

AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009

SUMMARY OF APRIL 1, 2009, DETAILED USED GUIDANCE & STATE FISCAL STABILIZATION FUND APPLICATION

On April 1, 2009, the U.S. Department of Education (USED) issued guidance on several of the education provisions of the American Recovery and Reinvestment Act of 2009 (ARRA). The guidance includes:

- A letter from U.S. Secretary of Education Arne Duncan to the Governors, which attaches preliminary information on the metrics that USED expects states to address in their "phase II" applications for State Fiscal Stabilization Fund (SFSF) grants relating to the education reform assurances required by the ARRA. These metrics will be further developed and published for public comment;
- A final "phase I" application for the initial ARRA funding under the SFSF and Q & A guidance on the SFSF;
- Q & A guidance on ARRA funding for Part A of Title I of the Elementary and Secondary Education Act (ESEA);
- Q & A guidance on ARRA funding for Parts B and C of the Individuals with Disabilities Education Act (IDEA);
- Q & A guidance on ARRA funding for the Vocational Rehabilitation Act and the Independent Living Program.

The documents issued by USED provide detailed guidance on USED's view of legal, policy, and technical issues for programs funded under the initial wave of ARRA programs. At the same time, the guidance does not address or fully resolve some fundamental issues that go to the heart of how the law can be implemented in the states to effect significant education reform, including:

- How competitive grant funds of unprecedented size will be administered by the Department to reward and incentivize major reforms. Guidance on these issues will be forthcoming from the Department.
- How to reconcile the tension or disconnect between statutory directives for state level reforms and state accountability with the vesting of broad authority in local educational agencies (LEAs) to determine how ARRA funds are expended; and
- How to reconcile the tension between purposes to spend grant funds to avoid cuts in existing programs and create or save jobs with the purpose to use the funds strategically for education reforms and short term investments that support long-term reforms.

USED has indicated that it will continue to update the guidance to reflect questions raised by stakeholders, and the guidance expressly commits to issuing further policies in proposed form for public comment on issues such as metrics for documenting the assurances in phase II SFSF

applications, as indicated above, and maintenance of effort waivers. In addition, further application notices, guidance, or proposed regulations will be issued at a later date for other programs funded by the ARRA, including the "Race-to-the-Top" State Incentive Grants; the "What-Works" Innovation Fund; Title I, ESEA School Improvement Grants; Teacher Incentive Project grants; and State Longitudinal Data grants.

The purpose of this memorandum is not to summarize fully the guidance and application issued by USED, but rather to highlight a few key points that have been the subject of questions or concerns raised by a number of stakeholders relating to the SFSF, Part A of Title I of the Elementary and Secondary Education Act, and Parts B and C of the Individuals with Disabilities Education Act.

State Fiscal Stabilization Fund

The guidance and application form stress the dual purposes of the ARRA to address the effects of the economic crisis on education and at the same time boost student achievement through reform efforts, based on required state assurances related to progress in developing college and career-ready standards and rigorous assessments; improving teacher effectiveness and the equitable distribution of qualified teachers; building P-16 state data systems to improve student learning; and providing effective supports and interventions to schools that need them most.

As previously indicated by USED, the SFSF will provide awards in two phases. The final application issued on April 1, 2009, is a simplified application for phase I. USED will provide 67% of a state's SFSF funds to the state within two weeks of receiving an approvable phase I application.

Several points from USED's guidance should be highlighted:

- *States Have Discretion in Determining FY 09 Support Levels.* The guidance and application provide significantly expanded discretion to states regarding the determination of funding levels, as compared to a prior draft of the application. Under the ARRA, the SFSF Education Allocation (82% of SFSF spending) must first be used to restore state support for elementary and secondary education for each of FYs 2009, 2010, and 2011 to the higher of state support levels for FY 2008 or 2009. (Parallel provisions apply to state support for public postsecondary schools, although a separate provision that provides for funding state formulae increases for FYs 2010 and 2011 if enacted prior to October 2008 applies only to elementary and secondary education.) The guidance indicates that states have some latitude in defining the primary funding formulae for these purposes. Further, the guidance provides that in determining the higher of state support for elementary and secondary education or postsecondary education in FYs 2008 or 2009 for this purpose, the state has flexibility to define the level of state support for FY 2009 to be the budgeted amounts proposed by the Governor; previously appropriated amounts that were subsequently reduced; *or* actual

levels of state support in FY 2009. Thus states may choose to target funding gaps that have emerged within FY 2009.

