



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

May 13, 2026

CBCA 8780-FEMA

In the Matter of MERRIMACK COLLEGE

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Before the Arbitration Panel consisting of Board Judges **GOODMAN**, **KULLBERG**, and **KANG**.

KANG, Board Judge, writing for the Panel.

Pursuant to the arbitration provisions of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), 42 U.S.C. §§ 5121–5207 (2024), applicant, Merrimack College (Merrimack), seeks public assistance (PA) funding for providing non-congregate sheltering (NCS) in connection with the COVID-19 pandemic. For the reasons stated below, we conclude that the costs incurred by Merrimack are not eligible for PA funding.

Background

The Stafford Act provides the statutory authority for FEMA’s federal disaster response activities. Congress enacted the Stafford Act to provide “assistance by the Federal Government to State and local governments in carrying out their responsibilities to alleviate the suffering and damage which result from [major] disasters.” 42 U.S.C. § 5121(b). The Stafford Act is “designed to assist the efforts of [eligible entities affected by major disasters] in expediting the rendering of aid, assistance, and emergency services, and the reconstruction and rehabilitation of devastated areas.” *Id.* § 5121(a)(2).

On March 13, 2020, the President declared the COVID-19 pandemic a nationwide emergency and issued emergency and disaster declarations for each state and territory under the Stafford Act. For the Commonwealth of Massachusetts (Massachusetts), where Merrimack is located, FEMA issued a notice on March 27, 2020, which, as subsequently revised, established the disaster incident period as beginning on January 20, 2020, and ending on May 11, 2023. *See* FEMA-4496-DR-MA, <https://www.fema.gov/disaster/4496> (last visited May 12, 2026). The grantee here is the Massachusetts Emergency Management Agency (MEMA).

NCS is living space that offers “some level of privacy (e.g., hotels, motels, casinos, dormitories, retreat camps, etc.)” Public Assistance Program and Policy Guide (PAPPG) (Apr. 2018)¹ at 66; *see also* FEMA Exhibit 2 at 1.² The PAPPG states that FEMA generally “does not provide PA funding for emergency sheltering in non-congregate environments” but may do so in “limited circumstances, such as when congregate shelters are not available or sufficient.” PAPPG at 66.

On March 19, 2020, FEMA issued the NCS Delegation of Authority Fact Sheet (NCS Fact Sheet), which established eligibility criteria for state, local, tribal, and territorial (SLTT) governments seeking PA for providing NCS in connection with the COVID-19 pandemic. FEMA Exhibit 1 at 1. The NCS Fact Sheet stated that SLTT governments “should work with their regional administrators for approval of non-congregate sheltering and procure the necessary support services needed to meet the needs of the public health emergency.” *Id.*

¹ This version of the PAPPG applies to declared disasters after August 23, 2017, but before June 1, 2020. PAPPG at vii.

² For all exhibits, .pdf page numbers are cited. Merrimack did not separately mark the exhibits to its request for arbitration (RFA), and they are therefore cited collectively as “RFA Exhibits.”

Relevant here, the NCS Fact Sheet established the following criteria for approval of PA funding:

The non-congregate sheltering must be at the direction of and documented through an official order signed by a state, local, tribal, or territorial public health official.

Any approval is limited to that which is reasonable and necessary to address the public health needs of the event and should not extend beyond the duration of the Public Health Emergency.

....

Prior to approval, the applicant must provide an analysis of the implementation options that were considered and a justification for the option selected.

Id.

In 2020, Massachusetts issued the “Reopening Massachusetts” guidance for the resumption of activities that had been ordered closed due to the COVID-19 pandemic.³ RFA Exhibits at 9-13. Massachusetts also issued the “Reopening: Higher Education” guidance, which stated that institutes of higher education (IHEs) “may begin to allow students, staff and faculty to return to campus for the limited purposes of permitting students to complete a degree, program, or prerequisite for employment, or other similar requirement for completion.” Applicant’s Reply, Exhibit A at 4.

IHEs that sought to reopen for classes in the fall of 2020 were required to complete a Higher Education COVID-19 Control Plan (control plan), as follows:

The plan will . . . demonstrate a self-certification that [IHEs] have adopted the COVID-19 workplace safety rules and requirements instituted under the Governor’s Reopening Orders. . . . Control plans do not need to be submitted for approval, but it is recommended that they be posted on the institution’s website and must be immediately available for review in the case of an inspection or outbreak.

