

GUIDANCE

Impact Aid Section 8007 School Construction Funds

Made Available Under

The American Recovery and Reinvestment Act of 2009



U.S. Department of Education
Office of Elementary and Secondary Education
Washington, D.C. 20202

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The American Recovery and Reinvestment Act of 2009 (ARRA) (P.L. 111-5)**

Purpose of the Guidance

The American Recovery and Reinvestment Act of 2009 (ARRA) (Public Law 111-5) provides \$100 million in new funding for Impact Aid construction under section 8007 of Title VIII of the Elementary and Secondary Education Act of 1965, as amended (ESEA). The purpose of this guidance is to provide information about the allocation, use, and reporting of these section 8007 ARRA funds. The guidance provides the U.S. Department of Education's interpretation of various statutory provisions and does not impose any requirements beyond those included in the American Recovery and Reinvestment Act of 2009 and other applicable laws and regulations. In addition, it does not create or confer any rights for or on any person.

The Department will provide additional or updated program guidance as necessary. If you are interested in commenting on this guidance, please send your comments to: impact.aid@ed.gov

Eligibility

1. What entities are eligible to receive the funds appropriated for Section 8007 under the American Recovery and Reinvestment Act (ARRA)?

The \$100 million appropriation for section 8007 of the Impact Aid Program under the ARRA legislation is divided into two funds—\$39.6 million for formula grants and \$59.4 million for competitive discretionary construction grants. (The Department will reserve one million dollars from the total appropriation for management and oversight of grants under this program.)

Formula Grants. Under section 805 of the ARRA, for the formula grants, eligible recipients are: (1) applicant local educational agencies (LEAs) under section 8003 of the Elementary and Secondary Education Act of 1965, as amended (ESEA), that enrolled eligible students residing on Indian lands or whose parents were on active duty in the U.S. military equal to at least 50 percent of their total enrollments according to their FY 2009 applications; and (2) LEAs eligible under the “heavily impacted” provisions of section 8003(b)(2) for FY 2008. 20 U.S.C. 7707(a).

Discretionary Grants. Different groups of Impact Aid LEAs than are typically eligible to compete for section 8007(b) funds may be eligible for the ARRA Impact Aid discretionary construction grant competition. Under section 805 of the ARRA, to be eligible for a discretionary construction grant, an LEA must have been eligible to receive a payment under section 8002 or 8003 of the ESEA for FY 2008 and have a total assessed value for real property that is taxable for school purposes of less than \$100 million OR an assessed value of real property per pupil that may be taxed for school purposes that is less than the State average assessed value per pupil.

Distribution of Funds

2. How will the funds be distributed?

Formula Grants. The Department will distribute formula grants as one-time payments through the Department's Grants Administration and Payment System (GAPS). These awards are based on student data contained in FY 2009 applications under section 8003 of the Impact Aid Program that were submitted in January 2008. LEAs are not required to submit an additional application for these funds.

Discretionary Grants. The discretionary grants will be awarded for specific projects following the competitive process that will be announced through a separate notice in the Federal Register in the upcoming months. Funds will be released in phases through GAPS as the selected projects progress.

3. Are there matching requirements for these funds?

No. However, under section 805(b)(5) of the ARRA, for the discretionary grants, the Department will take into consideration any funds that an LEA has available that may be used for the proposed project and adjust an award accordingly.

4. Is there a limit on the amount of funds one district may receive under this program?

Formula Grants. The formula grants will be based on the numbers of eligible students reported in the applications of the qualified LEAs. The Department estimates that LEAs will receive approximately \$300 per eligible student.

Discretionary Grants. The amount of a discretionary grant cannot exceed the cost of the proposed project minus any funds that the LEA has available that may be used for this purpose. 34 CFR 222.191(b)(2).

Grant Schedule

5. When will the funds be distributed?

Formula Grants. The Department will distribute the formula grants to eligible LEAs in April 2009.

Discretionary Grants. The Department anticipates that the notice inviting applications for discretionary construction grants will be published in the *Federal Register* in July 2009 with awards issued by November 30, 2009.

Use of Funds

6. What may these funds be used for?

Funds provided under section 8007 may generally be used for elementary and secondary school construction activities, including the preparation of drawings and specifications for school facilities; erecting, building, acquiring, altering, remodeling, repairing, or extending school facilities; and inspecting and supervising the construction of school facilities. 20 U.S.C. 7707(a)(4); 7713(3).

Formula Grants. Formula grants may also be used for debt service, subject to the September 30, 2011 obligation deadline. (See Question 10.)

