

STATE OF RHODE ISLAND
DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION
OFFICE OF THE COMMISSIONER

*In re the April 6, 2022 Request for an Advisory
Opinion/Declaratory Order Pursuant to
R.I. Gen. Laws § 42-35-8 by the Metropolitan
Regional Career and Technical Center Concerning
the Use of ESSER Funds for Employee Bonuses*

D.O. 22-001A

1. The Request for the Advisory Opinion/Declaratory Order

On April 6, 2022, counsel for the Metropolitan Regional Career and Technical Center (the “Met”) wrote the Commissioner and asked whether local educational agencies (“LEAs”) in Rhode Island “are permitted to use Elementary and Secondary School Emergency Relief (“ESSER”) Funds for hiring and retention bonuses as a strategy to address teacher and staff shortages.” *See* Request for an Advisory Opinion/Declaratory Order at 1.

Although counsel requested a “formal legal advisory opinion,” his request fits the description of a declaratory order under R.I. Gen. Laws § 42-35-8, and thus will be construed as if it were a request for such a declaratory order.

2. Declaratory Orders and Appeals

R.I. Gen. Laws § 42-35-8 provides that “[a] person may petition an agency for a declaratory order that interprets or applies a statute administered by the agency or states whether, or in what manner, a rule, guidance document, or order issued by the agency applies to the petitioner” and “[n]ot later than sixty (60) days after receipt of a petition under subsection (a), an agency shall issue a declaratory order in response to the petition, decline to issue the order, or schedule the matter for further consideration.” R.I. Gen. Laws § 42-35-8(a), (c); *see generally* Regulations Governing Declaratory Order Petitions (the “D.O. Regs.”), 200-RICR-30-15-2, *et. seq.* In addition, R.I. Gen. Laws § 42-35-8(d) provides that:

If an agency declines to issue a declaratory order requested under subsection (a), it shall notify, promptly, the petitioner of its decision. The decision must be in a record and must include a brief statement of the reasons for declining.

3. Decision

ESSER Funds were established in the Coronavirus Aid, Relief, and Economic Security (“CARES”) Act, Pub. L. No. 116-136 (March 27, 2020) (“ESSER I Funds”), and further funded under the Coronavirus Response and Relief Supplemental Appropriations (“CRRSA”) Act, 2021,

Pub. L. No. 116-260 (December 27, 2020) (“ESSER II Funds”), and the American Rescue Plan (“ARP”) Act of 2021, Pub. L. No. 117-2 (March 11, 2021) (“ARP ESSER Funds”) for the purpose of providing LEAs that receive funds under part A of title I of the Elementary and Secondary Education Act of 1965, including charter schools, with emergency relief funds to address the impact of the COVID-19 pandemic. *See* U.S. Department of Education, *Frequently Asked Questions, Elementary and Secondary School Emergency Relief Programs, Governor’s Emergency Education Relief Program* (May, 2021), Questions E-1 through E-3 at 48.¹

ESSER I Funds are available for obligation by LEAs and other subrecipients through September 30, 2022; an LEA has until September 30, 2023 to obligate ESSER II Funds; and ARP ESSER Funds must be obligated by September 30, 2024. All ESSER funds are obligated when an LEA commits those funds to specific purposes. *See id.* at Questions E-1 through E-3 at 48.

Consistent with these time constraints, the U.S. Department of Education has made clear that ESSER I and ESSER II Funds may be used for “premium pay” or “other additional compensation for teachers, principals, and other school personnel, including school nutrition staff and custodians” as long as it is “reasonable and necessary and consistent with 2 CFR § 200.430(f),² and given pursuant to an established plan (which could be established in response to the COVID-19 pandemic), consistent with applicable collective bargaining agreements and other relevant policies and requirements.” *See id.*, Question D-6 at 47.

In fact, the Secretary of Education has recently called attention to the “the harmful impacts of shortages of educators and other school staff” across the nation, and urged LEAs to use resources from ARP ESSER “to ensure that students have access to the teachers and other critical staff they need to support their success during this critical period.” *See* December 16, 2021 Dear Colleague Letter from the Secretary of Education at 1-2.³ And one of the strategies for hiring and retaining qualified and effective educators recommended by the Secretary – for which the use of ARP ESSER Funds would be appropriate – was the use of “[h]iring and

¹ Available at

https://oese.ed.gov/files/2021/05/ESSER.GEER_FAQs_5.26.21_745AM_FINALb0cd6833f6f46e03ba2d97d30aff953260028045f9ef3b18ea602db4b32b1d99.pdf

² 2 CFR § 200.430(f) provides that:

Incentive compensation. Incentive compensation to employees based on cost reduction, or efficient performance, suggestion awards, safety awards, etc., is allowable to the extent that the overall compensation is determined to be reasonable and such costs are paid or accrued pursuant to an agreement entered into in good faith between the non-Federal entity and the employees before the services were rendered, or pursuant to an established plan followed by the non-Federal entity so consistently as to imply, in effect, an agreement to make such payment.

Id.

³ Available at https://oese.ed.gov/files/2021/12/21-0414.DCL_Labor-Shortages.pdf ; *see also* Part 1: *Using ARP Funds and Other Federal Supports to Address State and Local Teacher Shortages*. YouTube. U.S. Department of Education, 2021. Available at <https://www.youtube.com/watch?v=bF3ZXjfdumc> ; and Part 2: *Using ARP Funds and Other Federal Supports to Address State and Local Teacher Shortages*. YouTube. U.S. Department of Education, 2021, available at <https://www.youtube.com/watch?v=HBr6hIrJ4cw>

retention bonuses,” which he concluded “may provide additional relief from some of the stresses caused by COVID-19.” *Id.* at 2.

Thus, in conclusion, LEAs in Rhode Island are permitted to use ESSER Funds for hiring and retention bonuses as a strategy to address teacher and staff shortages, as long as the specific use complies with other relevant program requirements.

Please be advised R.I. Gen. Laws § 42-35-8(d) provides that this decision “is subject to judicial review for abuse of discretion.” *Id.*

Entered as a final agency Order this 15th day of April 2022.



Angélica Infante-Green,
Commissioner

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of this Declaratory Order to be posted on RIDE’s website and to be served by email on this 15th day of April, 2022 upon Matthew R. Plain at mplain@bglaw.com.

