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THE STATE CHARTER SCHOOL FACILITIES INCENTIVE GRANTS PROGRAM

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GUIDANCE

Purpose of the Guidance

The purpose of this guidance is to provide information to States, local educational agencies, and charter schools on the State Charter School Facilities Incentive Grants program. The guidance provides the U.S. Department of Education's interpretation of various statutory and regulatory provisions and does not impose any requirements beyond those included in the Elementary and Secondary Education Act of 1965, as amended, its implementing regulations, and other applicable laws and regulations. In addition, it does not create or confer any rights for or on any person.

This guidance supersedes the 2004 guidance on the State Charter School Facilities Incentive Grants Program.

If you are interested in commenting on this guidance, please send your comments to Ann Margaret Galiatsos at ann.galiatsos@ed.gov.

Purpose of the State Charter School Facilities Incentive Grants Program

The purpose of the State Charter School Facilities Incentive Grants program (the "program") is to provide matching funds to States to establish or enhance and administer per-pupil facilities aid programs in order to help charter schools obtain adequate facilities. These grants thus provide an incentive for States to share in the costs of funding charter school facilities, as they often do in funding the capital costs of regular public schools. The program is authorized under section 5205(b) of the Elementary and Secondary Education Act of 1965 (ESEA) 20 U.S.C. 7221d(b), as amended. The regulations for this program are in 34 CFR part 226.

The following Questions and Answers are designed to clarify different aspects of the program.

A. Eligible Grantees

A.1. Who is eligible to apply for and receive a grant under this program?

States are eligible to apply for and receive grants under this program if they have:

- enacted a State law authorizing per-pupil facilities aid for charter schools by the deadline for submitting applications indicated in the application notice; and
- funded, or contingently funded upon receipt of an award, the non-Federal share of the cost of a program that provides annual per-pupil aid for charter school facilities.

20 U.S.C. 7221d(b)(4)(B).

A.2. What constitutes “annual per-pupil facilities funding”?

For a State to be eligible, the State’s program of annual per-pupil facilities funding must provide funds to charter schools on a formula basis (although, as discussed in subsequent questions, the formula does not have to provide a flat amount per child or reach every charter school). The formula must take into account the number of pupils in a charter school. Applicants must assure in their applications that they intend to provide charter school facility funding on an annual basis. Grantees must provide the non-Federal funds in a given year in order to receive the Federal funds in that same year. The per-pupil facilities aid must be dedicated solely or have a portion of which is dedicated solely for charter school facilities. 20 U.S.C. 7221d(b).

A.3. How is a State selected to receive grants under the program?

Applicants are selected to receive a grant in accordance with 34 CFR 226.11-226.14 and based on any other requirements described in the application notice that is published in the Federal Register.

A.4. Must a State per-pupil facilities aid program serve every charter school in the State in order to be eligible for a grant?

No, a State does not need to serve every charter school in the State to be eligible for a grant. For instance, a State could choose not to fund charter schools that are on probation. As a second example, a State might provide funds only to schools with high proportions of students in poverty. (See discussion under B.1.)

A.5. Must every student have the same weight in the State formula?

No, every student need not be assigned the same weight in the formula. For instance, students with disabilities and students from low-income families might be assigned relatively higher weights than other students. Furthermore, applicants that assign greater weight to students in charter schools with high proportions of students with disabilities or students in poverty could potentially score higher under the selection criteria than applicants that do not.

A.6. May charter schools apply for these funds directly?

No, charter schools may not apply for these funds directly. Only States may apply.

A.7. May programs that provide funds for facilities to both charter schools and regular public schools qualify for Federal matching funds?

Yes, such a program can qualify for Federal matching funds. However, the Federal match would be based on the portion of non-Federal funds provided for charter school facilities.

A.8. If a State is newly creating a per-pupil facilities financing program, how far along in the legislative process must a State be to become eligible for these funds?

To be eligible to receive funds, a program must be authorized or enacted into law by the deadline for transmitting applications indicated in the application notice. In addition, a State applicant needs to demonstrate by July 15, 2009, for example, that its non-Federal match funds will be available for the upcoming State fiscal year in order for an applicant to be eligible to receive the ED grant funds in FY 2009.