Discretionary Grants. Discretionary grants may be used only for the construction projects proposed in an LEA's application and approved in the Department's grant award document.

7. Are there any prohibitions on the use of these funds?

Yes, under section 1604 of the ARRA, these funds may not be used by formula or discretionary grantees for construction activities related to casinos or other gambling establishments, aquariums, zoos, golf courses, or swimming pools.

In addition, discretionary grant funds may not be used for:

- Improvements to facilities for which the LEA does not have full title or other interest, such as a lease-hold interest;
- Improvements to or repairs of school grounds, such as environmental remediation, traffic remediation, and landscaping, that do not directly involve instructional facilities;
- Repair, renovation, alteration, or construction for stadiums or other facilities that are primarily used for athletic contests, exhibitions, and other events for which admission is charged to the general public;
- Improvements to or repairs of teacher housing;
- The partial or complete replacement of an existing school facility unless it is less expensive or more cost effective to do so;
- Acquisition of any interest in real property, except in the limited circumstances when new construction is permissible;
- Maintenance costs associated with any of an LEA's school facilities; or
- Supplanting or replacing other available non-Federal construction money.

20 U.S.C. 7707(b)(5); 34 CFR 222.173.

8. Is a school gymnasium considered an athletic facility and could grant funds be used to renovate the school gym, even though admission is charged for some events?

A school gymnasium would be considered an athletic facility, but section 8007 (i.e. formula and discretionary) ARRA funds might still be used to repair, renovate, modernize or construct the gym facility so long as it is "not primarily used" for athletic contests, exhibitions, or other events for which admission is charged. For example, an LEA may not use grant funds to repair, renovate, modernize or construct a wrestling exhibition hall that is primarily used for profit-making sporting events but might use the funds to renovate a school gymnasium that is mainly used for physical education classes and only occasionally for sporting events for which admission is charged. An LEA must evaluate both the primary use and the admission aspects of an athletic facility in considering whether a project would be eligible for funding under the Impact Aid ARRA construction grant program.

9. May an LEA use formula or discretionary construction grant funds under this program to purchase real property, including land, as part of an emergency or modernization construction project?

Impact Aid LEAs may use grants to purchase a building and the land parcel on which it is located for a school construction project. LEAs may not use Impact Aid ARRA formula or discretionary grant funds for purchasing just land when there are no immediate plans to acquire/renovate/construct a building on that land, because land acquisition alone is not considered a construction activity.

10. If the amount of funds from the formula award is not enough to fund a major project, can an LEA save these funds to use in the future?

No. An LEA must obligate or commit the funds to specific allowable uses during the period of fund availability. These funds remain available for obligation by an LEA through September 30, 2011. See 34 CFR 75.500 in the Education Department General Administrative Regulations (EDGAR) for further guidance on when obligations occur for various goods and services.

In addition, section 1602 of the ARRA specifies that in using these grant funds for infrastructure investment (such as renovation, modernization, or construction of public school facilities), recipients must give preference to activities that can be started and completed expeditiously, with a goal of using at least 50 percent of the funds for activities that can be initiated not later than 120 days after February 17, 2009. Also recipients must use these funds in a manner that maximizes job creation and economic benefit.

11. May an LEA combine ARRA Impact Aid construction funds with other resources available for school construction to complete a project?

Yes. Either formula or discretionary funds from the ARRA Impact Aid programs may be combined with other funds to complete a school construction project. However, when a project uses any ARRA funds, all of the terms and conditions for ARRA funds apply to the entire project.

For example, a portion of the ARRA State Fiscal Stabilization Funds (Stabilization funds) that an LEA receives may be used for construction, modernization, renovation, or repair of public school facilities, to the extent consistent with State law, in combination with section 8007 funds. However, while section 8007 ARRA formula funds could be used to repair a district's central administrative office, Stabilization funds cannot be used for the improvement of stand-alone facilities whose purpose is not the education of children, including central office administration or operations or logistical support facilities. For complete details on the use of Stabilization Funds requirements, *see* <http://www.ed.gov/programs/statestabilization/guidance.doc>, particularly "section V. Construction, Modernization, Renovation, and Repair."

Special ARRA Requirements

12. Are there special rules for the Impact Aid construction funds under the ARRA?

Yes, there are a number of additional rules that apply to the use of the construction funds provided under the ARRA. There are new reporting requirements that will incorporate project descriptions, fiscal accountability, and job creation and preservation data. The Department will require quarterly reports from grantees beginning later this year and is working with other agencies of the Federal Government to develop a system for this purpose. (*See* also question 14 below.)

