

Congress of the United States  
Washington, DC 20515

June 9, 2021

The Honorable Miguel Cardona  
Secretary of Education  
U.S. Department of Education  
400 Maryland Ave, SW  
Washington, DC 20202

Secretary Cardona:

We write to express concern about administrative barriers that threaten to delay school projects to mitigate the risks of COVID-19 in New Hampshire. We urge the U.S. Department of Education (“the Department”) to work with New Hampshire’s state Department of Education (SEA) and impacted local educational agencies (LEAs) to ensure that students, teachers, and other school personnel return to safe and well-ventilated school buildings in the fall. We are concerned that recently-issued guidance from the Department will exacerbate current funding delays and prevent schools from effectively utilizing federal relief funds for needed construction projects.

Since the beginning of the pandemic, Congress has recognized the significant disruptions that COVID-19 has had on school districts and the students they serve. To help address this, Congress provided \$13.2 billion to the Elementary and Secondary School Emergency Relief Fund (ESSER fund) in March 2020, under the Coronavirus Aid, Relief, and Economic Security Act (the CARES Act). As the pandemic continued, Congress appropriated an additional \$54.3 billion to the ESSER fund under the Coronavirus Response and Relief Supplemental Appropriations Act (CRRSA) – called ESSER II. Congress intentionally made this funding flexible so that it could meet the unique needs of school districts and their communities to support remote learning when necessary and get students and teachers to safely return to full-time, in-person instruction as soon as possible. Subsequently, Congress provided an additional \$122 billion for the ESSER fund in the American Rescue Plan Act of 2021(ARP), signed into law on March 11, 2021.

The CARES Act allows ESSER funds to be used under any authority of the Elementary and Secondary Education Act. The text of CRRSA also explicitly states that relief funds can be used for “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” and for “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.”

In January, the New Hampshire SEA notified LEAs that they would receive additional funding under ESSER II.<sup>1</sup> At this time, the state provided LEAs with a fact sheet outlining the broad use of funds they could allocate these resources toward – including air ventilation updates. Understanding the time constraints to move forward with these projects, LEAs immediately started planning and working with the SEA on what was needed for project approval.

On May 26, 2021, the Department released an ESSER fund guidance document, entitled “Frequently Asked Questions, Elementary and Secondary School Emergency Relief Programs, Governor’s Emergency Education Relief Programs” that includes questions and answers intended to provide clarity to the federal requirements applicable to how ESSER funds may be used for construction projects, including HVAC updates. Even with this guidance document, there remains considerable confusion about the SEA’s responsibility to approve these projects.

We are concerned that, under this guidance document, it appears that the Department is applying onerous regulations on school districts looking to use ESSER funds for HVAC improvements and other construction projects. Specifically, part 75 federal regulations (34 CFR §§ 76.600 and 75.600-75.618) state 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,” with the SEA standing in the place of the Secretary as the pass-through entity to approve the drawings and specifications. Additionally, part 75 includes requirements such as having a full environmental impact study, despite public health recommendations being clear that schools should prioritize improved air quality to mitigate COVID-19.

These unduly burdensome requirements have put a number of LEAs’ HVAC-related projects on hold and are delaying essential work to protect students and improve indoor air quality in school facilities. Under CRSSA, Congress authorized ESSER funds to be used for HVAC-related improvements, but the Department did not make clear which regulations apply to these projects until May 26th, months after funds were released to SEAs and LEAs. We believe these LEAs are pursuing HVAC-related projects consistent with the purpose of these funds “to prevent, prepare for, and respond to” COVID-19.

Additionally, these regulations create obstacles for the use of ESSER funds for prior costs dating back to March 13, 2020, when the national emergency was declared. The Department’s guidance states “Although the lists of allowable uses of funds are not identical, any of the ESSER funds (ESSER I, ESSER II, or ARP ESSER) may be used to support all of the allowable uses of funds listed in any of the ESSER programs.” Therefore LEAs should be able to use ESSER funds for costs incurred for HVAC upgrades and/or facility repairs that were done in response to the COVID-19 pandemic. However, in order to comply with the guidance provided on May 26, 2021, specifically 34 CFR § 75.605, final plans would need to have been approved by the

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<sup>1</sup><https://www.education.nh.gov/news/nh-receives-156m-education-us-doe-allocates-esser-funds-states>

Governor or SEA before the construction was advertised or placed on the market for bidding. Therefore, the Department's decision to put in place this requirement potentially prohibits the use of funds for HVAC and other facility renovations that have already taken place in response to the coronavirus pandemic.

LEAs facing these delays in New Hampshire have followed the information and guidance available to them at the time regarding using ESSER funds for HVAC projects that Congress explicitly authorized in COVID-19 relief legislation. LEAs may now be forced to restart their procurement process, despite following federal and state contracting requirements, because of continued confusion with New Hampshire's SEA over the required grantee approval process and applicability of part 75 requirements outlined in guidance released by the Department on May 26, 2021.

We ask that you work with the New Hampshire SEA to expedite the approval process of these projects and revise the guidance as needed so that schools can use their ESSER funds to prevent, prepare for, and respond to COVID-19 as expeditiously as possible. We further respectfully request that you consider SEAs' being exempt from the requirements under 34 CFR § 75.605(b) for the purposes of the use of ESSER funds, provided that the LEA, within its request for funding, offers certification that the final working drawings and specifications meet applicable industry standards, including but not limited to the use of American Society of Heating, Refrigeration and Air Conditioning Engineers (ASHRAE) standards.

Thank you for your attention to this matter and for your work to ensure the successful usage of ESSER funds to support school districts and their schools during this challenging time. Please let us know if we can be helpful in any way as you work to address this issue.

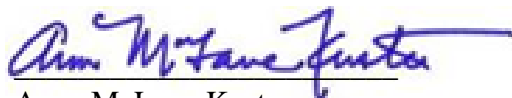
Sincerely,



Margaret Wood Hassan  
United States Senator



Jeanne Shaheen  
United States Senator



Anne McLane Kuster  
Member of Congress



Chris Pappas  
Member of Congress