- *States Have Discretion in Determining the Timing of Funding.* The guidance makes clear that the consecutive calculation of amounts needed to restore state support for FYs 2009, 2010, and 2011 is used to determine the overall amounts to be distributed under state funding formulae, not to prescribe the timing of awards. In other words, states have discretion as to how to spread the funds across these years, subject to requirements in the law that states sub-grant all of these funds within two years of receipt, and LEAs and postsecondary institutions also have considerable discretion in determining when to use these funds. For example, the fact that a certain amount of SFSF funds is needed to restore the state level of support for elementary and secondary education for FY 2009 does not mean that that amount of SFSF funds must be obligated in FY 2009.
- *States that Reduce Support for Education Face Consequences.* While states are not expressly prohibited from reducing state support for elementary and secondary or postsecondary education to the level for FY 2006 (in contemplation of receiving SFSF grants for education), the guidance indicates USED's intent to consider whether a state has reduced the share of total state revenues spent on education in making competitive grants to states under the "Race-to-the-Top" program. Such a reduction could also preclude a state from receiving a waiver of the SFSF maintenance of effort requirement and may also prejudice a state from receiving approval from the Secretary permitting the state to use SFSF funds as state funds in meeting maintenance of effort requirements under other federal programs.
- *LEAs Must Submit Applications to States for SFSF Funds.* To receive SFSF funds, LEAs must submit an application to the Governor with specific assurances. A Governor may choose to require additional information in the application, including information on how the LEA intends to use its SFSF funds and how it will assist the state in advancing the reforms that are the subject of required state assurances, and to demonstrate that it will comply with ARRA reporting requirements. However, the Governor may not restrict the LEA's use of funds beyond the limitations in the ARRA.
- *Governors May Require Postsecondary Applications.* Governors have discretion as to whether they will require an application from postsecondary institutions and the contents of that application.
- *LEAs May Use Funds for Broad Educational Purposes.* Because SFSF funds in the education allocation awarded to LEAs may be used for any activity authorized in ESEA, including the Impact Aid general assistance program, the funds may be broadly used to support early childhood education through grade 12, including current and capital expenditures, and also including the salaries of teachers and other staff. States and LEAs must also ensure that spending is promoting reform in the areas of assurance.

- *Funds May Be Used for Construction.* Funds under the Education Allocation (81.8%) of the SFSF that are granted to LEAs, as well as funds from the Government Services (18.2%) allocation may be used not only for school modernization, renovation, and repair projects, but also for new construction of school buildings. (The Government Services funds may be used to construct, modernize, renovate, or repair both public and private school buildings.) Funds from the Education Allocation for postsecondary institutions may be used for modernization, renovation, and repair of facilities primarily used for instruction, research, or student housing, but not for new construction.
- *LEAs are Encouraged to Use Funds for Reform Activities.* The guidance includes examples of reform activities that LEAs should consider supporting, including but not limited to extending time for learning; strengthening and expanding early childhood education; developing fair and reliable systems for teacher evaluation; training highly effective teachers to serve as instructional leaders; implementing innovative ways to identify, advance, and compensate highly effective teachers and leaders; and providing training on the use of data to improve instruction. Additional USED guidance on these examples is forthcoming.
- *Government Services Funds May be Used for State Administration (and USED May Expand Title I Caps for State Administration).* A state may use SFSF funds in the governor's Government Services allocation (18% of SFSF spending) for the administrative costs of overseeing the ARRA. (The guidance also indicates that USED plans to issue regulations to raise the Title I caps for state administration to support data collection and reporting, per the ARRA.)
- *Guidance Includes Preliminary Information on Proposed Assurance Metrics for phase II applications.* The Secretary's letter includes sample metrics that have been developed on state assurances related to teacher effectiveness and equity; college and career ready academic standards and rigorous assessments; supports and interventions for underperforming schools; and data systems to govern review of applications for phase II SFSF awards. The letter indicates that further details will be provided in a proposed notice for public comment that will address the phase II application process. States should begin to focus on these metrics, both for purposes of commenting and for preparing the phase II application, which will be peer reviewed.

