing building would not be cost effective.<sup>10</sup>

These are only some examples. This list is not meant to be exhaustive.

As the pandemic progresses, construction, renovation, and minor remodeling projects can continue to play a role in ongoing efforts to prevent and respond to COVID, efforts ED describes broadly to include "a wide range of activities . . . to emerge stronger post-pandemic . . ." <sup>11</sup> Even with increased vaccination, ED continues to encourage a layered approach to preventing COVID-19 transmission in

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<sup>2</sup> [ED May 2021 ESSER and GEER FAQs](#), Q&A B-7. See also U.S. Department of Education, [Improving Ventilation in Schools, Colleges, and Universities to Prevent COVID-19](#), July 2021 (this will be referred to as *ED July 2021 Ventilation Brief* for the rest of this document).

<sup>3</sup> [ED July 2021 Ventilation Brief](#).

<sup>4</sup> [ED July 2021 Ventilation Brief](#).

<sup>5</sup> U.S. Department of Education, [Using COVID-Relief Funds for Facility Upgrades, Renovations, and Construction Webinar Recording](#), September 2021, starting at timestamp 1:17:02 (this will be referred to as *ED September 2021 Facilities Webinar Recording* for the rest of this document). Note that timestamp might vary depending on device and browser.

<sup>6</sup> [ED September 2021 Facilities Webinar Recording](#), timestamp 1:18:42. Note that timestamp might vary depending on device and browser.

<sup>7</sup> [ED July 2021 Ventilation Brief](#). See also, Center for Disease Control and Prevention, [Ventilation in Schools and Childcare Programs](#), February 2021.

<sup>8</sup> [ED May 2021 ESSER and GEER FAQs](#), Q&A B-7.

<sup>9</sup> [ED May 2021 ESSER and GEER FAQs](#), Q&A B-7.

<sup>10</sup> U.S. Department of Education, [Using COVID-Relief Funds for Facility Upgrades, Renovations, and Construction: Webinar Slides](#), September 2021, slide 6 (this will be referred to as *ED September 2021 Facilities Webinar Slides* for the rest of this document).

<sup>11</sup> [ED May 2021 ESSER and GEER FAQs](#), p. 9.

school, including ventilation.<sup>12</sup> ED also encourages school districts to “do what they can to address other infrastructure issues, such as ensuring that preexisting ventilation, roofing, and plumbing needs do not inhibit healthy learning environments . . . .”<sup>13</sup>

## II. Authorized Uses of ESSER Funds

### Local Uses of Funds

ED has confirmed that local educational agencies (LEAs) may use ESSER funds for construction, renovation, and minor remodeling.<sup>14</sup> Construction, renovation, and minor remodeling are consistent with several authorized uses of ESSER funds including:

- Activities authorized by the Elementary and Secondary Education Act,<sup>15</sup> which includes the Impact Aid program that generally allows districts to “use the funds in whatever manner they choose in accordance with their local and State requirements,”<sup>16</sup>
- School facility repairs and improvements to enable operation of schools to reduce risk of virus transmission and exposure to environmental health hazards, and to support student health needs,<sup>17</sup>
- Inspection, testing, maintenance, repair, replacement, and upgrade projects to improve the indoor air quality in school facilities, including mechanical and non-mechanical heating, ventilation, and air conditioning systems, filtering, purification and other air cleaning, fans, control systems, and window and door repair and replacement,<sup>18</sup> and
- Other activities necessary to maintain LEA operations and continuity of services.<sup>19</sup>

#### Construction vs. Minor Remodeling

In guidance, ED has adopted a broad definition of construction for ESSER which includes:

- The preparation of drawings and specifications for school facilities,
- Erecting, building, acquiring, altering, remodeling, repairing, or extending school facilities,
- Inspecting and supervising the construction of school facilities, and

<sup>12</sup> U.S. Department of Education, [ED COVID-19 Handbook, Volume 2: Roadmap to Reopening Safely and Meeting All Students' Needs](#), August 2021, p. 16 (this will be referred to as *ED COVID-19 Handbook, Volume 2* for the rest of this document).

<sup>13</sup> [ED COVID-19 Handbook, Volume 2](#), p. 16.

<sup>14</sup> [ED May 2021 ESSER and GEER FAQs](#), Q&A B-6.

<sup>15</sup> CARES, Sec. 18003(d)(1); CRRSA, Sec. 313(d)(1); ARP, Sec. 2001(e)(2)(A).

<sup>16</sup> U.S. Department of Education, [Impact Aid program website](#).

