



Disability Rights

WASHINGTON

Washington's protection and advocacy system

July 9, 2020

*Sent First Class Mail and Email*

Governor Jay Inslee  
State of Washington Office of the Governor  
PO Box 40002  
Olympia WA 98504-0002

David Schumacher  
Director, Office of Financial Management  
PO Box 43113  
Olympia WA 98504-3113

**Dear Governor Inslee and Director Schumacher,**

We are writing to express our deep concern that you are unlawfully withholding Elementary and Secondary Emergency Relief (ESSER) funds<sup>1</sup> allocated through *the Coronavirus Aid, Relief and Economic Security (CARES) Act*,<sup>2</sup> and to demand that you release these funds to Washington's State Educational Agency (SEA), the Office of Superintendent of Public Instruction (OSPI). Congress mandated that the SEA determine use of these funds for students impacted by COVID-19, and the State of Washington's Office of Financial Management (OFM) does not have authority to withhold or repurpose these funds.

### **Factual Background**

Under the CARES Act, Congress set aside 13.2 billion for ESSER,<sup>3</sup> as part of its Education Stabilization Fund, to prevent, prepare for and respond to coronavirus.<sup>4</sup> \$216,892,447 was earmarked for Washington.<sup>5</sup> OSPI outlined proposed uses for this funding in its U.S.

---

<sup>1</sup> Dept. of Ed. Office of Elementary and Secondary Education. Elementary and Secondary School Emergency Relief Fund. See <https://oese.ed.gov/offices/education-stabilization-fund/elementary-secondary-school-emergency-relief-fund/>. Last visited June 25, 2020.

<sup>2</sup> Coronavirus Aid, Relief and Economic Security (CARES) Act, Pub. Law 116-136. Enacted March 28, 2020. See <https://www.congress.gov/116/bills/hr748/BILLS-116hr748enr.pdf>.

<sup>3</sup> Dept. of Ed. Office of Elementary and Secondary Education. Elementary and Secondary School Emergency Relief Fund.

<sup>4</sup> CARES Act, supra, §18000. Department of Education. Education Stabilization Fund. P.284. <https://www.congress.gov/116/bills/hr748/BILLS-116hr748enr.pdf>.

<sup>5</sup> Dept. of Ed. 2020 ESSER State Allocation Table <https://oese.ed.gov/files/2020/04/ESSER-Fund-State-Allocations-Table.pdf> (last visited June 25, 2020).

Department of Education “Certification and Agreement for funding under the ESSER Fund.”<sup>6</sup> OSPI also defined, online, its four priorities for ESSER funds: 1) Support students furthest from educational justice; 2) Prepare for Health and Safety in 2020-21; 3) Invest in connectivity and hardware, and 4) Leverage local expertise and provide training.<sup>7</sup>

This ESSER funding is crucial for equitably meeting the needs of all students, and is particularly critical for students with disabilities and those from marginalized backgrounds. With school closures from the novel Coronavirus of 2019 (COVID-19), many students experienced serious harm, and sought assistance from Disability Rights Washington and other advocacy organizations (TeamChild, ACLU-WA, Northwest Justice Project, Legal Counsel for Youth and Children). Students did not receive educational services because their parents did not speak English and could not translate instructional materials, or because materials were not accessible for parents or students disabilities. Some students lacked necessary broadband access and for some, education did not work without a physical setting and one-to-one supports. Students who had no access to therapies or essential services in their education plans experienced serious regression and harm. ESSER funds were established so SEAs and LEAs could address these types of issues.

As Washington’s Protection and Advocacy System for the State of Washington, Disability Rights Washington protects the rights of students with disabilities statewide. Disability Rights Washington and other advocacy organizations expressed these concerns in letters to the Governor’s Office, Health Care Authority and Office of Superintendent of Public Instruction in March and in May of 2020.

During a June meeting with the Office of Superintendent of Public Instruction (OSPI) and legal advocacy organizations, Superintendent Chris Reykdal remarked that there were approximately \$216 million Elementary and Secondary School Emergency Relief Fund dollars and these were held in the Washington’s Office of Financial Management (OFM). Superintendent Reykdal said he had been working with school districts and they had requested funding to meet many of the needs of marginalized students to address concerns Disability Rights Washington and other legal advocacy organizations raised. At that point, it was not clear that OFM was going to release all ESSER funds to OSPI.

OFM approved the 90% school district portion of \$195,203,202 for release but has withheld all but \$463,785 of the \$21,689,245 SEA reserve allocated for OSPI. Purportedly, there is a partial

---

<sup>6</sup> U.S. Dept. of Education. Washington’s Certification and Agreement for Funding under the Education Stabilization Fund Program Elementary and Secondary School Emergency Relief Fund (ESSER Fund). CFDA No. 84425D. OMB No. 1810-0743. OSPI April 27, 2020.

