

MEMORANDUM

To: School District Clients and Friends

From: Maree Sneed
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Date August 26, 2009

Re: **Recent Developments Regarding Education Programs under the American Recovery and Reinvestment Act**

Over the past few months, the U.S. Department of Education (the “Department”) and other federal agencies have issued guidance documents and updates on several programs applicable to school districts under the American Recovery and Reinvestment Act (“ARRA”). Information on most of the developments can be found on the Department’s ARRA website. *See* <http://www.ed.gov/policy/gen/leg/recovery/index.html>. In this memorandum, we highlight four of the more significant developments:

1. Guidance on ARRA Section 1512 reporting requirements;
2. Guidance for states and school districts seeking waivers under Title I, Part A;
3. A notice of proposed priorities published in the Federal Register for the Race to the Top program; and
4. Guidance for school districts planning to use a portion of their State Fiscal Stabilization Fund (“SFSF”) dollars to satisfy the maintenance of fiscal effort requirement (“MOE”) under the Individuals with Disabilities Education Act (“IDEA”).

1. Guidance on ARRA Section 1512 Reporting Requirements

On June 22, 2009, the Office of Management and Budget (“OMB”) issued guidance on reporting under ARRA Section 1512. *See* OMB, *Implementing Guidance for the Reports on Use of Funds Pursuant to the American Recovery and Reinvestment Act of 2009* (“OMB ARRA Guidance”), available at <http://www.recovery.gov/sites/default/files/Revised+OMB+List+of+programs.pdf>. ARRA Section 1512 reporting requirements apply to most ARRA programs. *See* OMB, *List of Federal Programs Subject to ARRA Section 1512 Reporting*, available at http://www.whitehouse.gov/omb/assets/memoranda_fy2009/m09-21-suppl.pdf. In particular, the reporting requirements apply to many ARRA programs pertinent to school districts. For example, the reporting rules apply to ARRA Title I, Part A distributions, ARRA IDEA distributions, and programs under the SFSF. *Id.* School districts receiving funds under these and other covered programs must comply with the detailed reporting requirements outlined in the OMB ARRA Guidance.

Some of the important points from the OMB ARRA Guidance are:

- Under the OMB ARRA Guidance, “prime recipients” of ARRA funds are “ultimately” responsible for Section 1512 reporting. *See* OMB ARRA Guidance, at 2.3. Whether school districts qualify as “prime recipients” depends on the program involved. For example, states are the “prime recipients” of ARRA Title I, Part A funds because the awards are made first to state governors and then flow to school districts, which are “sub-recipients.” In contrast, school districts that receive awards from the Department under the SFSF’s Innovation Fund will be the “prime recipients,” because the awards will be made directly to school districts. *See* SFSF, Sec. 14007.
- The OMB ARRA Guidance authorizes “prime recipients” to delegate to “sub-recipients” some of the ARRA Section 1512 reporting requirements. Because school districts are “sub-recipients” for several ARRA programs, school districts may want to contact the applicable state agency for more information on sub-recipient reporting requirements.
- Generally, Section 1512 requires recipients to report on how funds are used as opposed to the results or outcomes of the funded activities. Recipients must report: (i) “[t]otal amount of funds received; and of that, the amount spent on projects and activities”; (ii) “[a] list of those projects and activities funded by name,” including description, completion status, and estimates on jobs created or retained; and (iii) “[d]etails on sub-awards and other payments.” OMB ARRA Guidance, at 2.1.
- The OMB ARRA Guidance concerns only ARRA Section 1512 reporting requirements. *Id.* at 1.6. The ARRA itself also contains additional reporting requirements with which school districts may have to comply. For example, school districts receiving ARRA Title I, Part A funds must report by December 1, 2009 “a school-by-school listing of per-pupil educational

expenditures from State and local sources during the 2008-2009 academic year.” ARRA, Title VIII.