B. Match

B.1. What funds can a State use that will qualify as matching funds?

A State has several options for what it may use to qualify as non-Federal matching funds. The types of funds that would qualify as matching funds are regular State appropriations, funds in an account generated by a State bonding agency, surplus funds from a prior year, or foundation funds.

The matching funds must be in addition to the State and local public funds that would otherwise be used to provide per-pupil facilities aid programs, operations, financing programs, or other programs, for charter schools in absence of this Federal program. 20 U.S.C. 7221d(b)(3)(C). The Department generally considers that State and local funds would be available for this purpose at least in the amount that was available in the preceding comparison year and that the Federal funds and matching non-Federal funds under this program would supplement that amount.

B.2. How is the match calculated?

The Federal share and Non-Federal share (State share) of each grant's requisite match must meet the following percentages for each year of the grant:

	Non-Federal share	Federal share (maximum)
Year 1	10%	90%
Year 2	20%	80%
Year 3	40%	60%
Year 4	60%	40%
Year 5	80%	20%

20 U.S.C. 7221d(b)(2)(C).

As noted in more detail in B.1, matching funds must be in addition to the State and local funds that would otherwise be used to provide per-pupil facilities aid programs. In order to calculate its match, the State needs to

determine which State fiscal year will serve as the base comparison year for all match calculations. The State will typically choose its most recent fiscal year for its comparison year, but in some circumstances may be able to use its current fiscal year.

Once the base year has been selected, the required match will be determined based on the increase in the facility funding from the base comparison year to the next appropriate corresponding year.

For example, if a State used its prior State fiscal year as its base comparison year for a FY 2009 ED grant, the State's facility funding for FY 2008 (July 1, 2007 to June 30, 2008) will be used in calculating the match in subsequent years. Once the match has been calculated, we will determine the percentage of the Federal grant award in each fiscal year (Federal share) in comparison to the available Non-Federal share (State share).

*Please note that the dates are only examples and will be dependent on the individual State's fiscal dates.

C. Eligible charter schools

C.1. What is a "charter school" for the purposes of this program?

The definition of a charter school under this program is the same as the definition used by the U.S. Department of Education's Charter Schools Program (CSP). 20 U.S.C. 7221i(1). Under that definition:

(1) A charter school is a public school that--

(A) in accordance with a specific State statute authorizing the granting of charters to schools, is exempt from significant State or local rules that inhibit the flexible operation and management of public schools, but not from any rules relating to the other requirements of this paragraph [the paragraph in the statute that defines the term charter school];

(B) is created by a developer as a public school, or is adapted by a developer from an existing public school, and is operated under public supervision and direction;

(C) operates in pursuit of a specific set of educational objectives determined by the school's developer and agreed to by the authorized public chartering agency;

(D) provides a program of elementary or secondary education, or both;

(E) is nonsectarian in its programs, admissions policies, employment practices, and all other operations, and is not affiliated with a sectarian school

or religious institution;

(F) does not charge tuition;

(G) complies with the Age Discrimination Act of 1975, title VI of the Civil Rights Act of 1964, title IX of the Education Amendments of 1972, section 504 of the Rehabilitation Act of 1973, and part B of the Individuals with Disabilities Education Act;

(H) is a school to which parents choose to send their children, and that admits students on the basis of a lottery, if more students apply for admission than can be accommodated;

(I) agrees to comply with the same Federal and State audit requirements as do other elementary and secondary schools in the State, unless such requirements are specifically waived for the purpose of this program [the CSP] ;

(J) meets all applicable Federal, State, and local health and safety requirements;

(K) operates in accordance with State law; and

(L) has a written performance contract with the authorized public chartering agency in the State that includes a description of how student performance will be measured in charter schools pursuant to State assessments that are required of other schools and pursuant to any other assessments mutually agreeable to the authorized public chartering agency and the charter school.

Charter schools must meet each element of this definition in order to be eligible to receive Federal and non-Federal funding under the State Charter School Facilities Incentive Grants Program. Consequently, a school that meets its State's definition of a charter school, but, for example, does not:

- provide an elementary or secondary education program (as defined under State law) or
- admit students based on a lottery if more students apply for admission than can be accommodated

cannot receive funding from a grantee under the program. For further information, consult the guidance for CSP at

<http://www.ed.gov/policy/elsec/guid/cspguidance03.doc>.