<sup>17</sup> CRRSA, Sec. 313(d)(13) and ARP, Sec. 2001(e)(2)(O). Please note, although this activity is not specifically listed in CARES, ED has advised that LEAs may use CARES ESSER funds for any activity listed in CRSSA or ARP. U.S. Department of Education, [American Rescue Plan Act of 2021 Elementary and Secondary School Emergency Relief Fund \(ARP ESSER\) Fact Sheet](#), March 2021, p. 5.

<sup>18</sup> CRRSA, Sec. 313(d)(14) and ARP, Sec. 2001(e)(2)(P). As in the footnote above, although this activity is not specifically listed CARES, LEAs may use CARES ESSER funds for it.

<sup>19</sup> CARES, Sec. 18003(d)(12); CRRSA, Sec. 313(d)(15); ARP, Sec. 2001(e)(2)(R).

- Debt service for such activities.<sup>20</sup>

Although this definition references remodeling, ED has clarified that construction does not cover “minor remodeling,”<sup>21</sup> which ED regulations define as follows:

**Minor remodeling** means minor alterations in a previously completed building. 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 building construction, structural alterations to buildings, building maintenance, or repairs.<sup>22</sup>

According to ED staff, one factor that distinguishes construction from minor remodeling is moving walls.<sup>23</sup> For example, if an HVAC upgrade or replacement does not require moving any walls, it is likely to be considered minor remodeling.

Both construction and minor remodeling are allowable under ESSER, but as discussed in [Section III](#), a project’s classification affects which additional federal rules will apply.

## State Uses of Funds

State Educational Agencies (SEAs) may reserve some ESSER funds to pay for emergency needs to address issues responding to coronavirus.<sup>24</sup> ED has advised that these SEA Reserve funds “may be used by the SEA for any of the LEA ESSER allowable uses of funds and for other activities related to preventing, preparing for, and responding to COVID-19.”<sup>25</sup> This would include the authorized ESSER activities listed above for LEAs, meaning an SEA could use ESSER emergency needs funds for COVID-related construction, renovation, and minor remodeling.

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<sup>20</sup> [ED May 2021 ESSER and GEER FAQs](#), Q&A B-6, footnote 13. This definition comes from ESEA’s Impact Aid program.

<sup>21</sup> [ED September 2021 Facilities Webinar Slides](#), slide 15. See also U.S. Department of Education, [Letter to New Hampshire](#), June 2021, p. 2 (this will be referred to as *ED June 2021 Letter to New Hampshire* for the rest of this document) and U.S. Department of Education, [Elementary and Secondary School Emergency Relief \(ESSER\) Program Use of Funds FAQs School Construction](#), June 2021, slide 5 (this will be referred to as *ED June 2021 School Construction Webinar* for the rest of this document).

<sup>22</sup> [34 CFR § 77.1](#).

<sup>23</sup> [ED September 2021 Facilities Webinar Recording](#), timestamp 0:19:45. Note that timestamp might vary depending on device and browser.

<sup>24</sup> SEAs may keep up to 9.5% of their CARES and CRRSA ESSER funds for emergency needs (assuming they also reserve the full 0.5% permitted for administration). SEAs may keep up to 2.5% of their ARP ESSER funds for emergency needs (assuming they reserve the full 0.5% permitted for administration). [ED May 2021 ESSER and GEER FAQs](#), Q&A A-8 and A-9.

<sup>25</sup> [ED May 2021 ESSER and GEER FAQs](#), Q&A A-12.

### III. Uniform Grant Guidance Considerations

The Uniform Grant Guidance (UGG) specifies that recipients of federal funds must comply with all requirements of their federal awards.<sup>26</sup> For ESSER, this means complying with the General Education Provisions Act (GEPA) and the Education Department General Administrative Regulations (EDGAR) as well as the UGG. This section highlights certain GEPA, EDGAR, and UGG rules that affect construction and renovation projects, including:

- GEPA labor standards,
- EDGAR construction regulations, and
- UGG cost principles, prior approval requirements, procurement considerations, and property management considerations.

#### GEPA Labor Standards

GEPA is an education law that generally applies to programs ED administers,<sup>27</sup> including ESSER. GEPA requires that:

All laborers and mechanics employed by contractors or subcontractors on all construction and minor remodeling projects assisted under any applicable program shall be paid wages at rates not less than those prevailing on similar construction and minor remodeling in the locality as determined by the Secretary of Labor.<sup>28</sup>

In other words, the employees of contractors and subcontractors working on ESSER-funded construction and minor remodeling projects must be paid prevailing wages established by the U.S. Department of Labor.<sup>29</sup> This is sometimes known as the [Davis-Bacon](#) requirement.