In addition, under the "buy American" provision in section 1605 of the ARRA, grantees must use iron, steel, and manufactured goods that are produced in the United States for their projects. Section 1511 of the ARRA provides that all recipients of these funds must also post a certification that the school construction project received the full review and vetting required by law and that the LEA accepts responsibility that the project is an appropriate use of taxpayer funds. This certification, along with a description of the project, estimated total cost, and the amount of ARRA funds to be used, must be posted and linked on the Recovery Accountability and Transparency Board website (see question 15). An LEA may not use funds provided under the ARRA for infrastructure investment funding unless this certification is made and posted. The Department will provide additional information on these requirements as it becomes available.

13. May any of these requirements be waived?

Yes, the "buy American" provisions may be waived under certain very specific criteria, as identified in section 1605(b) of the ARRA. These criteria require that the Department determine that—

- The cost of domestic construction material would be unreasonable. The cost of domestic iron, steel, or other manufactured goods used as construction material is unreasonable when the cumulative cost of such material will increase the cost of the overall project by more than 25 percent;
- The construction material is not mined, produced, or manufactured in the United States in sufficient and reasonably available quantities and of a satisfactory quality; or
- The application of the restriction in section 1605 of the ARRA to a particular construction material would be inconsistent with the public interest.

14. What are the reporting requirements for Impact Aid ARRA grants?

An LEA that receives Impact Aid ARRA formula or discretionary funding is required to submit reports to the Department containing the information required under section 1512(c) of the ARRA. The Department is currently developing a common reporting form that will streamline for grantees the quarterly reporting process for ARRA funds awarded by the Department. Additionally, OMB is expected to issue government-wide guidance on the ARRA reporting requirements and procedures.

At a minimum, an LEA should anticipate reporting:

- the total amounts of ARRA funds received and expended or obligated;
- the name, description, and evaluation of the project or activity's completion status; and
- an estimate of the number of jobs that were saved or created with the funds.

Recipients will need to maintain accurate documentation of all ARRA expenditures to ensure that the data reported are accurate, complete, and reliable.

15. What are the shared responsibilities of LEAs and the Department for ensuring that all funds under the ARRA are used for authorized purposes and instances of fraud, waste, and abuse are prevented?

All ARRA funds, including Impact Aid ARRA funds, must be spent with an unprecedented level of transparency and accountability. Accordingly, LEAs must maintain accurate, complete, and reliable documentation of all section 8007 ARRA expenditures. As noted above, the ARRA contains very stringent reporting requirements and requires that detailed information on the uses of funds be available publicly on www.recovery.gov <<<<http://www.recovery.gov>>>>.

If an LEA fails to comply with requirements governing the use of section 8007 ARRA funds, the Department may, consistent with applicable administrative procedures, take one or more enforcement actions, including withholding or suspending, in whole or in part, section 8007 funds or recovering misspent funds following an audit.

The ARRA establishes the Recovery Act Accountability and Transparency Board, which is responsible for coordinating and conducting oversight of spending under the ARRA to

prevent fraud, waste, and abuse. The Department's Office of Inspector General (OIG) will conduct comprehensive audits of ARRA implementation activities. In addition, Department program offices will closely monitor these activities.

All recipients of ARRA funding are reminded that they must promptly refer to the Department's Office of Inspector General any credible evidence that a principal, employee, agent, contractor, sub-grantee, or subcontractor has committed a violation of federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 U.S.C., or a violation of the civil False Claims Act (31 U.S.C. 3729-33). Recipients also are reminded that significant new whistleblower protections were provided for ARRA funding. The Department's OIG may be contacted at 1-800-MIS-USED or oig.hotline@ed.gov.

In the coming weeks, the Department will provide additional information on how to help prevent instances of fraud, waste, and abuse.

16. Are there specific environmental impact requirements associated with these funds?

Yes. Under section 1609 of the ARRA, all recipients must comply with any applicable environmental impact requirements of the National Environmental Policy Act of 1970 (NEPA), as amended, (42 U.S.C. 4371 *et seq.*), 40 CFR parts 1500 through 1508 and any State government requirements that implement NEPA. In addition, adequate resources should be devoted to ensuring that any applicable environmental reviews under NEPA will be completed on an expeditious basis and that the shortest existing applicable process under NEPA is used.

Additional Information For Discretionary Grant Funds

17. Will an LEA be able to apply for discretionary funds for more than one project in a single application?

Each discretionary application must be for a specific school building. One application could include activities that address multiple building systems, such as the roof, windows, electrical systems—including information technology, doors, plumbing, HVAC or other repairs in that school building. An LEA could also choose to submit more than one application for the same building or separate applications for multiple buildings. 34 CFR 222.183(a).

