



OKLAHOMA STATE
DEPARTMENT *of* EDUCATION

MEMORANDUM

TO: Joy Hofmeister, State Superintendent of Public Instruction

FROM: Brad Clark, General Counsel

DATE: May 19, 2021

RE: Elementary and Secondary School Emergency Relief Fund (ESSER) – Use of Funds

The Oklahoma State Department of Education, Office of Legal Services, has received inquiries regarding the allowable activities and uses of funds under the federal Coronavirus relief funds. More specifically, whether construction activities are allowable uses of the ESSER emergency relief grants funds provided through the Coronavirus Aid, Relief, and Economic Security (CARES) Act, the Coronavirus Response and Relief Supplemental Appropriations (CRRSA) Act and/or the American Recovery Plan (ARP). As a result of the questions and discussion, this memorandum is being provided.

Within each of the aforementioned federal laws, it is specifically authorized that ESSER funds may be used for “any activity authorized by the ESEA [Elementary and Secondary Education Act] of 1965.” *See* Section 18003(d)(1) of the CARES Act, Section 313(d)(1) of the CRRSA Act, Section 2001(e)(2)(A) of the ARP Act; *see also* Title VII of the ESEA and 2 CFR § 200.439(b)(1). Under the ESEA’s Impact Aid program, a local educational agency (LEA) may use funds provided thereunder for construction activities. As such and consistent with the requirements below, as an allowable activity under the ESEA’s Impact Aid program, LEAs may lawfully use ESSER funds for construction activities. Further, for additional and complementary reasons, LEAs are authorized to use ESSER funds for construction activities. Under the CRRSA Act and the ARP, identical language authorizes an LEA receiving funds thereunder for “[s]chool 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.” *See* Section 313(d)(13) of the CRRSA Act and Section 2001(e)(2)(O).

As is the case with all activities charged to the ESSER funds, construction costs must be reasonable and necessary to meet the overall purpose of the program, which is to “prevent, prepare for and respond to” COVID-19. *See* CARES Act, CRRSA Act and ARP Act “Department of Education, Education Stabilization Fund” heading; *see also* 2 CFR §§ 200.403-200.405. Therefore, any construction activities, including renovations or remodeling, that would be

necessary for an LEA to prevent, prepare for, and respond to COVID-19 would be permissible. This might include renovations that would permit an LEA to clean more effectively (ex: replace carpet with tile that is more easily cleaned) or creating a learning environment that may better sustain social distancing (ex: renovate or add wing of a school to be in compliance with fire and safety code in order to reopen it to create more space for students and personnel to maintain appropriate distancing).

Furthermore, approved construction projects must comply with applicable Uniform Grant Guidance requirements, as well as United States Department of Education regulations regarding construction at 34 CFR § 76.600. Moreover, federal regulations require OSDE approval prior to an LEA's use of any federal grant funds for direct charges to capital expenditures¹ for general purpose equipment², buildings and/or land. *See* 2 CFR § 200.439. Similarly, if funds are used for direct charges to capital expenditures for *specific purpose equipment* and the value exceeds \$5,000, prior written approval of OSDE is required.³ *Id.* Further, equipment and other capital expenditures are unallowable as indirect costs. *See* § 200.436; *see also* 2 CFR §§ 200.407 and 200.439(b). Finally, awards made under the ARP Act and CRRSA Act are subject to federal procurement processes, 2 CFR §200.318-326, including those at 2 CFR § 200.322 requiring domestic preferences for procurements under Federal grants made after November 12, 2020.

In addition to the requirements under federal law, Oklahoma law provides for additional conditions on the uses of federal grants by public school districts. School districts receiving funds from impact aid monies or grants, gifts or donations *for capital purposes*, regardless of source (state, federal, or otherwise) may place the monies in the school district's building fund. *See* 70 O.S. § 1-117(H).⁴ As grants, federal funds available to school districts may be placed in a district's building fund *so long as the federal authorizing statute allows the use of said funds for purposes authorized in 70 O.S. §§ 1-117 – 1-118*.⁵ In the present context, because the CRRSA Act and the

¹ Capital expenditures is defined to mean “expenditures to acquire capital assets or expenditures to make additions, improvements, modifications, replacements, rearrangements, reinstallations, renovations, or alterations to capital assets that materially increase their value or useful life.” *See* 2 CFR § 200.1 Further, “capital assets” includes “land, buildings (facilities), equipment, and intellectual property (including software) whether acquired by purchase, construction, manufacture, exchange, or through a certain lease structures.” *Id.*

² General Purpose Equipment is defined to mean “equipment which is not limited to research, medical, scientific or other technical activities. Examples include office equipment and furnishings, modular offices, telephone networks, information technology equipment and systems, air conditioning equipment, reproduction and printing equipment, and motor vehicles. *See* 2 CFR § 200.1

³ Special purpose equipment is defined to mean equipment which is used only for research, medical, scientific, or other technical activities. Examples include microscopes, x-ray machines, surgical instruments, and spectrometers. *See* 2 CFR § 200.1.

⁴ Consistent therewith, the Oklahoma Cost Accounting System Manual definition of “building fund” provides in part that school districts receiving money from rental, sale or lease of buildings, Impact Aid monies, *or grants*, whether from state, federal or other sources, may place such monies in the building fund or the general fund authorized by 70 O.S. § 1-117.

⁵ Questions have arisen as to the operation of 70 O.S. § 18-104 with the allowability of placing federal funds in a school district's building fund. Stated otherwise, because section 18-104 provides that “[f]unds received under the provisions of this article shall be deposited in the general fund of the school district” a question has arisen as to whether

ARP act authorize these grant funds to be used for school facility repairs and improvements these funds may be placed in a school district's building fund.

To the extent a school district is considering planning, budgeting and obligating federal relief funds for construction-related activities, OSDE strongly encourages consultation with the Office of Federal Programs, especially considering the requirement of OSDE approval of certain expenditures in excess of \$5,000, as well as the district's independent legal counsel. Finally, OSDE must remind district's that repairs and improvements to facilities is 1 of 15 authorized uses such that districts are urged to consider uses of funds for purposes that are directly related to student instruction and health and safety in responding to COVID-19.

I hope that this memorandum is helpful to you. Should you have any questions or want to further discuss, please do not hesitate to contact me.

this includes federal funds. Although the title of section 18-104 is "Purpose of Funds – Federal Funds" the "article" as referenced in the operative language of this section relates to the "State Aid" formula and not federal funds. As such, and while it is recommended and should be the default fund to place federal funds for the operations of public schools, it is OSDE's opinion that section 18-104 does not require federal funds to be placed in the school district's general fund.