³ Although the documents provided by Merrimack do not show the exact dates on which Massachusetts issued the guidance and policies, the precise dates are not relevant to the issues here.

Applicant's Reply, Exhibit B at 9.

Relevant here, IHEs were required to self-certify in their control plans that they had completed the following tasks:

Designated residential facilities space for residential students to immediately quarantine if they arrive on campus from another country or state not designated as a lower-risk state by [the Massachusetts Department of Public Health] and do not have documentation of a negative COVID test result on a sample taken no more than 72 hours prior to their arrival.

....

Developed a plan for coordinating with students, staff and faculty who are diagnosed with COVID-19, or have been in close contact with someone who has, to ensure that they have adequate space and support to isolate or quarantine.

....

Designated residential facilities space to immediately isolate students who reside on campus and test positive for COVID-19, and to separately quarantine students who have had close contact with them.

Applicant's Reply, Exhibit B at 12-13.

Merrimack is a private not-for-profit (PNP) college. Prior to reopening its campus for the fall 2020 semester, Merrimack completed a control plan that self-certified the items listed above. RFA at 2-3. Merrimack also prepared a "Fall 2020 Return to Campus Handbook" that detailed "the policies and procedures we have adopted to help protect the health and safety of those on our campus during the ongoing COVID-19 pandemic," including providing NCS. RFA Exhibits at 19-20. Merrimack states that it provided NCS through the lease of housing and hotels "to quarantine and isolate those who were COVID-19 positive, or were in close contact with someone who was." RFA at 3.

Merrimack submitted a request for PA funding to FEMA seeking reimbursement of \$4,770,521.67 for the "purchase of materials and supplies, force account labor, and the procurement of contracted services," which included \$648,461.56 for NCS costs incurred

between July 1, 2020, and November 19, 2021.⁴ RFA Exhibits at 90. FEMA obligated the full requested amount on July 23, 2024, and disbursed the funds to Merrimack on August 29, 2024. RFA at 3. On April 30, 2025, FEMA issued a determination memorandum in which it concluded that Merrimack was not eligible for costs incurred for NCS. RFA Exhibits at 14-18 and 90. Based on this denial, FEMA sought to recoup the \$648,461.56 previously obligated and disbursed for NCS. RFA Exhibits at 87.

Merrimack filed a first-level appeal of the denial of PA for NCS on June 26, 2025. RFA Exhibits at 91. On November 13, 2025, FEMA denied the appeal, determining that Merrimack was not eligible for reimbursement of costs for NCS because MEMA had not transferred legal responsibility for this work to Merrimack. *Id.* at 94. Merrimack filed this RFA with the Board on January 12, 2026. Merrimack seeks a determination that it is eligible for \$648,461.56 in PA funding and that FEMA may not recoup this amount.

Discussion

I. Standard of Review and FEMA Regulations

In arbitration matters, the panel reviews FEMA eligibility determinations de novo.⁵ *Monroe County, Florida*, CBCA 6716-FEMA, 20-1 BCA ¶ 37,688, at 182,980. This review extends to determinations of issues of fact. *Harris County, Texas*, CBCA 6909-FEMA, 21-1 BCA ¶ 37,754, at 183,268 (2020). It is the applicant's burden to support its application for PA funding. *City of Hattiesburg, Mississippi*, CBCA 7228-FEMA, 22-1 BCA ¶ 38,029, at 184,685.

To be eligible for PA funding, an “item of work must: (1) Be required as the result of the emergency or major disaster event; (2) Be located within the designated area of a major disaster or emergency declaration . . . ; and (3) Be the legal responsibility of an eligible applicant.” 44 CFR 206.223(a) (2020); *see* PAPPG at 19. PNPs, such as Merrimack, are generally eligible for reimbursement of costs for emergency protective measures only when they are “associated with preventing damage to an eligible facility and its contents.” PAPPG

⁴ As discussed below, information provided by Merrimack to FEMA indicates that the request for PA also included costs for NCS that Merrimack incurred through January 1, 2022.

