

Florida School Finance Officers Association  
St. Augustine, Florida  
June, 2009

“American Reinvestment and Recovery Act of  
2009: Overview & Unanswered Questions”

Leigh Manasevit, Esq.  
Brustein & Manasevit  
3105 South Street NW  
Washington, DC 20007  
(202) 965-3652  
[lmanasevit@bruman.com](mailto:lmanasevit@bruman.com)  
[www.bruman.com](http://www.bruman.com)

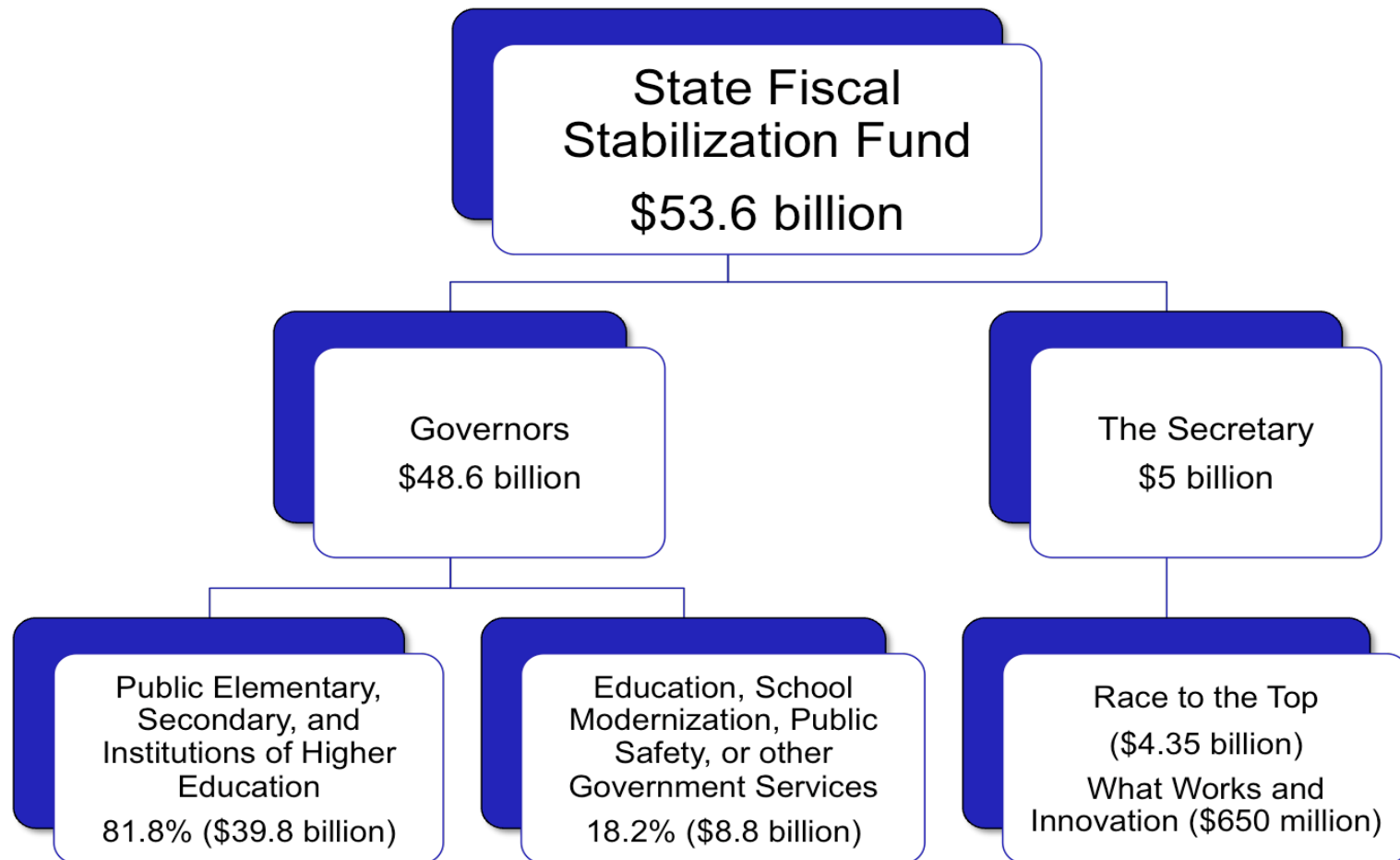
# Resources

- <http://www.recovery.gov/>
- <http://www.ed.gov/recovery>
- “Recovery Act Guidance,”  
[http://www.whitehouse.gov/omb/recovery\\_default/](http://www.whitehouse.gov/omb/recovery_default/)

