

February 9, 2021

Elsie Arntzen
Superintendent of Public Instruction
Office of Public Instruction
P.O. Box 202501
Helena, MT 59620-2501

Re: ESSER I and ESSER II Funding.

Dear Superintendent Arntzen:

You asked my office to look into three issues related to the use of ESSER I and ESSER II funding from the federal government.

Issue One: Is OPI the SEA provided for under federal law?

Federal law defines the education services agency “SEA” as:

State educational agency. State educational agency or SEA means the State board of education or other agency or officer primarily responsible for the State supervision of public elementary schools and secondary schools, or, if there is no such officer or agency, an officer or agency designated by the Governor or by State law.

34 CFR § 300.41.

Two entities are afforded supervision of primary and secondary schools in Montana. The Board of Public Education is to “exercise general supervision over the public school system.” Mont. Const. Art. X § 9(3). The Board’s duties are set forth in more detail in § 20-2-121 Mont. Code Ann., but notably absent from those duties are supervision or control over federal funds granted to either the state or local school districts. The Superintendent of Public Instruction has “such duties as are provided by law.” Mont. Const. Art. VI § 4(5). The Superintendent “has the general supervision of the public schools and districts of the state. . .”. § 20-3-106. Further, the Superintendent shall “request, accept, deposit, and expend federal money in accordance with the provisions of [20-9-603](#).” § 20-3-106(14). The referenced section in turn provides:

The governor and the superintendent of public instruction are authorized on behalf of the state of Montana to request and accept money that is or will be made available under any act of congress of the United States or otherwise for

purposes of public school building construction or for any other purposes of public schools and public education as permitted under the laws of the state of Montana and as authorized by the grants from the federal government. The money must be deposited by the governor and superintendent of public instruction in the state treasury and is available for appropriation to the superintendent of public instruction. The money must be expended for the purpose of public school building construction or for any other purposes of public schools and public education as permitted under the laws of the state of Montana and as authorized by the grants from the federal government.

§ 20-9-603(1). By looking at the general grants of authority and specific duties both entities likely meet the requirements of 34 C.F.R. § 300.41. Both the Board and Superintendent are granted supervision over public schools, but neither entity possesses exclusive supervision over public schools. However, by looking at the specific duties, under the current statutory regime, only the Superintendent has authority – in conjunction with the Governor – over request, receipt, and expenditure of federal funds. Therefore, only the Superintendent is a qualified SEA for the purpose of distributing funds under ESSER I and ESSER II.

Issue Two: Does the Legislature have appropriations authority over the \$17M in discretionary funding retained by the SEA?

The Montana Constitution provides; “[e]xcept for interest on the public debt, no money shall be paid out of the treasury unless upon an appropriation made by law and a warrant drawn by the proper officer in pursuance thereof.” Mont. Const. Art. VIII § 14. As noted above, the money requested by the Superintendent and Governor “must be deposited by the governor and superintendent of public instruction in the state treasury.” § 20-9-603(1). However, the next clause makes clear that the Legislature has delegated its appropriation authority by stating the money is “available for appropriation to the superintendent of public instruction.” *Id.* Therefore, absent any further instruction by the Legislature, once the Superintendent has requested the funding pursuant to § 20-9-603 and that money is deposited in the state treasury then the Superintendent possesses appropriations authority over that money. However, because the Superintendent’s authority is delegated by the Legislature, the Legislature may modify or rescind that authority through passage of a new law.

For illustrative purposes, there are situations where the Legislature’s authority may not be plenary:

- (1) Federal funding is requested, deposited, and obligated by the Superintendent. Subsequently, the Legislature passes a law that directs appropriations in conflict with the obligations made by the Superintendent.

- (2) The Legislature passes a law that anticipates the Superintendent requesting federal funds and directs the Superintendent to appropriate that money towards specific uses.