<sup>7</sup> Office of Supt. of Public Instruction. OSPI’s Priorities for ESSER Funds. <https://k12.wa.us/sites/default/files/public/communications/OSPI%20Priorities%20for%20ESSER%20Funds.pdf> (last visited July 6, 2020).

hold for funds through mid-August. On June 17, Reykdal wrote OFM Director Schumacher. Articulating the SEA's proposed use of funds, Reykdal expressed "profound disappointment" in OFM's decision to hold back Coronavirus funds designated for the SEA, and asked they be "released for their stated purposes."<sup>8</sup> OFM did not release the funds as Superintended Reykdal requested.

## Legal Obligation

### *Statutory Mandate*

The *CARES Act* clearly establishes the SEA shall be the recipient and disbursing officer of ESSER funds. Pursuant to the Act, the Department of Education (DOE) Secretary "shall make elementary and secondary relief grants to each State educational agency."<sup>9</sup> Each State "shall allocate not less than 90 percent" to local educational agencies' (LEA) as subgrants.<sup>10</sup> The *CARES Act* mandates that if LEA funds are not otherwise awarded for allowable uses, a State may reserve up to 1/2 of 1 percent for administrative costs.<sup>11</sup> The remaining reserve funding must be allocated to meet emergency coronavirus related needs, "**as determined by the state educational agency.**"<sup>12</sup> Any ESSER funds that are not awarded within one year shall be returned to the DOE Secretary, to be redistributed to remaining States.<sup>13</sup>

The *CARES Act* also carries a maintenance of effort provision which conditions application of ESSER funds on "assurances that the State will maintain support for elementary and secondary education ... in fiscal years 2020 and 2021 at least at the levels of such support that is the average of such State's support for elementary and secondary education and for higher education provided in the 3 fiscal years preceding the date of enactment of this Act."<sup>14</sup> This maintenance of effort may only be waived by the DOE Secretary for "the purpose of relieving fiscal burdens on States that have experienced a precipitous decline in financial resources."

### *U.S. Department of Education Guidance*

The U.S. Department of Education has further reinforced the congressional mandate for the SEA to determine disbursement of ESSER funding. "Eligibility" for ESSER funding, per the *U.S. Dept. of Education Certification and Agreement for Funding under the ESSER Fund* is exclusively defined as "SEAs in any of the 50 States, the District of Columbia, and the Commonwealth of

---

<sup>8</sup> OSPI letter to Office of Financial Management Director Schumacher. June 17, 2020.

<sup>9</sup> *CARES Act, supra*, §18003 (a). Emphasis added.

<sup>10</sup> *CARES Act, supra*, §18003 (c). Emphasis added.

<sup>11</sup> *CARES Act, supra*, §18003(d), (e)

<sup>12</sup> *CARES Act, supra*, §18003 (e). Emphasis added.

<sup>13</sup> *CARES Act, supra* §18003 (f).

<sup>14</sup> *CARES Act, supra* §18008.

Puerto Rico.”<sup>15</sup> The DOE assembled an ESSER Frequently Asked Questions (FAQ) document wherein it reiterates “**Only** SEAs in the 50 States, Puerto Rico, and the District of Columbia apply directly to the Department for ESSER funds.”<sup>16</sup> As in the legislation, the FAQ also says school districts (LEAs) must **apply to the SEA** for subgrants for 90 percent of the state’s ESSER fund.

The bulk of the remaining 10 percent, known as the SEA Reserve, must be used “to address emergency needs **as determined by the SEA** resulting from COVID-19” through subgrants or contracts.<sup>17</sup> DOE therefore interprets the CARES Act to assign responsibility for disbursing this Reserve to the SEA, which is OSPI, and not the state. The intent of these funds, in both legislation and in DOE guidance, is to be used by OSPI, at the discretion of OSPI, through contract and disbursement from OSPI, in order to address COVID-19 related educational issues that OSPI deems most important.

Question Four in this document specifically delineates who is eligible to receive ESSER funds from the 10 percent SEA Reserve:

“A wide range of entities, including LEAs and organizations serving students and families, may be a “subrecipient” of funds from the SEA Reserve. A “subrecipient” includes any entity that receives a subgrant or contract consistent with applicable State and Federal subgrant and procurement standards. Entities interested in learning more about an SEA’s intended use of its reserve should contact the SEA.”<sup>18</sup>

ESSER SEA Reserve funds, therefore, may be used by the state, or by other entities, but only after the SEA has agreed to usage of these funds and accordingly awarded a subgrant or contract to a subrecipient. Here, there is no indication of any agreement or contract between the State and with OSPI regarding use of ESSER funds. To the contrary, OSPI is asking for release of these funds from the State so that they may allocate their reserve funds as they have planned, for COVID-19 emergency needs.

Also of import, as mentioned above, maintenance of effort provision within the CARES Act conditions funding on State support for elementary and secondary education.<sup>19</sup> The DOE states that ESSER funds are not a supplement to ESEA Title I Part A grant award and must be awarded

---

<sup>15</sup> Dept. of Ed. Certification and Agreement for Funding under the Education Stabilization Fund Program Elementary and Secondary School Emergency Relief Fund (ESSER Fund). OMB number: 1810-0473. P. ii.