# ARRA

- **General Funding Structure**
  - **103B Divided Roughly Equally**
- **Stabilization 53B**
- **Formula Programs 50B**

# Stabilization Overview



# ARRA April 1, 2009 Guidance

- American Recovery and Reinvestment Act of 2009 (ARRA) (Pub. L. 111-5), which President Barack Obama signed into law on February 17, 2009.
- The two components of the Stabilization program are the Education Stabilization Fund (CFDA No. 84.394) and the Government Services Fund (CFDA No. 84.397).

Education Stabilization Fund	Government Services Fund
➤ 81.8 percent of the State's total Stabilization Fund allocation	➤ 18.2 percent of the State's total Stabilization Fund allocation

# Education Stabilization (ES) Funds: CFDA No. 84.394

- The Governor makes awards under the Education Stabilization Fund only to local educational agencies (LEAs) and public IHEs.
- The Governor may not retain any portion of the Education Stabilization Fund for State purposes, nor award any portion of this allocation to entities other than LEAs and public IHEs

## ES: Defining State support through primary funding formula(e)

- Only funds that a State awards through its primary elementary and secondary education funding formula(e) may be used in determining the levels of State support for elementary and secondary education.
- The same is not true, however, in determining the levels of State support for elementary and secondary education for maintenance-of-effort purposes.

## ES: Defining State support through primary funding formula(e)

- State funding formulae are used solely as the mechanism to determine the amount of Education Stabilization funds that each LEA will receive.
- Critical: The Education Stabilization funds are always Federal ARRA funds.

## ES: Calculating the amounts (cont.)

- State may not choose to restore support only for elementary and secondary education or only for public IHEs.

## ES: The Governor's timing discretion

- A Governor must return to the Secretary any funds that the State does not award as subgrants or otherwise **commit** within two years of receipt of those funds.
- The Department is awarding funds to States in two phases, and there are separate deadlines by which the Governor must **subgrant or commit** the funds awarded in each phase.
- Funds must be “obligated” by September 30, 2011.

# ES: LEA and Public IHE Application Requirements

- Governor may not use the local application process to restrict an LEA's use of the funds beyond the limitations in the ARRA, yet...
  - May require an LEA to provide in its application additional information.
  - May require an LEA to describe how it intends to use its ES funds. Such a requirement would help the State ensure that the LEA is expending its funds on activities authorized under the ARRA.
  - Question: Who is responsible for (non) compliance? SEA? Only LEA? Governor?

## ES: Uses of Education Stabilization Funds by LEAs

- Any Education Stabilization funds that an LEA receives may be used for activities authorized under the ESEA, the IDEA, the AEFLA, or the Perkins Act, subject to ARRA and other applicable Federal requirements, including the limited prohibitions.
- **Critical:** The Education Stabilization funds are **ALWAYS** Federal ARRA funds: Therefore there is accountability to ED.

## ES: Impact Aid

- ESEA includes the broad Impact Aid authority (*see* Title VIII of the ESEA), an LEA may use Education Stabilization funds for activities that would be allowable under Impact Aid.
  - This flexibility applies to all LEAs that receive Education Stabilization funds, and is not limited to those LEAs that also receive Impact Aid funds.
  - Under the Impact Aid authority, an LEA may use Education Stabilization funds for educational purposes consistent with State and local requirements, subject to ARRA and other applicable Federal requirements, including the limited prohibitions.

## ES: Impact Aid

- Among other things, the Education Stabilization funds may be used for activities such as:
  - paying the salaries of administrators, teachers, and support staff; purchasing textbooks, computers, and other equipment; supporting programs designed to address the educational needs of children at risk of academic failure, limited English proficient students, children with disabilities, and gifted students; and
  - meeting the general expenses of the LEA, investing in pre-K as part of “elementary education,” etc.

## ES: Impact Aid & Construction, M/R/R

- Yes! Section 8007 of the ESEA, but...
- Prohibitions that apply to an LEA's use of Education Stabilization funds, including prohibitions against using funds for:
  - (a) stadiums or other facilities primarily used for athletic contests or exhibitions or other events for which admission is charged to the general public;
  - (b) improvement of stand-alone facilities whose purpose is not the education of children, including central office administration or operations or logistical support facilities;
  - (c) school modernization, renovation, or repair that is inconsistent with State law.