#### EDGAR Construction Regulations

EDGAR is a set of ED regulations that apply to ED programs including ESSER. EDGAR includes rules for managing ED-funded construction projects.<sup>30</sup> *These rules do not apply to minor remodeling projects.*<sup>31</sup>

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<sup>26</sup> [2 CFR § 200.300\(b\)](#).

<sup>27</sup> [20 U.S.C. § 1221](#).

<sup>28</sup> [20 U.S.C. § 1232b](#).

<sup>29</sup> ED has advised the prevailing wage rules apply to contracts of \$2,000 or more. [ED May 2021 ESSER and GEER FAQs](#), Q&A A-16. For more information about prevailing wage requirements, please see U.S. Department of Labor, Wage and Hour Division, [Fact Sheet #66: The Davis-Bacon and Related Acts \(DBRA\)](#).

<sup>30</sup> [34 CFR §§ 75.601 – 75.615](#).

<sup>31</sup> [ED June 2021 School Construction Webinar](#), slide 5. While not applicable to ESSER, for additional information from ED about minor remodeling, see [Higher Education Emergency Relief Fund III: Frequently Asked Questions](#), May 2021, Q&A 24.

EDGAR’s construction rules are primarily intended for projects ED funds directly (that is, when ED provides construction funding directly to an entity), but they apply to state-administered programs<sup>32</sup> like ESSER as well.<sup>33</sup>

**Importantly, ED has clarified that not all EDGAR construction rules apply to ESSER-funded construction projects.** Specifically:

- ED’s [May 2021 ESSER and GEER FAQs](#) describe eight considerations based on EDGAR’s construction rules that SEAs and LEAs should take into account before initiating a construction project.<sup>34</sup>
- In June 2021, ED clarified that EDGAR’s construction rules only apply “as applicable” and “every provision does not apply to every project.”<sup>35</sup> *In other words, ED clarified that not all eight considerations apply to ESSER-funded construction projects.*
  - For example, ED clarified that:
    - LEAs are not required 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).<sup>36</sup>
    - LEAs are not required to obtain their SEA’s approval of the final working drawings and specifications before construction is advertised or placed on the market for bidding.<sup>37</sup> Instead, LEAs must follow their SEA’s state-established prior approval process as described in more detail below.
  - These are only some examples of EDGAR construction rules that do not apply to ESSER. Other rules might also not apply.
- In September 2021, ED reiterated that not all EDGAR construction rules apply to ESSER-funded projects.<sup>38</sup>

Because ED’s clarifications about the application of EDGAR construction rules to ESSER-funded projects came after ED issued its [May 2021 ESSER and GEER FAQs](#), **the FAQs alone do not fully reflect ED’s guidance on this issue.** It is important to ensure ED’s June 2021 and September 2021 clarifications are widely disseminated across the SEA and to LEAs, auditors, and other oversight entities.

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<sup>32</sup> ED administers two types of a grant programs: (1) direct grant programs, and (2) state-administered programs. In a direct grant program ED awards funds to an entity and is responsible for overseeing how the entity spends the funds. In a state-administered program, ED awards funds to a state which then subgrants funds to LEAs and other entities. The state is responsible for overseeing this spending and ED is responsible for overseeing the state.

<sup>33</sup> [34 CFR § 76.600](#).

<sup>34</sup> [ED May 2021 ESSER and GEER FAQs](#), Q&A B-6.

<sup>35</sup> U.S. Department of Education, [Letter to New Hampshire](#), June 2021, p. 2 and U.S. Department of Education, [Elementary and Secondary School Emergency Relief \(ESSER\) Program Use of Funds FAQs School Construction](#), June 2021, slide 6.

<sup>36</sup> [ED June 2021 Letter to New Hampshire](#), p. 3 and [ED June 2021 School Construction Webinar](#), slide 8.

<sup>37</sup> [ED June 2021 Letter to New Hampshire](#), p. 2 and [ED June 2021 School Construction Webinar](#), slide 6.

<sup>38</sup> [ED September 2021 Facilities Webinar Slides](#), slide 16.

## UGG Cost Principles

Among other rules, the UGG requires that all costs paid with federal funds, including ESSER, must be “necessary and reasonable.” In general, necessary and reasonable means an objective observer would understand the decision to spend funds on an activity considering the amount of money being spent, the needs of the program, and other relevant circumstances. Factors to consider include:

- Whether the cost is needed to carry out the grant program properly and efficiently,
- Whether the LEA or SEA followed sound business practices,
- The cost of the good, service, or activity being supported and whether the cost is consistent with market prices,
- Whether the LEA or SEA acted prudently considering its responsibilities to itself, its students, the public, and the federal government, and
- Whether the LEA or SEA generally followed established practices and policies.<sup>39</sup>

For construction projects, ED encourages LEAs and SEAs to consider a project’s cost effectiveness and projected timeline.<sup>40</sup>

The UGG also includes special rules for certain kinds of costs that may be relevant to construction projects such as bonding,<sup>41</sup> depreciation,<sup>42</sup> financing,<sup>43</sup> insurance,<sup>44</sup> and more.