<sup>16</sup> Dept. of Ed. Office of Elementary and Secondary Education. Elementary and Secondary School Emergency Relief Fund. Frequently Asked Questions about the Elementary and Secondary School Emergency Relief Fund. P 2. See <https://oese.ed.gov/files/2020/05/ESSER-Fund-Frequently-Asked-Questions.pdf>. (Last visited June 25, 2020.) Emphasis added.

<sup>17</sup> *Ibid.* Emphasis added.

<sup>18</sup> *Ibid.*

<sup>19</sup> CARES Act, supra §18008.

and tracked separately.<sup>20</sup> There is quite a bit of flexibility in use of ESSER funds and the DOE guidance indicates that funds may take the place of State or local funds for allowable activities, including funds for costs incurred prior to grant receipt. Additionally, the secretary may waive the requirement for maintenance of effort if states have experienced a precipitous decline in financial resources. However, while states may use ESSER funds to supplant education expenses, as long as there is maintenance of funding, these details must be sanctioned by the SEA and agreed to by way of award or contract with the ESSER subrecipient, and, if necessary, with the Secretary of the Department of Education. States may not choose to withhold and repurpose funds that would otherwise fall under the discretion of the SEA.

The Washington State Director of Financial Management must “perform all the duties prescribed by law with respect to the administration of the state budget and accounting system.” RCW 43.41.100(2). The Office of Financial Management does not have authority to override statutory funding allocations. See RCW 43.41.110. The CARES Act precisely prescribes how states must use ESSER funding according to the discretion and determination of the SEA. Accordingly, OFM must perform its duty to honor OSPI’s authority to determine how all ESSER funding, including the 10% reserve, will be used to meet student needs.

OFM must not withhold federal funding that Congress intended to benefit students. If Washington does not acknowledge OSPI’s federally mandated authority to determine how ESSER funding will be used to address a myriad of student needs, it will be misusing federal DOE funding in violation of the CARES Act. Therefore, in order to avoid the need for any further action on behalf of Washington’s students, we ask that you please provide written confirmation by July 20, 2020, that OFM will release all ESSER funds to OSPI, including the \$21,689,245 SEA Reserve funds.

Sincerely,



Staff Attorney,  
Disability Rights Washington

---

<sup>20</sup> Dept. of Ed. Office of Elementary and Secondary Education. ESSER Fund. FAQ, *supra*, p. 2. See: <https://oese.ed.gov/files/2020/05/ESSER-Fund-Frequently-Asked-Questions.pdf> (Last visited June 25, 2020.)



# Disability Rights

## WASHINGTON

Washington's protection and advocacy system

cc:

Maddy Thompson  
Senior Policy Advisory, Education  
and College Access  
Office of the Governor  
PO Box 40002  
Olympia WA 98504-0002  
[maddy.thompson@gov.wa.gov](mailto:maddy.thompson@gov.wa.gov)

Rep. Sharon Tomiko Santos  
Chair, House Education Committee  
236A John L O'Brien  
PO Box 40600  
Olympia WA 98504-0600  
[sharontomiko.santos@leg.wa.gov](mailto:sharontomiko.santos@leg.wa.gov)

Tara Osuna  
Legislative Aide to Rep. Tomiko  
Santos  
PO Box 40600  
Olympia WA 98504-0600  
[tara.osuna@leg.wa.gov](mailto:tara.osuna@leg.wa.gov)

Sen. Lisa Wellman  
Chair, Senate Early Learning & K-12  
Education Committee  
PO Box 40466  
Olympia WA 98504-0466  
[lisa.wellman@leg.wa.gov](mailto:lisa.wellman@leg.wa.gov)

Superintendent Chris Reykdal,  
OSPI  
PO Box 47200  
Olympia WA 98504-7200  
[chris.reykdal@k12.wa.us](mailto:chris.reykdal@k12.wa.us)

Noah Burgher  
Legislative Aide to Sen. Wellman  
PO Box 40466  
Olympia WA 98504-0466  
[noah.burgher@leg.wa.gov](mailto:noah.burgher@leg.wa.gov)

Sen. Christine Rolfes  
Chair, Ways and Means  
PO Box 40466  
Olympia WA 98501-0466  
[christine.rolfes@leg.wa.gov](mailto:christine.rolfes@leg.wa.gov)

Halyee Anderson and Linda Owens  
Legislative Aides to Sen. Rolfes  
PO Box 40466  
Olympia WA 98501-0466  
[haylee.anderson@leg.wa.gov](mailto:haylee.anderson@leg.wa.gov)  
[linda.owens@leg.wa.gov](mailto:linda.owens@leg.wa.gov)

Rep. Tim Ormsby  
Chair, Appropriations  
PO Box 40600  
Olympia WA 98504-0600  
[tim.ormsby@leg.wa.gov](mailto:tim.ormsby@leg.wa.gov)

Shannon Waechter  
Legislative Aide to Rep. Ormsby  
[shannon.waechter@leg.wa.gov](mailto:shannon.waechter@leg.wa.gov)

Asst. Superintendent Glenna Gallo  
OSPI  
PO Box 47200  
Olympia WA 98504-7200  
[glenna.gallo@k12.wa.us](mailto:glenna.gallo@k12.wa.us)