⁵ Decisions by panels in FEMA arbitrations are not binding precedent for other panels. Rule 613 (48 CFR 6106.613 (2025)) (Arbitration decisions under the Stafford Act are “primarily for the parties, [are] not precedential, and should concisely resolve the dispute.”). We consider the decisions by other panels cited herein to be persuasive authority.

at 60. In contrast, emergency services, such as fire and rescue activities, animal control, emergency ambulance evacuation, or “other similarly urgent governmental services,” are “usually” the responsibility of SLTT governments. *Id.* The PAPPG identifies emergency sheltering, including NCS, as an emergency service. *Id.* at 66.

Because “PNPs are generally not legally responsible” for emergency services, “FEMA does not provide PA funding to PNPs for the costs associated with providing those services.” PAPPG at 60. An exception to this general rule arises when a SLTT government transfers legal responsibility to a PNP to perform an emergency service. *Id.* The PAPPG states that responsibility is transferred “[w]hen a PNP provides emergency services at the request of, and certified by, the legally responsible government entity,” in which case, “FEMA provides PA funding through that government entity as the eligible Applicant.” *Id.*

II. Merrimack Does Not Demonstrate Eligibility for PA

This primary dispute regarding Merrimack’s eligibility for PA concerns whether MEMA transferred legal responsibility for providing NCS to Merrimack under the criteria in the PAPPG and the NCS Fact Sheet. Merrimack argues that it was legally responsible for providing NCS to its students because it complied with Massachusetts’ reopening plans, which required IHEs to complete a control plan that self-certified that they would provide NCS to isolate or quarantine students during the COVID-19 pandemic as a condition for reopening their campuses for the fall 2020 semester. FEMA argues that Merrimack was not transferred responsibility to provide NCS because MEMA did not certify an agreement for such a transfer and because Merrimack did not request approval from FEMA prior to providing NCS.⁶

A. MEMA Did Not Certify a Request to Provide NCS

First, we determine that the requirement to complete a control plan may have been a request by MEMA for Merrimack to perform work. In this regard, during the period Massachusetts’ reopening plans applied, an IHE that sought to reopen for the fall 2020 semester was required to self-certify that it would provide NCS to quarantine or isolate students. RFA Exhibits at 9-13; Applicant’s Reply, Exhibit B at 12.

⁶ The parties each raise other collateral arguments. Although we do not address every argument, we have reviewed them all and find no basis to conclude that Merrimack is eligible for reimbursement.

Nonetheless, even if the requirement to complete the control plan self-certifications is construed as a request by MEMA to Merrimack to provide NCS, the record does not show that MEMA certified the request, as required by the PAPPG. *See* PAPPG at 60. Although the PAPPG does not define the term “certify” in the context of the transfer of legal responsibility for emergency services, the arbitration panel in *University of Southern California*, CBCA 8121-FEMA, 24-1 BCA ¶ 38,695, determined that certification clearly means something other than a request by the SLTT government. *Id.* at 188,126-27 (quoting PAPPG at 60 (“[A] PNP provides emergency services at the request of, *and certified by*, the legally responsible government entity.” (emphasis added))). The panel in *University of Southern California* noted that FEMA views the PAPPG’s certification provision to require the grantee to “assume liability for the PNP’s performance of work and expenditure of funds.” *Id.* at 188,127. Further, as the PAPPG explains, PA funding for work provided by a PNP at the request of an SLTT is provided to the SLTT. PAPPG at 60.

The record does not show that MEMA certified that it had transferred legal responsibility for providing NCS to Merrimack. Merrimack states that it “applied for reimbursement [of NCS] costs, and after several levels of review, including by [MEMA], FEMA obligated and paid for these costs.” Applicant’s Reply at 2-3. Merrimack appears to ask the panel to infer that MEMA’s apparent overall support for Merrimack’s application for PA shows that MEMA effectively certified a request to provide NCS and, thereby, transferred responsibility for performing this work. As explained, however, applicants have the burden to demonstrate their eligibility for PA.⁷

IHEs were not required to submit their control plan self-certifications nor was MEMA required to issue an approval of an IHE’s control plan. *See* RFA Exhibits at 9-13; Applicant’s Reply, Exhibit B at 12. Merrimack does not state that it submitted its self-certification to MEMA or that MEMA approved its plan to provide NCS. In fact, the record does not show any documents from MEMA addressing Merrimack’s provision of

⁷ Merrimack was provided several opportunities to file information in support of its RFA. The panel issued a conference memorandum advising: “Merrimack’s reply to FEMA’s response is due on March 2, 2026. The reply shall include all additional documents or other information that applicant would like the Panel to consider.” Conference Memorandum and Scheduling Order at 2. Additionally, after Merrimack elected a hearing on the record, the panel advised that any supplementation of the record was due by March 20, 2026, at which time the arbitration record would be closed. Scheduling Order at 1. Merrimack did not file any additional documents following its election of a hearing on the record. We also note that although MEMA entered an appearance in this arbitration, it did not file any substantive statements or documents.