In the first case, the new legislative enactment would be ripe for legal challenge. “No ex post facto law nor any law impairing the obligation of contracts, or making any irrevocable grant of special privileges, franchises, or immunities, shall be passed by the legislature.” Mont. Const. Art. II § 31. A legislative enactment challenged under this section is subject to the following analysis: (1) is the state law a substantial impairment to the contractual relationship?; (2) does the state have a significant and legitimate purpose for the law?; and (3) does the law impose reasonable conditions which are reasonably related to achieving the legitimate and public purpose? *City of Billings v. County Water Dist.*, 281 Mont. 219, 935 P.2d 246 (Mont. 1997). Importantly, the Court has stated that when the state contracts are at issue, then the level of scrutiny applied to the legislative act is heightened. *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 327 (1986). Therefore, if this hypothetical were to arise and assuming (1) is met, then the Court might be skeptical of any legislative enactment that would render void an otherwise valid state contract in order to impose its policy choice on the Superintendent.

The second issue is more straightforward. The Legislature’s act in that case would be a classic modification of the appropriation authority delegated under § 20-9-603. The Legislature would be within its authority to specify the anticipated source of funding and direct portions, or all, of the anticipated funding.

The Legislature possesses the power of the purse. However, as the Legislature has delegated its appropriations authority to the Superintendent in situations such as the one at hand, ultimate control over spending certain funds is largely a matter of timing. If the Superintendent acts prior to any new legislative enactment, or if the Legislature elects not to modify or rescind the appropriations authority in § 20-9-603 as it applies to the ESSER II funds, then the Superintendent would possess unencumbered authority over the funds in question. However, the Legislature has authority to modify or rescind its delegation to the Superintendent.

Issue Three: What are the limits imposed by federal law on the \$17M in discretionary funding?

Both ESSER I and ESSER II contain similar language for the operative sections involving state funding.

ESSER I:

- (e) STATE FUNDING.—With funds not otherwise allocated under subsection (c), a State may reserve not more than 1/2 of 1 percent for administrative costs

and the remainder for emergency needs as determined by the state educational agency to address issues responding to coronavirus, which may be addressed through the use of grants or contracts.

CARES ACT Section 18003.

ESSER II:

(e) STATE FUNDING.—With funds not otherwise allocated under subsection (c), a State may reserve not more than one-half of 1 percent for administrative costs and the remainder for emergency needs as determined by the state educational agency to address issues responding to coronavirus, including measuring and addressing learning loss, which may be addressed through the use of grants or contracts.

CRRSA Section 313.

The only substantive limitation of use on SEA funds under subsection (e) is that the funding be used for emergency needs to address issues responding to coronavirus. The clause added to ESSER II, “including measuring and addressing learning loss,” is an example of a permissible use of funds related to responding to the coronavirus. The intent of Congress and the intent of USDOE is to provide broad flexibility to the SEA to meet emerging needs related to coronavirus.^{1 2 3}

As I understand the MT-PEC proposal, MT-PEC wants the SEA to use a portion of these discretionary funds to update and upgrade existing data systems at OPI. This likely falls within the permissible use of funds under ESSER II. First, ESSER II placed additional emphasis on “measuring and addressing learning loss.” Upgraded data systems allow for the measuring of learning loss. The state could justify the upgrade on the basis that the need for a more robust data collection system is based upon the enhanced need to track, monitor, and measure learning loss.

In summary, given that Congressional intent was to provide maximum flexibility to the states with the only restriction being that the funding be used to address needs

¹ For example, see January 28, 2021 email from Lakesha McKenzie at USDOE to Ken Bailey at OPI that authorizes the use of LEA funds to bridge budget shortfalls if the deficit is related to coronavirus, including using LEA funds in place of failed local mill levies that failed because of the economic effects of the pandemic.

² See also, USDOE guidance comparing ESSER I and II [Final ESSERII Factsheet 1.5.21.pdf \(ed.gov\)](#)

³ See, Statement of Secretary DeVos April 23, 2020. The Secretary touts, alongside ESSER I funding, the flexibility USDOE is providing to states such as waivers from standardized testing. The intent of Congress and the Administration was to alleviate hardships on states and local districts. [Secretary DeVos Makes Available Over \\$13 Billion in Emergency Coronavirus Relief to Support Continued Education for K-12 Students | U.S. Department of Education](#)

related to coronavirus and that CRRSA further clarified that tracking and addressing learning loss is afforded special priority I do not find a substantive restriction on OPI in using ESSER II funds on upgrading data systems that assist in addressing learning loss.

Thank you and please contact my office with any further questions.

Kristin Hansen
Lieutenant General
Montana Attorney General