C.2. Does a charter school need to have a charter or be operating to receive assistance from a grantee?

So long as the charter schools served meet the definition specified in C.1., applicants may determine the requirements a charter school must meet, such as the date by which charter schools must have a charter or be open, to receive assistance through their proposed grant projects.

C.3. Is the use of the facility limited to operation of a charter school?

Operating a charter school (or schools) must be the primary use of the facility. However, there may be cases where a charter school rents out either all of the facility for part of the time or a portion of its facility all of the time for other uses. After factoring in these other uses, the primary purpose of the facility must be for operating the charter school(s).

C.4. May a charter school use program funds to lease a religious organization's facility?

A charter school may use these grant funds to lease a religious organization's facility. Charter schools may use the facilities of a religious organization to the same extent that other public schools may use these facilities. Generally, this means that a charter school may lease space from a religious organization so long as the charter school remains non-religious in all its programs and operations. Therefore, the religious landlord may not exercise any control over what is taught in the charter school.

Space constraints can be a major challenge facing charter schools. A charter school should select space based on its logistical and educational needs, not because the space is located in or near a religious school or institution or because officials of the charter school are connected to a particular religious organization. On the other hand, it is important that charter school operators have the flexibility to examine a range of options in their community. The Department strongly recommends that any space used by a charter school be free of religious symbols and under the full control of the charter school during school hours and during all charter school activities.

D. Use of grant funds

D.1. How may a grantee use these funds?

Grantees may use these funds to:

- establish new per-pupil facilities aid programs;
- enhance (increase the funding level of) existing per-pupil facilities aid programs; and
- administer per-pupil facilities aid programs.

20 U.S.C. 7221d(b)(3)(A); 34 CFR 226.1.

D.2. How may charter schools use these grant funds?

Charter schools that receive these Federal grant funds through their State must use the funds for their facilities. Allowable expenditures include:

- paying rent;
- purchasing a school building;
- purchasing land, subject to the restrictions described in D.4;
- constructing a school building;
- renovating an existing school facility;
- making leasehold improvements; and
- paying debt service on a school facility (see next question).

34 CFR 226.21(a).

D.3. May these grant funds be used for debt service? Can they be used to make payments to trustees?

Unless restricted by State or local law, yes, these funds may be used for debt service. Furthermore, they may be paid into the account of a third party or trustee who in turn makes debt service payments for facilities on behalf of charter schools.

D.4. May a charter school use grant funds under this program to purchase land?

Yes, if the land is included in an allowable building purchase or if the charter school has immediate plans to construct a building on the land. Because charter schools are permitted to use these grant funds for acquiring facilities, a charter school may use grant funds to purchase a building and the land on which it is located. However, charter schools may not use these grant funds for purchasing land when they have no immediate plans to construct a building on that land because land alone does not meet a charter school's building infrastructure needs. 34 CFR 226.21(b).

D.5. What costs may be included as administrative costs? Are they limited?

For States, administrative costs include indirect costs, evaluation, technical assistance, dissemination, personnel, and any other costs involved in administering the State's per-pupil facilities aid program. These costs may not exceed five percent of the grant award for each fiscal year for which funds are received. 34 CFR 226.22.

Please note however that 34 CFR 75.564 specifically prohibits grantees from charging indirect costs to construction grants. Therefore, to the extent that a

charter school recipient uses these grant funds for renovation, remodeling, construction, or debt service, they may not charge indirect costs to the cost of that portion of their grant.

In addition, an approved restricted indirect cost rate is required in order to recover appropriate indirect costs.

D.6. How long do grantees and subgrantees have to obligate funds?

Grantees and their subgrantees both must obligate funds before the end of the grant funding period specified in the grant award documents. 34 CFR 80.23. For FY 2009 grantees, the funding period will be up to five years, which means that all funds must be obligated by grantees and subgrantees within five years from when a grant is awarded. Because subgrantees will often take longer to obligate their funds because they have State and local bidding procedures to follow before they can issue contracts for certain facilities construction or improvements, it is essential that State grantees obligate the funds to the charter schools as soon as possible. Our expectation is that States will obligate funds to charter schools within the first six months of their receipt of the Federal grant funds.

