



ESSER III: Funding school construction

June 2, 2021

The federal government has issued three rounds of relief funding to Ohio school districts in response to the coronavirus pandemic. The most recent round—created by the American Rescue Plan and referred to as ESSER III or ARP ESSER—is the largest round so far and has made \$4.5 billion available to Ohio school districts. Given the significant amount of dollars that school districts need to allocate, many are wondering how and to what extent these funds may be used for construction and facilities improvements. While these monies come with certain requirements as to how the funds can be used and how spending decisions are made, based on the track record of ESSER II approvals, these requirements have proven to be more accommodating than restrictive. Thus, with some attention to the details in the CCIP application form, these funds can have widespread application to school district construction and facilities improvement projects.

Before they can spend any ESSER III funds, school districts must post their plan for returning to in-person instruction and continuity of services on their website. This plan must be posted by [June 24, 2021](#). Before they can finalize this plan, districts are required to engage in meaningful consultation with stakeholders and to solicit input about the needs of their students. Additionally, the district must create an ARP ESSER Plan that details how the school district plans to spend its ESSER III allocation. This spending plan must be posted on the district website by August 20, 2021. It is within this plan that the district will identify the proposed construction or improvement project.

To be sure, the focus of the American Rescue Plan, and its ESSER III funding, is to facilitate school districts' safe return to in-person instruction. To that end, the authorizing legislation expressly allows these funds to be used for repairs and improvements to school facilities to “reduce risk of virus transmission and exposure to environmental health hazards” and for performing HVAC

and other improvements to “improve the indoor air quality” of school buildings.

As noted above, the Ohio Department of Education (ODE) has approved a wide variety of facility improvements under this language. New construction of, or improvements to, existing outdoor facilities will allow students the opportunity to spend part of their day in fresh air, consistent with CDC recommendations. Projects creating additional square footage—whether in the form of an addition to an existing facility or even the construction of new facilities—facilitate social distancing. While the statutory language is clear that construction and facility improvements are allowable expenditures of ESSER funds, ODE does review applications for these expenditures with some level of scrutiny, so care should be taken when drafting the CCIP application to make clear how the construction project relates to reducing the risk of the virus’ spread.

While school districts have significantly more funding available to them under ESSER III than they have in previous rounds of relief, some districts may not have enough funding in ESSER III alone to fund a major facility construction project. Fortunately, ESSER III funds may be used to fund an improvement in conjunction with other funding sources. For example, the school district may look to use ESSER III funds in combination with a voted levy or bond issue to construct a project. (Note: The August 4, 2021, deadline to place a levy or bond issue on the November ballot falls before the August 20, 2021, ESSER III application deadline.) Alternatively, school districts may couple ESSER III funds with a lease-purchase arrangement under R.C. 3313.375 and avoid the need to go to their voters altogether, assuming a sufficient existing cash flow. School districts should consult experienced public finance counsel to further explore these financing options.

Finally, school districts should be aware of the [additional procurement requirements](#) applicable to using federal funding for construction projects. For example, school districts will need to ensure the procurement of the construction professionals complies with Uniform Guidance under federal law, along with the state law requirements that would ordinarily apply to such projects. Additionally, the Davis-Bacon Act applies to ESSER-funded construction projects, triggering an obligation on the contractors to pay prevailing wage. Finally, there are a host of contractual provisions required to be included in the construction contract to fully ensure federal compliance. Experienced construction counsel can assist the school district in navigating the unfamiliar waters of federally-funded construction.

The ESSER monies authorized by Congress have presented school district leaders what many consider a once-in-a-lifetime opportunity to address some of their existing facilities needs while promoting the health and safety of district students. Districts’ thorough consideration of the funds’ varied allowable uses and thoughtful compilation of their applications and plans will assist in realizing the full potential of their grant dollars.

Authors



Beverly A. Meyer
Partner & Political Subdivisions Chair

Dayton
937.224.1849
bmeyer@bricker.com



Sean R. Lehman
Associate

Columbus
614.227.7712
slehman@bricker.com



Christopher L. McCloskey
Partner & Public Sector Industry Group
Chair

Columbus
614.227.2385
cmcloskey@bricker.com



Rebecca C. Princehorn
Partner

Columbus
614.227.2302
rprincehorn@bricker.com