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2009 ISSUE 2

OVERVIEW OF OPPORTUNITIES OF THE AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009

by Jana R. Burk and Micah T. Zomer

The American Recovery and Reinvestment Act of 2009 ("ARRA"), commonly referred to as the "stimulus bill," was signed into law by President Obama on February 17, 2009. As stated on the U.S. Department of Education website, "[t]he overall goals of ARRA are to stimulate the economy in the short term and invest in education and other essential public services to ensure the long-term economic health of our nation." To facilitate these goals, ARRA invests hundreds of billions of dollars in critical sectors of the econ-

omy, including education. This article provides an overview of several education funding programs under ARRA, including the State Fiscal Stabilization Fund and a number of competitive grant competitions.

Please note that Rosenstein, Fist and Ringold provides program and grant development services in partnership with Heartland Consulting for higher-stake grant competitions like those available through ARRA. We will be monitoring state and federal grant opportunities related to

ARRA and traditional grant programs and will update you as more information becomes available.

STATE FISCAL STABILIZATION FUND

The State Fiscal Stabilization Fund ("SFSF") is a new one-time appropriation of \$53.6 billion under ARRA, of which \$48.6 billion will be awarded directly to governors on a formula basis, and the remaining \$5 billion will be awarded on a competitive basis. This section details

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POLICY ALERT: CHANGES IN EMPLOYEE BACKGROUND CHECK REQUIREMENTS

by Jana R. Burk

Since July 1, 2008, school districts have been required to obtain signed assurance from contractors relating to the Mary Rippe Violent Offender Registration Act if the contractors are performing services on school property.

This new background check is a result of amendments to Okla. Stat. tit. 70, § 6-101.48. Many school districts are still unaware of this new background search requirement. This assurance is in addition to the

assurance regarding the Oklahoma Sex Offenders Registration Act and requires an additional background search with the Department of Corrections' databases. Furthermore, the

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OKLAHOMA'S PIONEER IN LEGAL EXCELLENCE



OPPORTUNITIES OF THE ARRA OF 2009 (CONTINUED FROM PAGE 1)

how the SFSF will be allocated.

Formula Allocation

Oklahoma will have access to an estimated \$578.02 million in SFSF formula funding, which will be distributed in

two phases: one in April 2009 and one in late summer/fall 2009.

ARRA delineates the manner in which states may use their SFSF funds. Under ARRA, 81.8% of SFSF funds must be used to help

restore for FY 2009, 2010, and 2011, support for public elementary, secondary, and postsecondary education to the greater of the FY 2008 or FY 2009 level. The funds needed to restore support for elementary and secondary education must run through the state's primary elementary and secondary education funding formulae. If any SFSF funds remain after the state has restored state support for elementary and secondary education, the state must award such surplus funds to Local Education Agencies ("LEAs") on the basis of their relative Title I shares.

States must use the remaining 18.2% of SFSF funds for education, public safety, and other government services. This may include assistance for early learning, elementary

and secondary education, and public institutions of higher education. In addition, states may use these funds for modernization, renovation, or repair of public school and public or private college facilities.

LEAs should use funds consistent with the intent and overall goals of ARRA: to create and save jobs and to advance education reforms so as to produce lasting results for students from early learning to college. Under ARRA, LEAs may use SFSF funds for any activity authorized under the Elementary and Secondary Education Act of 1965 (which includes the modernization, renovation, or repair of public school facilities), the Individuals with Disabilities Education Act, the Adult Education and Family Literacy Act, or the Carl D. Perkins Career and Technical Education Act of 2006. LEAs may also use SFSF funds to pay salaries to avoid having to lay off teachers and other school employees.

However, ARRA prohibits LEAs from using SFSF funds for: (1) the payment of maintenance costs; (2) stadiums or other facilities primarily used for athletic contests or exhibitions or other events for which admission is charged to the general public; (3) the purchase or upgrade of vehicles; or (4) improvement of stand-alone facilities whose purpose is not the education of children, including central

office administration or operations or logistical support facilities.

Competitive Allocation

As stated above, \$5 billion of the SFSF fund will be allocated by the U.S. Department of Education on a competitive basis. These allocations will be awarded primarily through two competitive grant programs: (1) the "Race to the Top" grant, and (2) the "Invest in What Works and Innovation" grant.

"RACE TO THE TOP" GRANT

The U.S. Department of Education will use at least \$4.35 billion (*yes, billion...*) to make competitive awards to states under the "Race to the Top" grant program. These awards will likely be made in two competitions - one in fall 2009, and the other in summer 2010. The number of expected awards and the average award sizes are not known at this time.

The purpose of the "Race to the Top" grants is to help states drive significant improvement in student achievement. The grants will be awarded based upon the state's:

- progress in meeting specified goals;
- achievement and graduation rates;
- plan to improve student academic achievement in

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"Oklahoma will receive an estimated \$578.02 million in SFSF formula funding, which will be distributed in two phases."

OPPORTUNITIES OF THE ARRA OF 2009 (CONTINUED FROM PAGE 2)

the state, including how grant funds will be allocated to high-need LEAs; and

- plan for evaluating its progress in closing achievement gaps.

