

The Council of Chief State School Officers (CCSSO) has received many questions from states about using ESSER funds to pay for COVID-related staff leave. With support from the Federal Education Group, PLLC, this document lays out considerations to help states analyze the allowability of such costs. 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 guidance 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

Ensuring employees affected by COVID-19 can isolate or quarantine as necessary is a strategy to help to prevent the spread of COVID-19 [as acknowledged by the CDC](#) and other health officials. Preventing the spread of COVID-19 is consistent with ESSER's purpose and is therefore consistent with the first step in ED's recommended spending analysis framework.

## II. Authorized Uses of ESSER Funds

### Local Uses of Funds

Local Educational Agencies (LEAs) may use ESSER funds to implement public health protocols including, to the greatest extent possible, policies in line with CDC guidance to effectively maintain the health and safety of students, educators, and other staff.<sup>2</sup> ED recognizes that paid leave may be one way to implement public health practices. For example, ED has advised it is allowable for LEAs to use ESSER funds for paid time off to incentivize vaccination.<sup>3</sup> Therefore, offering paid time off for staff to isolate or quarantine consistent with CDC guidance appears consistent with this authorized use of ESSER funds.

Offering COVID-related leave is also consistent with other authorized uses of ESSER funds including:

- Activities authorized by the Elementary and Secondary Education Act,<sup>4</sup> which includes the Impact Aid program, which, in general, allows districts to "use the funds in whatever manner they choose in accordance with their local and State requirements,"<sup>5</sup>
- Coordination of preparedness and response efforts of LEAs with state, local, tribal, and territorial public health departments, and other relevant agencies, to prevent, prepare for, and respond to the coronavirus,<sup>6</sup>
- Implementing procedures and systems to improve LEA preparedness and response efforts,<sup>7</sup> and
- Other activities necessary to maintain LEA operations and continuity of services.<sup>8</sup>

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<sup>2</sup> ARP, Sec. 2001(e)(2)(Q). Please note even though this activity is not specifically delineated in CARES or CRRSA, ED has advised it is an allowable activity under CARES and CRRSA ESSER as well. U.S. Department of Education, [ARP ESSER Fact Sheet](#), 2021, pp. 5-6.

<sup>3</sup> [ED May 2021 ESSER and GEER FAQs](#), B-3.

<sup>4</sup> CARES, Sec. 18003(d)(1); CRRSA, Sec. 313(d)(1); ARP, Sec. 2001(e)(2)(A).

<sup>5</sup> U.S. Department of Education [Impact Aid program website](#).

<sup>6</sup> CARES, Sec. 18003(d)(2); CRRSA, Sec. 313(d)(2); ARP, Sec. 2001(e)(2)(E).

<sup>7</sup> CARES, Sec. 18003(d)(5); CRRSA, Sec. 313(d)(5); ARP, Sec. 2001(e)(2)(G).

<sup>8</sup> CARES, Sec. 18003(d)(12); CRRSA, Sec. 313(d)(15); ARP, Sec. 2001(e)(2)(R).

Please note ESSER does not limit spending to teachers or staff that work directly in schools or classrooms. ED has advised, for example, that LEAs could use ESSER funds to pay superintendents or even school board members if necessary to maintain operations.<sup>9</sup> (See more on this below.)

Please also note the CARES and CRRSA ESSER Grant Award Notifications (GANs) issued to states included language stating ED generally does not consider “subsidizing or offsetting executive salaries and benefits of individuals who are not employees of the school district” to be an allowable ESSER expense. This language covers executive compensation for *non-employees*; it does not prohibit COVID-related leave payments to a school district’s own employees. In addition, this language is not part of the CARES or CRRSA laws themselves and was not included in ARP ESSER GANs.

### 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>10</sup> ED has advised that 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>11</sup> This would include the authorized ESSER activities listed above for LEAs, meaning an SEA could use ESSER emergency needs funds for COVID-related leave.

## III. Uniform Grant Guidance Considerations

### General Considerations for Leave Payments

Generally, paid leave for employees is allowed under the Uniform Grant Guidance (UGG) as long as the benefits are:

- Reasonable, and
- Required by law, entity-employee agreement, or an established LEA policy.<sup>12</sup> (ED has made clear that pay and benefits policies can be established in response to COVID.<sup>13</sup> In other words, these policies need not have been in place pre-pandemic.)

Additional rules for charging leave can be found in [2 CFR § 200.431\(b\)](#).

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<sup>9</sup> U.S. Department of Education, [Letter to Florida](#), Aug. 2021. This letter will be referred to as *ED August 2021 Letter to Florida* for the rest of this document.

<sup>10</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](#), A-8 and A-9.

<sup>11</sup> [ED May 2021 ESSER and GEER FAQs](#), A-12.

<sup>12</sup> [2 CFR § 200.431\(a\)](#).

<sup>13</sup> See, for example, [ED May 2021 ESSER and GEER FAQs](#), D-6.