18. Will an LEA be able to apply for funds to build a new school to serve military dependent children moving into the LEA?

Under the provisions of ARRA, an LEA could apply for a grant if an existing building does not meet the current enrollment capacity needs or cannot support comprehensive educational services that meet current standards in the LEA's State. An LEA's application could request funds to expand the existing facility or to replace that facility if

rebuilding would be more cost effective than repairing or renovating the existing school facility.

Other Requirements

19. Do the Davis-Bacon wage requirements apply to these ARRA funds?

Yes. Any laborers and mechanics employed by contractors or subcontractors for emergency or modernization school construction projects assisted in whole or in part with ARRA funds must be paid in accordance with the prevailing wage requirements as determined by the Secretary of Labor in accordance with subchapter IV of chapter 31 of title 40 of the U.S. Code (commonly called Davis-Bacon and related acts). (*See also* 20 U.S.C. 1232b Labor Standards and section 1606 of ARRA.) Contracts must include language that acknowledges that all contractors or subcontractors must pay wages that are not less than those established for the locality of the project (prevailing wage rates). 29 CFR 5.5.

The U.S. Department of Labor (DOL) determines and publishes prevailing wage rates for the various regions of the country. If an LEA needs information about the prevailing wages in its community, the LEA should contact the DOL regional office serving its geographic location. A list of the regional offices with contact information can be found at the following website: <http://www.dol.gov/esa/contacts/whd/america2.htm#content>. An LEA can also find additional Davis-Bacon and other prevailing wage information at the following DOL website: <http://www.dol.gov/esa/whd/programs/dbra/faqs.htm>

The DOL regional offices may also provide guidance as to where the required weekly payroll submissions referenced in the Davis-Bacon regulations (*see* 29 CFR 3.3 and 3.4 for example) should be sent. State Departments of Labor (or equivalent) may also provide further guidance on these types of issues.

20. If an LEA receives formula or discretionary construction grant funds under ARRA and educates children living on Indian lands, are these funds subject to Indian preference requirements?

Yes. If an LEA educates children living on Indian lands, it is considered to have received a grant award primarily for the benefit of Indians and is subject to the Indian Preference provisions throughout the administration of its grant. Section 7(b) of the Indian Self-Determination Act specifies that the recipient of a grant awarded for the benefit of Indians must "to the greatest extent feasible" give preference to Indians. The grantee must also provide Indians opportunities for training and employment in connection with the administration of the grant. Indian organizations and Indian-owned economic enterprises must receive preference in the award of contracts and subcontracts at any level of administration of the construction project. 25 U.S.C. 450e(b).

In particular, during the solicitation for bid process, grantees must express in bidding documents that Indian Preference applies to these grant awards. The Impact Aid Program

has issued additional guidance on the Indian Preference Requirements for Construction Grants. For a copy of this guidance, please send a request to Impact.Aid@ed.gov.

21. Does the receipt of these ARRA section 8007 funds require recipients to comply with Federal civil rights laws?

Yes. The receipt of any Federal funds obligates recipients to comply with Federal civil rights laws that prohibit discrimination based on race, color, national origin, sex, disability, and age. For additional information on civil rights obligations applicable to ARRA funds, see <http://www.ed.gov/policy/gen/leg/recovery/notices/civil-rights.html>. Because Section 8007 funds must be used for construction activities, including altering school facilities, recipients of these funds should be especially aware of civil rights requirements for construction and alteration of facilities that are accessible to persons with physical disabilities. For additional information on the use of ARRA funds for the construction or alteration of facilities, see <http://www.ada.gov/reinvestact.htm>.

Other Information

22. Are there general school facilities resources available for planning a school construction project?

The National Clearinghouse for Educational Facilities (NCEF), <http://www.ncef.org/school-modernization/>, which was created in 1997 by the U.S. Department of Education, provides information on planning, designing, funding, building, improving, and maintaining safe, healthy, and high performance schools. This site is updated daily. NCEF's Federal Stimulus Funding for School Modernization webpage provides useful information on school construction, modernization, renovation, and repair.

Also, the Environmental Protection Agency (EPA) hosts the Healthy School Environments web portal, <http://www.epa.gov/schools/>, which provides one-stop access to the many programs and resources available to help prevent and resolve environmental health issues in schools.