Title I, Part A, ESEA

The guidance stresses that ARRA appropriations for Part A of Title I, ESEA (Title I-A) provide an unprecedented opportunity to implement innovative strategies to improve education for academically at-risk students and to close achievement gaps for students in Title I schools. These funds permit LEAs to serve more students under Title I-A and to boost the quality of Title I services. The ARRA appropriations for Title I-A are subject to all statutory and regulatory requirements that apply to regularly appropriated Title I-A funds. In addition, to

meet reporting requirements in the ARRA, LEAs need to account separately for these ARRA funds and provide a school-by-school listing of its per pupil expenditures from state and local sources during the 2008-09 school year. USED awarded 50% of Title I-A funds provided under the ARRA on April 1, 2009. The remainder of these funds will be awarded during the period July 1 to October 1, 2009, based on application amendments that the state will be required to make that address how the state will meet the recordkeeping and reporting requirements of the ARRA. Further information on this process will be provided by USED.

Several points from USED's guidance should be highlighted:

- LEAs Treat Awards as FY 2009 Allocations. The phase I and phase II Title I awards, together with the regular FY 2009 Title I awards to be made July 1 and October 1, 2009, will constitute the state's FY 2009 allocation. Absent a waiver, 85% of these funds must be obligated by each LEA by September 30, 2010, and the remaining funds must be obligated by September 30, 2011.
- USED Plans to Raise the Cap on State Administrative Funds. While funds for state administration under Title I are generally capped, USED plans to propose for public comment regulations to adjust the cap on state administrative funds under Title I-A (and other programs, as appropriate) to help states defray the costs of data collection and reporting requirements in the ARRA.
- State May Retain and Use Limited Funds. States are required to reserve 4% of their title I-A allocations for the School Improvement Program under Section 1003(a), ESEA. (95% of those funds must be sub-granted to LEAs, although, with the approval of the LEA, the state may retain these funds to provide school improvement services to the LEA). In addition, Title I-A authorizes states, at their discretion, to reserve 5% of the increase in its annual Title I-A allocation for State Academic Achievement Awards (subject to a requirement that not less than 75% of these funds be reserved for schools in the quartile of schools with the highest percentage of students from low income families). These percentages or percentage increases apply to overall allocations for each fiscal year, and the funds may be taken from the ARRA or regular appropriations.
- LEAs Should Focus on Short-term Investments. The guidance encourages LEAs to focus use of these funds on short-term, evidence-based investments with the potential for long-term benefits, rather than making unsustainable, ongoing commitments. USED intends to publish examples of these investments.
- LEAs May Reserve Funds for Rewards for Teachers. The guidance notes that an LEA may reserve not more than 5% of its Title I-A funds (in addition to uncapped amounts under Title II, ESEA) to provide financial incentives and rewards to teachers who serve in Title I schools identified for improvement, corrective action, or restructuring in order to attract and retain qualified and effective teachers in these schools.

- USED Will Consider ESEA Title I Waivers. The guidance indicates that the Secretary will consider requests for waivers relating to the use of ARRA Title I funds concerning set-asides in Title I; per pupil amounts for supplemental educational services; the limit on how often a state may grant a waiver of the carryover limit; and the maintenance of effort requirement. Although the guidance is silent on this point, the ESEA requires that waiver requests from LEAs be submitted through their SEAs.
- Treatment of SFSF funds as State or Local Funds to Meet Title I-A MOE will Affect Future MOE Calculations. If the Secretary permits a state or LEA to treat SFSF funds as state or local funds to meet Title I-A maintenance of effort requirements, the SFSF funds would then be included in the state's or LEA's expenditures on which maintenance of effort is calculated in subsequent years.