## UGG Prior Approval Requirements

The UGG requires prior written approval for “capital expenditures.”<sup>45</sup> Capital expenditures are expenditures to:

- Acquire “capital assets,” and
- Make additions, improvements, modifications, replacements, rearrangements, reinstallations, renovations, or alterations to “capital assets” that materially increase their value or useful life.<sup>46</sup>

Capital assets include, among other things, land, buildings (facilities), and equipment.<sup>47</sup>

Accordingly, LEAs and SEAs must get prior written approval to spend ESSER funds to:

- Acquire land, buildings, or equipment, and
- Add to, improve, modify, replace, rearrange, reinstall, renovate, or alter land, buildings, or equipment in a way that materially increases its value or useful life.

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<sup>39</sup> [2 CFR § 200.404.](#)

<sup>40</sup> [ED May 2021 ESSER and GEER FAQs](#), Q&A B-6; [ED September 2021 Facilities Webinar Slides](#), slide 16.

<sup>41</sup> [2 CFR § 200.427.](#)

<sup>42</sup> [2 CFR § 200.436.](#)

<sup>43</sup> [2 CFR § 200.449.](#)

<sup>44</sup> [2 CFR § 200.447.](#)

<sup>45</sup> [2 CFR § 200.439\(b\).](#)

<sup>46</sup> [2 CFR § 200.1.](#)

<sup>47</sup> [2 CFR § 200.1](#)



LEAs obtain prior approval to spend their ESSER funds on capital expenditures from their SEAs.<sup>48</sup> Each SEA is responsible for setting up its own prior approval process, and ED has clarified SEAs have many options.<sup>49</sup> ED has also clarified that prior approval can be granted at any point in the project timeline up to the point ESSER funds are spent. If, for example, an SEA pays ESSER funds to its LEAs on a reimbursement basis, prior approval can come at any point before reimbursement.<sup>50</sup>

SEAs obtain prior approval to spend their ESSER funds on capital expenditures from ED.<sup>51</sup>

### UGG Procurement Requirements

Contracts supported with ESSER funds must be procured consistent with the UGG's procurement standards.

LEAs must follow the procurement standards in [2 CFR §§ 200.318 through 200.327](#).<sup>52</sup>

SEAs must follow their own state procurement standards. In addition, SEAs must comply with UGG requirements on contracting with small and minority businesses, women's business enterprises, and labor surplus area firms;<sup>53</sup> domestic preferences;<sup>54</sup> and recovered materials.<sup>55</sup> SEAs must also ensure ESSER-funded contracts contain federally required terms and conditions.<sup>56</sup>

When procuring items with CRRSA ESSER or ARP ESSER funds, SEAs and LEAs must, to the greatest extent practicable, give preference to goods, products, or materials produced in the United States.<sup>57</sup>

### UGG Property Management Considerations

Any property acquired or improved with ESSER funds must be appropriately insured<sup>58</sup> and is subject to the UGG's disposition rules.<sup>59</sup> In practical terms, this means the federal government retains an interest in property that is acquired or improved with ESSER funds that must be accounted for until the LEA or SEA disposes of the property.

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<sup>48</sup> [2 CFR § 200.439\(b\)](#).

<sup>49</sup> [ED June 2021 School Construction Webinar](#), slides 2-7.

<sup>50</sup> [ED June 2021 School Construction Webinar](#), slides 7.

<sup>51</sup> [2 CFR § 200.439\(b\)](#).

<sup>52</sup> [2 CFR § 200.317](#). Please note ED recognizes the pandemic may affect procurement processes. Please see C-27 of [ED's May 2021 ESSER and GEER FAQs](#) for more information.

<sup>53</sup> [2 CFR §§ 200.317](#) and [200.321](#).

<sup>54</sup> [2 CFR §§ 200.317](#) and [200.322](#).

<sup>55</sup> [2 CFR §§ 200.317](#) and [200.323](#).

<sup>56</sup> [2 CFR §§ 200.317](#) and [200.327](#).

<sup>57</sup> [2 CFR § 200.322](#). See also [ED May 2021 ESSER and GEER FAQs](#), A-20.

<sup>58</sup> [2 CFR § 200.310](#).

<sup>59</sup> [2 CFR § 200.311](#) (real property) and [2 CFR § 200.313](#) (equipment). Items of equipment are also subject to the UGG's inventory management requirements. [2 CFR § 200.313\(d\)](#).