23. Since the ARRA presents new opportunities for energy efficiency improvements, what resources are available on recognized green building rating systems that may be incorporated into either a formula or discretionary Impact Aid ARRA construction project?

Generally, green building standards provide a system for rating a building's environmental sustainability and energy efficiency. Some recognized examples of green building rating systems include: the LEED Green Building Rating System, Energy Star, the CHPS Criteria, and Green Globes. States or other jurisdictions with authority over local school districts may also have adopted equivalent programs that may be used.

The following list provides a brief description of a few examples of green building standards for schools and links to their websites.

- **LEED:** LEED (Leadership in Energy and Environmental Design) Green Building Rating System is a third-party certification program for the design, construction, and operation of green buildings. The U.S. Green Building Council, LEED's creator, has specifically developed a LEED for Schools Rating System that K-12 schools seeking LEED certification must use. Details are available at the LEED website, www.leadbuilding.org, or the LEED website for schools, <http://www.buildgreenschools.org/>.
- **Energy Star:** Energy Star is a joint program of the U.S. Environmental Protection Agency (EPA) and the U.S. Department of Energy (DOE) seeking to save money and protect the environment by giving special recognition to the use of energy efficient products and practices. Among other Energy Star services, EPA and DOE provide strategies for energy management, tools to measure and track energy performance, and assistance in designing energy-efficient schools at: http://www.energystar.gov/index.cfm?c=k12_schools.bus_schoolsk12.
- **CHPS Criteria:** CHPS, the Collaborative for High Performance Schools, oversees a green building rating program specifically designed for K-12 schools. The CHPS Criteria is a system of environmentally responsible benchmarks for school design created by CHPS with input from, among others, school facility experts, school district officials, State officials, contractors, and designers. Details are available at the CHPS website: <http://www.chps.net/index.htm>. The CHPS best practices manual, which contains the CHPS Criteria, is available online at <http://www.chps.net/manual/index.htm#BPM>.
- **Green Globes:** The Green Globes system is a building environmental design and management tool developed by the Green Building Initiative. It provides an online assessment tool, rating system and guidance for green building design, operation and management. Details are available at the Green Globes website: <http://www.greenglobes.com/>.

Additional information on ARRA school modernization can also be found at <http://www.ed.gov/policy/gen/leg/recovery/modernization/index.html>

NOTE: The information provided in this response should not be construed as an endorsement by the U.S. Department of Education of any products or services offered or opinions expressed by the referenced organizations.

24. Are there other financing tools available to States and LEAs to supplement school construction, modernization, renovation, or repair projects financed with section 8007 and other ARRA funds?

Yes. The ARRA also established several new bond programs, including a new school construction tax credit bond program. State and local governments may issue up to \$22 billion in "Qualified School Construction Bonds" (\$11 billion in 2009 and \$11 billion in 2010), for "the construction, rehabilitation, or repair of a public school facility, or for the acquisition of land on which such a facility is to be constructed." (See Division B - Section 1521 of ARRA.) The Department of Treasury recently issued initial guidance for the program available at: www.irs.gov/pub/irs-drop/n-09-35.pdf that allocates the annual bond volume among the states and the 100 largest school districts.

Additionally, the ARRA increased funding for the existing Qualified Zone Academy Bonds (QZAB) program for eligible schools to \$2.8 billion (\$1.4 billion in 2009 and \$1.4 billion in 2010). (See Division B - Section 1522 of ARRA.) QZABs must be used for rehabilitating or repairing certain public school facilities, investing in new equipment and technology, developing challenging course materials, and training teachers. QZABs may not be used for new construction. The Department of Treasury has issued recent guidance for the extended program available at: <http://www.irs.gov/pub/irs-drop/n-09-30.pdf>. Existing ED guidance on QZABs is available at: www.ed.gov/programs/qualifiedzone/faq.html.

The ARRA also contains other provisions regarding tax-exempt debt and tax-credit programs that entities may use for school facilities as well as other types of facilities. Build America Bonds (BABs), for example, are taxable tax-credit bonds that can be used to finance a wide range of public projects, including schools. The BABs program allows municipal bond issuers in 2009 and 2010 to offer an unlimited amount of taxable debt and to elect to either receive a cash subsidy from the Federal Government or have it provide bondholders with a tax credit. Either the payment or the tax credit would be equal to 35% of the interest paid on the bonds. The Treasury Department's recent guidance on this program is at <http://www.irs.gov/pub/irs-drop/n-09-26.pdf>.

In the next month, ED intends to provide further guidance on these valuable school construction financing tools that can help State and local governments save money and make their repair, renovation, modernization, or construction funds go further.