# Impact Aid Alert

- **May 11, 2009 Guidance**
  - ED discourages use of stabilization funds for new construction



## ES: Impact Aid and Construction, M/R/R

- If an LEA uses Education Stabilization funds for modernization, renovation, or repair of public school facilities, it must comply with specific requirements relating to the use of American iron, steel, and manufactured goods used in the project.

## ES: Record keeping is critical

- An LEA must: (a) maintain records that separately track and account for its Education Stabilization funds and (b) report on the specific uses of those funds.

## ES: May Nots...

- Obligation: An LEA's transfer of Education Stabilization funds to its local "rainy day" fund would not constitute an "obligation" of the funds.
- Neither the Governor nor the SEA may mandate how an LEA will or will not use the Education Stabilization funds.
  - Funding that an LEA receives is determined strictly on the basis of formulae and the ARRA gives LEAs considerable flexibility over the use of these funds.

# ES: May Nots...

## **Prohibitions on an LEA's Use of Education Stabilization Funds**

**Cautionary Note:** This list is not meant to be all-inclusive. LEAs must carefully review, for example, all requirements in Titles XIV, XV, and XVI of Division A of the ARRA relating to the Education Stabilization Fund.

An LEA may not use Education Stabilization funds for –

- Payment of maintenance costs;
- Stadiums or other facilities primarily used for athletic contests or exhibitions or other events for which admission is charged to the general public;
- Purchase or upgrade of vehicles;
- Improvement of stand-alone facilities whose purpose is not the education of children, including central office administration or operations or logistical support facilities;
- Financial assistance for students to attend private elementary or secondary schools, unless the funds are used to provide special education and related services to students with disabilities, as authorized by the IDEA;
- School modernization, renovation, or repair that is inconsistent with State law; or
- Restoring or supplementing a “rainy day” fund.

## ES: Equitable Services??

- No requirement in the ARRA that an LEA provide equitable services for private school students with Education Stabilization funds, even if those funds are used for an activity authorized by a program that otherwise requires equitable services.

# Government Services Fund (GSF), CFDA No. 84.397

- Section 14002(b) of the ARRA authorizes a State to use its Government Services funds for “public safety and other government services”, including assistance for elementary and secondary education and public IHEs.
- Scope of allowable activities must be determined on the basis of State law, subject to applicable requirements in the ARRA and other Federal laws, including the limited restrictions in the ARRA on the uses of funds.
- Question – Is this truly as broad as it seems? What is not a government service?

## GSF: administrative funds

- A Governor may use part of the State's Government Services Fund to support administrative costs associated with implementing the ARRA.

# GSF: restrictions

- Few enumerated restrictions
  - Casinos and other gaming establishments, aquariums, zoos, golf courses, or swimming pools (Section 1604 of the ARRA);
  - Financial assistance to students to attend private elem. & secondary schools, (with IDEA exceptions) (ARRA Section 14011);
  - Maintenance of systems, equipment, or facilities;
  - Construction, M/R/R of stadiums or other facilities primarily used for athletic contests or exhibitions or other events for which admission is charged to the general public; or
  - Construction, M/R/R of facilities (a) used for sectarian instruction or religious worship; or (b) in which a substantial portion of the functions of the facilities are subsumed in a religious mission.

## GSF distribution

- Awarding subgrants to LEAs through pro-rata formulas would be an allowable use of the Government Services funds, but a State may use its Government Services allocation to provide assistance for elementary and secondary education in other ways, such as competitive subgrants.
- GSF are available for obligation through September 30, 2011. 34 C.F.R. 76.707 offers guidance on when an obligation occurs for various kinds of activities.

# Formula Programs: Major Increases

<b>Title I Part A</b>	<b>\$10 Billion</b>
<b>Title I 1003g</b>	<b>\$3 Billion</b>
<b>IDEA Part B</b>	<b>\$12 Billion</b>

# Timing

- **All formula funds added to '09 allocations**
  - **Available July 1, 2009 (or before) through September 30, 2010**
    - **Plus Carryover Year to September 30, 2011**

# How to Avoid the Funding Cliff a.k.a. Spend Quickly but Wisely



# Title I Part A Issues

- **Carryover Limitation (15%)**
- **Waivers - ?**

# Title I Part A

- **Set asides**
  - **SES**
  - **Parental**

# Title I 1003g and 1003a - What are the differences?

<b>1003a</b>	<b>4% Set aside</b>
<b>1003g</b>	<b>Standalone \$3 Billion Grant</b>

