

‘Loophole’ Allows for Sweeping Flexibility in Stimulus Funds, ED Confirms;

Department to Release Further Details in Guidance by the End of the Month

Washington, March 16 — The U.S. Department of Education is prepared to accept an ambitious interpretation of the economic stimulus law that would allow up to \$48.6 billion to be spent with maximum flexibility, in some cases on activities that were previously thought to be forbidden, such as school construction.

The reading of the law is expected to be explained by the end of the month in guidance the Education Department (ED) will send to governors who plan to apply for education “stabilization” funds under the stimulus. Those dollars are designed to offset projected state and local budget cuts, primarily in education.

At least three organizations have asked ED to weigh in on a previously little-noticed loophole in the language of the law, which states that school districts can use stabilization dollars for “any activity authorized by the Elementary and Secondary Education Act (ESEA),” among other statutes. The loophole resides in Title VIII of ESEA, which authorizes Impact Aid, a Cold War-era program that allows for sweeping spending authority with minimal strings attached.

The absence of strings arises from the fact that the money is intended to offset the negative impact of military bases and Indian reservations on the local tax base. Since school districts are responsible for educating children on these lands but cannot tax the property, Impact Aid simply fills budgetary holes created by the “federal” presence. Hence, the aid gives school districts receiving Impact Aid the same freedom to spend the money as they have with regular state and local funds.

Reached late Monday, ED Spokeswoman Elizabeth Utrup confirmed that stabilization funds could be used for Impact Aid, but deferred additional comment until guidance is released later this month.

A ‘Highly Ambitious Reading’

“Under Impact Aid, the district can use funds for anything within the district — anything,” said Leigh Manasevit, an attorney with the education law firm Brustein & Manasevit. “That means hiring teachers, paying for basic educational services, building a school...If we were to proceed under this analysis, then really everything the [stimulus] law says about stabilization dollars at school districts goes out the window, because you wouldn’t need to use funds according to Title I, IDEA [the Individuals with Disabilities Education Act] or voc-ed. You could spend them as if they were general revenue.”

Manasevit, whose firm is one of the organizations that is seeking clarification on the matter, was quick to note that he would not advise clients to take such a “highly ambitious reading” of the statute before the department makes its intentions clear. “But

until the department clarifies this issue, it's going to be out there," he said. The other organizations that asked ED to chime in on the Impact Aid loophole were the National Alliance for Public Charter Schools and the National Association of Federally Impacted Schools.

Recordkeeping Requirements

Stabilization funds spent under the Impact Aid authority would have a few requirements not associated with normal Impact Aid funds. They would be subject to the application and reporting requirements of the statute, the American Recovery and Reinvestment Act (ARRA) of 2009.

For instance, states applying for stabilization funds must commit to turning around failing schools, improving teacher quality, building better data systems and improving standards and assessments. In the later stages of funding, according to recent guidance, states would have to show how they and their school districts plan to use the money "in a fiscally prudent way that substantially improves teaching and learning."

The law also has detailed reporting and transparency requirements. Any activity paid for with ARRA funds must be tracked separately with its own budget code. Districts must report such activities to the state; the state will send the information on to ED; and ultimately, it will be placed on www.recovery.gov, the Obama administration's stimulus Web site. For any given stabilization project, districts will need to report to states the amount of ARRA funds spent or obligated, the completion status, and the estimated number of jobs created or retained due to the activity. On a more global level, states using stabilization dollars will have to report on the projects funded, the estimated number of jobs created, any tax increases averted, and the state's progress on the "assurances" outlined in the application.

In a nutshell, the ARRA funds could not be simply folded into local budgets and lose their identity entirely. Unlike regular Impact Aid funds, they would retain their identity as federal dollars.

While ARRA's reporting requirements are formidable, they lack the strings associated with typical federal programs like Title I or IDEA. If a district wanted to use stabilization funds as Impact Aid, it would not be prohibited, for example, from "supplanting" state and local dollars, nor would it be required to provide "equitable services" for private school students.