If a state is awarded money under the “Race to the Top” grant, the state must use at least 50% of the grant to provide LEAs with sub-grants based on their relative shares of Title I funding.

“INVEST IN WHAT WORKS AND INNOVATION” GRANT

Under the “Invest in What Works and Innovation” (“Innovation Grant”), the U.S. Secretary of Education will award a total of \$650 million in competitive

grants to eligible entities that have made significant gains in closing achievement gaps so that these entities can serve as models for best practices. Entities eligible for the Innovation Grant include LEAs, or a partnership between a non-profit organization and one or more LEAs or a consortium of schools. Awards will be based on eligible entities’ success in:

- closing the achievement gaps between groups of students;
- exceeding the respective state’s annual measurable objectives for two or more consecutive years or demonstrating success in significantly increasing student academic achievement for all groups of students;

- making significant improvement in other areas, such as graduation rates or increased recruitment and placement of high-quality teachers and school leaders, as demonstrated with meaningful data; and
- establishing partnerships with the private sector, which may include philanthropic organizations

OTHER COMPETITIVE GRANTS UNDER ARRA

Two other competitive grants competitions of note
(Continued on page 4)



“More detail regarding the U.S. Department of Education’s implementation of ARRA can also be found at: <http://www.ed.gov/policy/gen/leg/recovery/presentation/arra.pdf>.”

EMPLOYEE BACKGROUND CHECK REQUIREMENTS (CONTINUED FROM PAGE 1)

contractors’ assurances must now reference whether their workers are *required* to register with certain registration acts—not just whether the employees are actually registered with the registration acts. We advise that you review your district’s policies regarding contractors to ensure that they comply with current law. If you have any questions or need assistance with your district’s background check policies, please let one of the firm’s school law attorneys know.

We also suggest that you review your district’s background check policies regarding district employees because amendments to Okla. Stat. tit. 57, § 589 in the last legislative session created new background check obligations of which many school districts are unaware. In particular, § 589 requires certain employers—and arguably, all school districts—to conduct annual background searches of their current employees against the Violent Offender and Sexual Offender regis-

tries as long as the employees are working with or serving children. Often, school districts make these background checks only at the time of application or upon actual employment. Because failing to comply with § 589 may result in civil liability or criminal prosecution, we suggest that you review your current policies and call us if you have any concerns or assistance in updating your policies or using the Department of Correction’s registry searches.

OPPORTUNITIES OF THE ARRA OF 2009 (CONTINUED FROM PAGE 3)

from the Department made available through ARRA include the **Teacher Quality Enhancement Partnerships** and **Teacher Incentive Fund**. These grant competitions are currently slated to open this spring and summer respectively.

The Teacher Quality Enhancement Partnership grant program will fund projects designed to improve the quality of new teachers working in high-need districts and schools as well as support principals and early childhood educator program directors in high need or rural districts. The average award size is expected to be \$200,000, and the Department expects to award approximately fifty grants. At this time, no local matching or cost sharing is expected.

The Teacher Incentive Fund will also serve high-needs schools. It will support programs in high-need schools that develop and implement performance-based teacher and principal compensation systems based primarily on increases in student achievement. The average award size is expected to be \$1.3 million, and approximately fifteen awardees are anticipated. At this time, the Department expects there to be some level of re-

quired cost sharing or matching.

FOR ADDITIONAL INFORMATION

More detail regarding the U.S. Department of Education's implementation of ARRA can also be found at: <http://www.ed.gov/policy/gen/leg/recovery/presentation/arra.pdf>.

If you have questions or are interested in enlisting the firm's assistance in pursuing a competitive grant, please call Doug Mann or Jana Burk for more information.



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RFR SPEAKER SHOWCASE

ANDREA KUNKEL will be making a presentation to the Oklahoma Directors of Special Services at its spring meeting at the Airport Holiday Inn in Oklahoma City on April 30.

JOHN MOYER will be speaking on the issue of employee due process at the May 2 New Board Member Workshop at the Clarion Meridian Hotel in Oklahoma City.

JERRY ZIMMERMAN will be presenting a COBRA Subsidy Workshop to school district and technology center administrators at the Moore-Norman Technology Center on May 5.

KAREN LONG will present a workshop on "Issues on the Cutting Edge of School Law" at the Moore-Norman Technology Center on May 8.

DOUG MANN AND KAREN LONG will make presentations at a seminar sponsored by the Oklahoma Bar Association entitled **2009 Oklahoma School Law: Lessons Learned Along the Way**. The seminar will be held on May 14 at the Oklahoma Bar Center, 1901 North Lincoln Blvd. in Oklahoma City. Mr. Mann's topic is "Title IX and School Sports – A Decade of Change: Liability for Schools that Disregard Title IX." Ms. Long's topic is "Cyber-Bullying in Schools – When

High-Tech Treats Equal Liability: Student Rights Versus School Safety."