NCS. In sum, the record does not demonstrate that MEMA certified that it transferred legal responsibility for providing NCS to Merrimack.

B. Merrimack Did Not Coordinate With FEMA

In addition to the lack of certification by MEMA, Merrimack's request for PA fails to show that MEMA or Merrimack coordinated with the FEMA regional administrator, as required by the NCS Fact Sheet. The NCS Fact Sheet explained that before "setting up non-congregate sheltering and support services," applicants were required to "provide an analysis of the implementation options that were considered and a justification for the option selected." FEMA Exhibit 1 at 1.

This requirement was consistent with the PAPPG's requirement that an applicant "submit a request for PA funding for costs related to emergency, non-congregate sheltering and obtain FEMA approval prior to sheltering survivors in non-congregate facilities." PAPPG at 66. FEMA explains that approval by the regional administrator was required to ensure that NCS activities for which PA was sought were reasonable and necessary. FEMA Response at 12-13.

Merrimack does not contend that either it or MEMA requested or received prior approval from the FEMA regional administrator.⁸ Although FEMA's NCS Frequently Asked Questions guidance states that "[i]n limited circumstances where the nature of the emergency did not make a request feasible prior to beginning non-congregate sheltering, the Regional Administrator may approve non-congregate sheltering after it has already commenced," FEMA Exhibit 2 at 3, Merrimack does not contend that such circumstances precluded it from seeking approval or that it sought approval after the fact. In sum, Merrimack is also not eligible for PA because the FEMA regional administrator did not approve NCS for Merrimack or MEMA.

C. Merrimack's Request Seeks PA For Ineligible Dates

Finally, we note an additional concern which would have limited Merrimack's recovery of NCS costs even if we had found it eligible for PA. The NCS Frequently Asked Questions guidance explained that "[s]heltering eligibility for sheltering activities may not

⁸ The NCS Fact Sheet appears to assume that the applicant for PA would be an SLTT entity, rather than a PNP. *See* FEMA Exhibit 1 at 1. The intended entity does not matter here, as the record does not show that either Merrimack or MEMA sought approval from the FEMA regional administrator.

extend beyond the state or local public health order or the [United States Department of Health and Human Services] Public Health Emergency for COVID-19.” FEMA Exhibit 2 at 2. The State of Massachusetts lifted the restrictions under its Reopening Massachusetts Plan on May 29, 2021. RFA Exhibits at 9.

FEMA’s determination memorandum stated that Merrimack sought PA funding for providing NCS during the period of July 1, 2020, to November 19, 2021. RFA Exhibits at 15. Additionally, Merrimack’s response to FEMA’s request for information in connection with its initial application stated that some of the request for PA was based on the cost of hotel units from the period August 29, 2021, to January 1, 2022. Exhibits at 85. Thus, even if we had found that Merrimack was eligible for PA in general, the claimed costs for NCS provided after Massachusetts lifted its COVID-19 restrictions on May 29, 2021, would be ineligible.

Decision

Merrimack is not eligible for reimbursement of the costs in dispute.⁹

Jonathan L. Kang
JONATHAN L. KANG
Board Judge

Allan H. Goodman
ALLAN H. GOODMAN
Board Judge

H. Chuck Kullberg
H. CHUCK KULLBERG
Board Judge

⁹ We recognize that FEMA has already disbursed the PA funding to Merrimack, and therefore denial of this appeal upholds FEMA’s demand to recoup the funding. While this may create a hardship for Merrimack, prior decisions by arbitration panels have found that FEMA is authorized, and may well be required, to seek recoupment of improperly disbursed funding. *See, e.g., Montgomery County Secondary Roads*, CBCA 7480-FEMA, 22-1 BCA ¶ 38,230, at 185,659-70.