Critically, it would not be limited by the *spending* limitations of those provisions. What is most appealing about Impact Aid is that it has the broadest spending of authority of any provision under ESEA. Impact Aid funds can be spent directly on expenses like bus drivers, parking lots, lunchrooms, and school board salaries — expenses that either are not authorized under other federal laws or are specifically prohibited.

ARRA does contain a few restrictions that might ultimately carry over to those stabilization funds used under the Impact Aid authority — such as a ban on use of funds for athletic fields, swimming pools, purchase of vehicles, improvement of buildings not used for education, and maintenance. But it opens the door for a whole new category of funding that the law doesn't even explicitly mention in the context of education — namely, construction of new school buildings.

Ironic Outcome

It is a somewhat topsy-turvy outcome given the intense debate that led to the bill's passage. Several moderate Republicans agreed to the compromise that allowed ARRA to become law on the condition that a \$20 billion line item for school modernization in the House version of the bill be jettisoned. Modernization remains an allowable use of stabilization dollars, but the lack of a line item and the pressure to fill other state and local shortfalls has dimmed the prospect for a large-scale use of funds to renovate schools. So, the ability to spend a portion of \$48.6 billion to not only renovate schools, but construct new ones — based not on an explicit provision, but a back-door loophole in the legislative language — seems like an unanticipated outcome.

“It's very ironic,” said Brooks Garber, federal policy director of the National Alliance for Public Charter Schools. “It's certainly an unexpected turnaround.”

John Forkenbrock, executive director of the National Association of Federally Impacted Schools, acknowledged the broad authority of the law, indicating that it was not uncommon for districts to use Impact Aid funds to finance revenue bonds to build new schools.

“The use of stabilization funds for Impact Aid puts the federal government into a general aid program,” he said. “Districts wouldn't have to worry about the kind of restrictions you have in Title I or IDEA. It would give the district total flexibility on the use, including construction, although under the stimulus, they would have to report on where the allocation went and what it was used for.”

In fact, the ARRA places some additional reporting requirements on infrastructure spending. States and districts would have to report the purpose, total cost and rationale for the investment and “detailed information” on any subcontracts or subgrants offered as part the activity.

Key Provision

That said, the permissibility of funds for school construction considerably alters the landscape of the stimulus debate. More generally, the allowance of stabilization dollars for Impact Aid means those funds have far greater flexibility than the department has previously acknowledged.

ED has yet to fully explain its interpretation of the key provision at question: Section 14003(a), which states that districts may use their stabilization funds “for any activity authorized by the Elementary and Secondary Education Act of 1965, the Individuals with Disabilities Education Act, the Adult and Family Literacy Act, or the Carl D. Perkins Career and Technical Education Act of 2006, or for modernization, renovation, or repair of public school facilities. . . .”

In “fact sheets” issued March 7, ED states that districts may use funds “to pay salaries to avoid having to lay off teachers and other school employees.” But ED offers no statutory citation to support this reading.

As a result, educators have been feverishly parsing the language of the statute, with the consensus being that stabilization funds must be spent on some identifiable “educational purpose,” such as teacher salaries or books. At conferences and in published analyses, the most commonly cited example of an impermissible expenditure has been paying the salaries of bus drivers, because the assumption is that such an expenditure is not authorized under any provision of the four laws cited in the statute.

This is correct — with the glaring exception of Impact Aid, which seems to have been almost universally overlooked.

Manasevit suggested this is the inevitable outgrowth of a department working at breakneck speed to implement a law whose chief goal, after all, is to provide a quick jolt to the nation’s economy.

“It’s the type of issue that comes about when you have 8 or 9 pages authorizing \$50 billion dollars,” Manasevit said.

Garber, of the charter school organization, said the department needs the broadest possible interpretation to facilitate its goals and allow districts to make sense of the statute.

“To get where they’re going, the feds are going to need flexibility, and the maximum flexibility is afforded by Impact Aid,” Garber said. “Impact Aid is the only way to do all of this legally.”

--By *Andrew Brownstein and Charles J. Edwards*