# Title I 1003g and 1003a

- **1003a**
  - If needs met – may be redistributed
- **1003g**
  - No redistribution
  - Use 1003g **First**

# Title I 1003g and 1003a

- **1003a**
  - School in SI, CA, Restructuring only
- **1003g**
  - 2 additional years after SI, CA Restructuring

# Maintenance of Effort



## MOE: The NCLB Rule

- The combined fiscal effort per student or the aggregate expenditures of the LEA
- From state and local funds
- From preceding year must not be less than 90% of the second preceding year

# MOE: Failure under NCLB

- **SEA must reduce amount of allocation in the exact proportion by which LEA fails to maintain effort below 90%**
- **Reduce all applicable NCLB programs, not just Title I**



## MOE: Waiver

- **USDE Secretary may waive if:**
  - **Exceptional or uncontrollable circumstances such as natural disaster**
  - **OR**
  - **Precipitous decline in financial resources of the LEA**

## IDEA Part B

- MOE = Non Supplant?
- ED suggests yes

# Maintenance of Effort

- **IDEA Part B**
- **Current year level must equal prior year expenditures for special education**
  - **State Educational Agency**
  - **Local Educational Agency**

# Waiver

- **ED to SEA**
- **No Waiver to LEA**

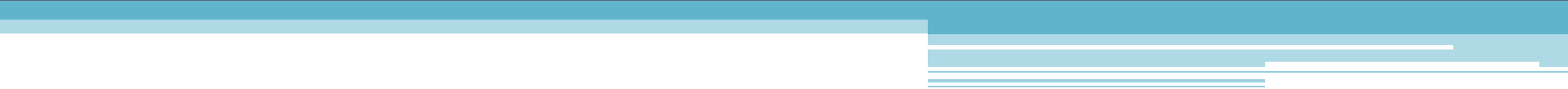
# Waiver

- **Precipitous and unforeseen decline in available resources**
  - Precipitous?
  - Unforeseen?

# IDEA MOE Flexibility

- **50% of increase as local**
- **Must use consistently in ESEA**
- **Not available if significantly disproportionate**

# Maintenance of Effort (MOE) & Supplement not Supplant In the Stimulus Bill



# What is MOE?

- Be mindful, Stabilization fund MOE is separate from MOE in ESEA, IDEA, Perkins, AEFLA
- Each must be considered on its own terms



# Supplement Not Supplant - SNS

- **Senate Bill authorized modifications to SNS**
- **Conference Report dropped the authority**
- **Statute is silent**
- **Guidance – Secretary cannot waive SNS**

## Section 14005, the assurances

- **MOE**: in each fiscal years '09, '10, and '11 maintain state support for elem. & secondary education and higher education at least at the level of support in FY '06
  - See Sec 14012 Fiscal Relief if unable to meet '06 MOE

# Section 14012, fiscal relief

- For the purpose of relieving fiscal burdens on States and LEAs that have
  - experienced a precipitous decline in financial resources,
  - the Sec. of Education may waive or modify any requirement of **this title** (the stabilization title) relating to maintaining fiscal effort.

## Section 14012, fiscal relief

- (b) A waiver modification under this section shall be for any fiscal year 2009, 2010, or 2011.
- (c) Criteria: Secretary shall not grant a waiver or modification unless
  - the state or local educational agency will not provide a smaller % of the total revenues *available* than the amount provided in the preceding fiscal year.
  - It cannot be a smaller percentage!

## Section 14012, fiscal relief

- (d) Maintenance of effort: upon prior approval from the Secretary, a state or LEA that receives funds under this title may treat any portion of such funds *that is used for elementary, secondary, or post secondary education* as nonfederal funds for the purpose of any requirement to maintain fiscal efforts under any other program administered by the Secretary.

## Section 14012, fiscal relief

- **Notwithstanding (d), the level of effort required by a state or local educational agency for the following fiscal year shall not be reduced.**

# Questions???



# Firm Disclaimer

**This presentation is intended solely to provide general information and does not constitute legal advice. Attendance at the presentation or later review of these printed materials does not create an attorney-client relationship with Brustein & Manasevit. You should not take any action based upon any information in this presentation without first consulting legal counsel familiar with your particular circumstances.**