IDEA, Part B

The guidance stresses that ARRA appropriations for Part B of IDEA provide an unprecedented opportunity for states and LEAs to implement innovative strategies to improve outcomes for children and youth with disabilities. The ARRA appropriations for Part B are subject to all statutory and regulatory requirements that apply to regularly appropriated Part B funds. In addition, to meeting reporting requirements in the ARRA, SEAs and LEAs need to account separately for these ARRA funds. USED awarded 50% of Part B funds provided under the ARRA on April 1, 2009. The remainder of these funds will be awarded during the period July 1 to October 1, 2009, based on amendments that address how the state will meet the recordkeeping and reporting requirements of the ARRA. Further information on this process will be provided by USED.

Several points from USED's guidance should be highlighted:

- LEAs Need to Obligate Funds on a Timely Basis. ARRA funds for Part B must be obligated by September 30, 2011. The guidance encourages states to obligate funds to LEAs as soon as possible, consistent with prudent management.
- States' Use of Funds for State-Level Activities. ARRA funds for Part B do not increase funds for state-level activities that a state could otherwise reserve from its regular 2009 appropriation. However, the additional ARRA funds under Part B do result in an increase in the amount a state may reserve for state level activities under the pre-school grants program. Given requirements to report separately on ARRA funds, the guidance advises states, for ease of recordkeeping, to reserve set-aside amounts for state administrative and other activities from the regular IDEA appropriations.
- Possible Use of Funds for Construction. Section 605 of IDEA authorizes the Secretary to allow use of IDEA funds for construction or alteration of facilities if the Secretary determines the program would be improved by allowing funds to be used for this

purpose. States need to obtain prior approval from the Secretary, and LEAs need to obtain prior approval from the state.

- Other. The guidance also includes detailed discussions of maintenance of effort and supplement not supplant provisions in Part B and on Part B requirements for calculating the proportionate share of funds for services to parentally placed private school children.

IDEA, Part C

The guidance stresses that ARRA appropriations for Part C of IDEA (Part C) provide an unprecedented opportunity for states and early intervention service programs to implement innovative strategies to improve outcomes for infants and toddlers with disabilities. USED awarded 50% of the Part C Grants for Infants and Families Program under the ARRA on April 1, 2009. The other 50% will be awarded by September 30, 2009, based on the submission of additional information on how the state will meet the ARRA accountability and transparency requirements. Approximately \$71 million have been reserved by USED for state incentive grants for states that elect to serve under Part C children aged 3 until entrance into elementary school. Those funds will be reallocated proportionately to all states to the extent they are not allocated for state incentive grants. Part C funds must be obligated by September 20, 2011, and the guidance encourages states to obligate the funds expeditiously. These funds are subject to all statutory and regulatory requirements that apply to the Part C program and may be used for any activity authorized under that program, including the direct provision of early intervention services to infants and toddlers with disabilities and their families, and implementation of a statewide comprehensive, interagency system to provide early intervention services.

A small number of points should be highlighted:

- Funds Should Be Used for Short-term Investments. As for the other programs, the guidance encourages states to use funds for short-term investments that have the potential for long-term benefits, rather than for investments the state may be unable to sustain once ARRA funds are expended. The guidance provides examples of such uses.
- Other. The guidance includes detailed information on maintenance of effort requirements in Part C and also includes guidance parallel to that in Part B guidance on use of funds for construction.

If you have questions about the ARRA, please contact Scott Palmer at Scott.Palmer@educationcounsel.com or (202) 545-2916; Reg Leichy at reg.leichy@educationcounsel.com or (202) 545-2918; or Steve Winnick at steve.winnick@educationcounsel.com or (202) 545-2913.

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