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Chalkboard is a Rosenstein, Fist & Ringold publication that addresses current education law issues. *Chalkboard* is published four times a year and is sent without charge to all education clients of Rosenstein, Fist & Ringold and all other persons who are interested in education law issues. We invite you to share *Chalkboard* with your friends and colleagues. We think you will find *Chalkboard* to be informative and helpful with the difficult task of operating our educational institutions.

Chalkboard is designed to provide current and accurate information regarding current education law issues. *Chalkboard* is not intended to provide legal or other professional advice to its readers. If legal advice or assistance is required, the services of a competent attorney familiar with education law issues should be sought.

We welcome your comments, criticisms and suggestions. Correspondence should be directed to Rosenstein, Fist & Ringold, 525 South Main, Seventh Floor, Tulsa, Oklahoma 74103-4508, or call us at (918) 585-9211 or 1-800-767-5291. Our FAX number is (918) 583-5617. Help us make *Chalkboard* an asset to you.

BULLETIN: IDENTITY THEFT RED FLAG RULES GO INTO EFFECT ON MAY 1, 2009

By Jana R. Burk

Do school districts need to worry about identity theft? Yes—and for reasons likely unknown to you. Pursuant to the Fair and Accurate Credit Transactions Act of 2003 (“FACT Act”)¹ and the Federal Trade Commission’s Red Flag Rules, certain entities (even governmental and nonprofit entities) providing goods and services for a fee must adopt a written identity theft program to detect, prevent, and mitigate “Red Flags”—which are patterns, practices, or specific activities indicating the possible risk of identity theft.

Is your school district subject to the Red Flag rules just because it provides some goods and services for a fee? Yes, if it offers its clients the ability to pay for services *after* those services are rendered. Such entities are called “creditors” under the Red Flag Rules and are subject to the Rules’ requirements. Let’s take the case of a school district that charges parents or other individuals for lunch services, before/after care services or tuition. If the district offers its clients the ability to defer payment for services (i.e., it allows clients to pay for services after they are provided as opposed to requiring prepayment or contemporaneous payment), the district is a “creditor” subject to the Rules. Likewise, if your district rents facilities or provides services to outside organizations for a fee and invoices those organizations for later payment, it is a “creditor” subject to the Rules. For similar reasons, technical colleges that participate in federal loan programs are also subject to the Rules.

What does a school district do if it is subject to the Red Flag rules? It depends on whether the district has “Covered Accounts.” A district must develop an identity theft program only if it is subject to the Rules and has Covered Accounts. If it is subject to the Rules but doesn’t have Covered Accounts, then it need only conduct periodic risk assessments to determine if it has acquired any Covered Accounts through changes to its business structure, processes, or organization.

What is a Covered Account? A district subject to the Rules has a Covered Account if it (1) has client accounts used mostly for personal, family, or household purposes involving multiple payments or transactions—such as meal services, child-care services, tuition payments, etc., or (2) has client accounts for which there is a reasonably foreseeable risk to customers or to the safety and soundness of the district from identity theft, “including financial, operational, compliance, reputation, or litigation.”

¹15 U.S.C. § 1681 *et seq.*; 16 C.F.R. § 681.2 *et seq.* (available at http://www.access.gpo.gov/nara/cfr/waisidx_09/16cfr681_09.html); text of the agency discussion regarding the Red Flag rules in their entirety is available at 72 Fed. Reg. 63718, Nov. 9, 2007 (<http://ftc.gov/os/fedreg/2007/november/071109redflags.pdf>).

BULLETIN: IDENTITY THEFT RED FLAG RULES GO INTO EFFECT ON MAY 1, 2009 (PAGE 2)

tion risks.” The second category of accounts include the district’s small business accounts, sole proprietorship accounts, and accounts for which the risk of identity theft is reasonably foreseeable because of how they are opened and accessed (i.e., they accounts can be accessed without face-to-face contact, such as through the Internet or by telephone).

What is an Identity Theft Program? If your district is subject to the Rules and a Covered Account, it must formally adopt and implement an Identity Theft Program designed to detect, prevent, and mitigate identity theft in connection with the covered accounts. The Program must be tailored to the organization’s size, complexity, and the nature of operations. The required program has four elements (with specific requirements not included here). The program must:

- Identify relevant red flags for covered accounts and incorporate those red flags into the Program;
- Detect red flags that have been incorporated into the Program;
- Respond appropriately to any red flags that are detected to prevent and mitigate identity theft; and
- Ensure the Program is updated periodically, to reflect changes in risks to customers or to the safety and soundness of the financial institution or Creditor from identity theft.

When will the Red Flag Rules go into effect, and what are the penalties for noncompliance? The compliance date for these regulations is May 1, 2009, and the FTC may impose civil penalties in amounts up to \$2,500 per knowing violation against covered entities with covered accounts who lack an adequate Identity Theft Program. Notably, it is most likely that the FTC will focus its enforcement efforts on actual complaints it receives from customers—i.e., clients of the district or clients of school districts generally.

If you require more information about the Red Flag rules, contact your school district attorney for more information. In addition, you can refer to the FTC’s guidance at <http://www.ftc.gov/os/statutes/fcrajump.shtm> and <http://www.ftc.gov/bcp/edu/pubs/business/idtheft/bus23.pdf>.