D.7. How long do grantees and subgrantees have to expend or liquidate funds?

States and local governments/charter schools must expend or liquidate all obligations not later than 90 days after the end of the funding period but no later than September 30 of the last year of the funding period. We anticipate that the funding period for this program will be up to five years. So, for FY 2009 State grantees, this means that all funds must be liquidated within 90 days after the conclusion of their grant funding period, which will be specified in the grant award documents and likely will be within calendar year 2014. However, for FY 2009 grants, all grant funds must be **obligated and liquidated** before September 30, 2014.

For example, if a State receives an FY 2009 grant and its grant period runs from August 30, 2009, to August 30, 2014, both the State and its charter school recipients must obligate their funds before the end of August 2014. States and charter schools must typically liquidate these funds within 90 days after the end of the grant period; however, in this case, grantees would need to liquidate all FY 2009 grant funds before September 30, 2014, after which time those funds for FY 2009 grants will no longer be available.

D.8. How does the “supplement not supplant” requirement work?

At the State level:

All State applicants, but in particular those that are enhancing existing charter school facilities programs, must ensure that neither they nor their charter school recipients violate this program’s statutory non-supplanting

requirements. A State may use these grant funds only to the extent that the grant funds and the required non-Federal match would supplement the total amount of funding provided to charter schools for any type of cost, including operating and capital costs.

Example of supplanting: If a State has been providing \$100 million per year on behalf of charter schools for their facility expenses and operating expenses and intends to continue that level of funding in future years, it would be supplanting if it reduced the level of its financial contribution to charter schools after it received the Federal grant.

At the local level:

At the local level, charter schools may use these grant funds only to the extent that the grant funds and the required non-Federal match would supplement the total amount of State and local funding provided to charter schools.

Example of supplanting: If a school district has been providing \$1 million per year on behalf of a charter school for its facility expenses and operating expenses and intends to continue that level of funding in future years, it would be supplanting if it reduced the level of its financial contribution to the charter school after it received grant funds from the State.

E. Conflicts of Interest

E.1. What are the rules governing “conflicts of interest” in the administration of grants?

Grantees must avoid apparent and actual conflicts of interest when administering grants from the U.S. Department of Education. Department regulations at 34 CFR 75.525(a) prohibit a person from participating in an administrative decision regarding a project if (a) the decision is likely to benefit that person or his or her immediate family member; and (b) the person is a public official or has a family or business relationship with the grantee. 34 CFR 75.525(b) provides further that a grantee may not permit any person participating in a project to use his or her position for a purpose that is -- or gives the appearance of being -- motivated by a desire for a private or financial gain for that person or for others.

E.2. What procedures must a grantee follow in order to avoid a conflict of interest when making a procurement?

When using Federal funds to enter into a contract, a State or local entity receiving a grant must comply with 34 CFR 80.36. These standards require Federal grant recipients to develop written procurement procedures and to conduct all procurement transactions in a manner that provides, to the maximum extent possible, open and free competition. No employee, officer,

or agent of the grantee may participate in the selection, award, or administration of any contract supported by Federal funds if a real or apparent conflict of interest exists.

F. Federal requirements

Do Davis-Bacon prevailing wage requirements apply to these funds?

When funds under this program are used for construction-related activities costing over \$2,000, such as constructing a school building, renovating an existing school facility, or making leasehold improvements, any laborers and mechanics employed by contractors or subcontractors on the projects assisted with these Federal funds must be paid in accordance with prevailing wage requirements as determined by the Secretary of Labor in accordance with subchapter IV of chapter 31 of title 40 of the United States Code (commonly called "Davis-Bacon and related acts"). (See *also* 20 U.S.C. 1232b Labor Standards). You can also find additional Davis-Bacon and other related acts prevailing wage information at <http://www.gpo.gov/davisbacon/> and the following DOL website: <http://www.dol.gov/esa/whd/programs/dbra/faqs.htm>.