2. Guidance for States and School Districts Seeking Waivers Under Title I, Part A

In July 2009, the Department issued guidance on waivers under Title I, Part A. See Department, *Non-regulatory Guidance on Title I, Part A Waivers* (“Title I Waiver Guidance”), available at <http://www.ed.gov/policy/gen/leg/recovery/programs.html>. The guidance provides “detailed information about the provisions for which the Secretary is specifically inviting waiver requests, the entities the Secretary is inviting to request waivers, the contents of the invited waiver requests, the submission and approval process for the requests, notice-and-comment requirements, reporting requirements, and the anticipated duration of the waivers for which requests are invited, as well as examples of acceptable formats for submissions of invited waiver requests.” Title I Waiver Guidance, at p. 8.

Some of the important points from the guidance are:

- Under the Elementary and Secondary Education Act (“ESEA”), both states and school districts can apply for waivers of Title I, Part A requirements. The guidance, however, encourages state educational agencies (“SEA”) to apply for most waivers on behalf of school districts. See *id.* at B-2, B-8, B-16, and C-2. School districts seeking a waiver will have to apply directly to their respective SEA.
- The guidance confirms that the Department cannot waive certain Title I, Part A requirements, such as the supplement, not supplant requirement. *Id.* at A-4.
- Under ESEA Section 9401, the Department has the authority to waive most Title I, Part A requirements. The guidance, however, identifies several waiver provisions for which the Department “encourages” SEAs to apply, including Title I, Part A’s MOE requirement and several provisions related to supplemental educational services (“SES”) and public school choice:
 - the requirement that school districts provide parents of eligible students with notice of their public school choice options at least 14 days before the start of the school year, see 34 C.F.R. § 200.37(b)(4)(iv);
 - the provision that prohibits an SEA from approving as an SES provider a school identified for improvement, corrective action, or restructuring or a school district identified for improvement or corrective action, see 34 C.F.R. § 200.47(b)(1)(iv)(A), (B); and
 - the provision that limits which funds may be counted toward the obligation of a school district with one or more schools in improvement, corrective action, or restructuring to spend an amount at least equal to

20 percent of its Title I, Part A allocation on public school-choice related transportation and SES (“20 percent obligation”), *see* ESEA Sec. 1116(b)(10)(A); 34 C.F.R. § 200.48(a)(2). Specifically, the Department proposes to allow school districts “to offer SES in addition to public school choice to eligible students in Title I schools during the first year of school improvement and to count the funds spent on providing SES to eligible children in those schools toward meeting the [district’s] 20 percent obligation.” Title I Waiver Guidance, at B-16.

- In addition, the Department “encourages” SEAs to apply for certain waivers with respect only to the ARRA portion of a school district’s Title I, Part A allocation:
 - the SES-Choice 20 percent obligation;
 - the responsibility of a school in improvement to spend 10 percent of its Title I, Part A funds on professional development, *see* ESEA Sec. 1116(b)(3)(A)(iii); 34 C.F.R. § 200.41(c)(5);
 - the responsibility of a district in improvement to spend 10 percent of its FY 2009 Title I, Part A allocation on professional development, *see* ESEA Sec. 1116(c)(7)(A)(iii); 34 C.F.R. § 200.52(a)(3)(iii);
 - the responsibility of a district to calculate the per-pupil amount for SES based on its FY 2009 Title I, Part A allocation, *see* ESEA Sec. 1116(e)(6); 34 C.F.R. § 200.48(c); and
 - the prohibition on an SEA’s ability to grant districts waivers of the ESEA’s 15% carryover limitation more than once every three years, *see* ESEA Sec. 1127(b).

3. Notice of Proposed Priorities Regarding the Race to the Top Program

The ARRA provides \$4.35 billion for the Race to the Top Fund. This is “a competitive grant program designed to encourage and reward [s]tates that are creating the conditions for education innovation and reform; achieving significant improvement in student outcomes, including making substantial gains in student achievement, closing achievement gaps, improving high school graduation rates, and ensuring student preparation for success in college and careers; and implementing ambitious plans in four core education reform areas.” The four core reform areas are: (1) adopting internationally-benchmarked standards and assessments that prepare students for success in college and the workplace; (2) recruiting, developing, retaining, and rewarding effective teachers and principals; (3) building data systems that measure student success and inform teachers and principals how they can improve their practices; and (4) turning around low-performing schools. *See* Department, *Race to the Top Fund – Executive Summary*,

at p. 1 (“RTF Executive Summary”), available at <http://www.ed.gov/programs/race/tothetop/executive-summary.pdf>.