## Special Considerations for Executive Positions

There have been some questions about whether any special considerations apply to paying leave for executive staff like a local superintendent who must quarantine or isolate due to COVID given UGG limitations on spending federal funds for certain governmental costs. Specifically, the UGG prohibits state, local, and Tribal governments from using federal funds for “general costs of government,” including salaries and expenses of a chief executive or local governmental body like a school board.<sup>14</sup> The federal government has not provided much guidance on this provision, but this requirement has generally been interpreted to mean federal funds cannot pay for the general expense of carrying out the overall responsibilities of local government—for example operating the government.

This does not necessarily preclude, however, using federal funds for identifiable expenses related to carrying out a federal program.<sup>15</sup> It could be reasonable to view COVID-related leave payments as identifiable expenses related to ESSER as opposed to a general cost of government. As noted above, ESSER specifically allows LEAs to spend funds to implement public health policies consistent with CDC guidance, which could include COVID-related leave policies. In other words, paying COVID-related leave to support policies consistent with CDC guidance is not part of carrying out general government responsibilities under 2 CFR § 200.444, but rather is an identifiable expense related to carrying out ESSER.

It is also important to note the UGG does not supersede federal statutes. As provided in the UGG, “where the provisions of Federal statutes or regulations differ from the provisions of this part, the provision of the Federal statutes or regulations govern.”<sup>16</sup> ESSER specifically permits LEAs to spend on their own operations, which ED confirmed can include compensation for an LEA’s superintendent and its school board members:

The Department notes that allowable uses of ESSER funds include “activities that are necessary to maintain the operation of and continuity of services in local educational agencies and continuing to employ existing staff of the local educational agency.” This includes paying the full salaries of educators (including superintendents) and school board members . . .<sup>17</sup>

In other words, because ESSER specifically permits spending on operational expenses, and because ED has advised that operational expenses can include superintendent compensation, it

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<sup>14</sup> [2 CFR § 200.444](#).

<sup>15</sup> See, for example, U.S. Department of Health and Human Services, [DCA Best Practices Manual for Reviewing State and Local Governments State/Local-Wide Central Service Cost Allocation Plans and Indirect Cost Rate Proposals](#), 2007, p. III-9. Note this guidance was based on an earlier version of the rule in 2 CFR § 200.444 but addresses the same requirement.

<sup>16</sup> [2 CFR § 200.101\(d\)](#).

<sup>17</sup> [ED August 2021 Letter to Florida](#).

is reasonable to conclude COVID-related leave for a superintendent is allowable notwithstanding the UGG’s limits on general costs of government.

### Time and Effort Considerations

The UGG includes special rules for documenting employee compensation, including employee benefits like paid leave. These rules were updated in 2014. Under current UGG rules, an entity using federal funds for employee compensation must have records that meet the following criteria:

1. Are supported by a system of internal control which provides reasonable assurance that the charges are accurate, allowable, and properly allocated,
2. Are incorporated into the official records of the non-Federal entity,
3. Reasonably reflect the total activity for which the employee is compensated by the non-Federal entity, not exceeding 100% of compensated activities,
4. Encompass federally assisted and all other activities compensated by the non-Federal entity on an integrated basis, but may include the use of subsidiary records as defined in the non-Federal entity's written policy,
5. Comply with the established accounting policies and practices of the non-Federal entity, and
6. Support the distribution of the employee's salary or wages among specific activities or cost objectives if the employee works on more than one Federal award; a Federal award and non-Federal award; an indirect cost activity and a direct cost activity; two or more indirect activities which are allocated using different allocation bases; or an unallowable activity and a direct or indirect cost activity.<sup>18</sup>

If an entity has records that meet these criteria (and other requirements of 2 CFR § 200.430(i)), then its employees do not need to keep separate time and effort certifications (like semi-annual certifications or personnel activity reports).<sup>19</sup>

In practice, the first five criteria above can usually be met through payroll and related records. The last criterion, however, supporting the distribution of time across multiple cost objectives, can be hard to meet without some accounting of employee time. Time distribution, however, is less likely to be a concern for ESSER.

According to ED, it is unlikely an employee paid with ESSER funds would work on multiple cost objectives because the allowable uses of ESSER funds are so expansive. Where an employee works on only one cost objective, the employee has no time to distribute, so no time distribution record is needed. Specifically, ED has said:

An LEA must maintain time distribution records (sometimes called “time and effort” reporting) only if an individual employee is splitting his or her time between activities

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<sup>18</sup> [2 CFR § 200.430\(i\)](#).

<sup>19</sup> [2 CFR § 200.430\(i\)\(8\)](#).

that may be funded under ESSER or GEER and activities that are not allowable under the applicable program. However, it is likely there will be very few situations in which an employee of an LEA would perform multiple activities where some are not allowable under ESSER or GEER, and thus would be required to maintain time distribution records, given that an LEA is authorized to use funds on “activities that are necessary to maintain the operation of and continuity of services in [an LEA] and continuing to employ existing staff of the [LEA]” in order to “prevent, prepare for, and respond to” the COVID-19 pandemic.<sup>20</sup>

In most cases, this means entities do not need to collect time and effort records from employees whose leave is paid with ESSER funds. The entity would only need records that satisfy criteria 1 through 5 listed above, which most likely have in their existing systems.

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<sup>20</sup> [ED May 2021 ESSER and GEER FAQs](#), A-16.