There have been several recent developments regarding the Race to the Top program:

- On July 29, 2009, the Department published a Notice of Proposed Priorities in the Federal Register. See 74 Fed. Reg. 37,803 (July 29, 2009), available at <http://www.ed.gov/legislation/FedRegister/proprule/2009-3/072909d.html>. The Notice outlines proposed application requirements that state governors’ offices, which will apply for Race to the Top awards, would have to satisfy to receive an award. The comment period is open until August 28, 2009.
- The Department will award Race to the Top grants in two phases. See RTF Executive Summary, at p. 1. Phase 1 likely will open for applications in late 2009, with awards being made in early 2010. States that do not receive an award in Phase 1 – either because they did not apply or because their applications were not accepted – may apply for Phase 2 awards. Phase 2 likely will open for applications in late spring 2010, with awards being made by September 2010. *Id.*
- Although states will apply for the funds, the Department has encouraged school districts to coordinate with the offices of their respective governors while the application is being developed.

4. Guidance for School Districts Planning to Use a Portion of Their SFSF Funds to Satisfy IDEA MOE

School districts that receive IDEA, Part B funds generally must maintain local effort for the education of children with disabilities at 100% of previous year levels. School districts may calculate MOE under IDEA by looking either at (a) local expenditures or (b) state and local expenditures combined. See Department, *Modifications to Questions in the April 2009 Guidance on the IDEA, Part B*, at H-6 (“IDEA Guidance Modification”), available at <http://www.ed.gov/policy/gen/leg/recovery/guidance/idea-guidance-mod.pdf>.

Under the ARRA, with prior approval from the Secretary, school districts may use SFSF funds to satisfy MOE requirements under federal law, including IDEA. *Id.* at H-7. In July 2009, the Department issued guidance clarifying the circumstances under which SFSF funds can be used to satisfy the MOE requirement of IDEA:

- School districts can treat “as local funds for the purpose of meeting local-level MOE any Education Stabilization funds . . . that are provided to it and that it uses for the education of children with disabilities, except for Education Stabilization funds that the state has identified as funds that it is treating as state funds for meeting the state-level MOE requirement.” *Id.*

- The Department will give school districts “prior approval” to use SFSF funds for MOE if:
 - The state demonstrates to the Department, on the basis of auditable data, that it has maintained state support for education at least at FY 2006 levels in FYs 2009, 2010, and 2011 or that it has received a waiver of this requirement; and
 - The school district “maintains auditable data to demonstrate that it separately accounts for Stabilization funds that the state treats as state funds for meeting state-level MOE, if any, and Stabilization funds that the district treats as local funds for meeting local-level MOE, including that those funds were spent on the education of children with disabilities.” *Id.* at H-9.

- The Department is not requiring school districts to apply for “prior approval” to use SFSF funds for MOE under IDEA. Rather, a school district may take advantage of the MOE flexibility as long the state and the district satisfy the two criteria above. The guidance also notes that states may require additional information “to ensure that the [district] properly maintains auditable data concerning the use of its Stabilization funds,” so the Department advises school districts to coordinate with their states before using SFSF funds to satisfy MOE.

- School districts electing to use Stabilization funds for MOE under IDEA “must maintain documentation that the Stabilization funds . . . in fact were spent on the education of children with disabilities.” *Id.* at H-8.

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If you have questions about the ARRA or its implications, please feel free to contact Maree Sneed (at 202-637-6416, MFSneed@HHlaw.com), John W. Borkowski (at 574-239-7010, JWBorkowksi@HHlaw.com), or Chris Lott (at 202-637-5877, CALott@hhlaw.com).