## DEPARTMENT OF EDUCATION

### 34 CFR Part 226

### State Charter School Facilities Incentive Program

**AGENCY:** Office of Innovation and Improvement, Department of Education.

**ACTION:** Final regulations.

**SUMMARY:** The Secretary issues regulations to administer the State Charter School Facilities Incentive program. Under this program, the Department of Education (''Department'') provides competitive grants to States to help charter schools meet their need for facilities.

**DATES:** These regulations are effective January 20, 2006.

**FOR FURTHER INFORMATION CONTACT:** Ann Margaret Galiatsos or Jim Houser, U.S. Department of Education, 400 Maryland Avenue, SW., Washington, DC 20202–6140. Telephone: (202) 205–9765 or via Internet: *charter.facilities@ed.gov*.

If you use a telecommunications device for the deaf (TDD), you may call the Federal Relay Service (FRS) at 1–800–877–8339.

Individuals with disabilities may obtain this document in an alternative format (e.g., Braille, large print, audiotape, or computer diskette) on request to the contact person listed under **FOR FURTHER INFORMATION CONTACT**.

**SUPPLEMENTARY INFORMATION:** These regulations implement title V, part B, subpart 1 of the Elementary and Secondary Education Act of 1965, as amended by the No Child Left Behind Act of 2001 (Pub. L. 107–110, enacted January 8, 2002) (''Act''). Subpart 1, Charter School Programs, of Part B of the Act authorizes the State Charter School Facilities Incentive program. These regulations apply to the State Charter School Facilities Incentive program, which assists charter schools in meeting their facilities needs. Under this program, funds are provided on a competitive basis to States to create new or enhance existing per-pupil facilities aid programs on behalf of charter schools.

On August 26, 2005, the Secretary published a notice of proposed rulemaking (NPRM) for this program in the **Federal Register** (70 FR 50257). The NPRM proposed selection criteria to implement section 5205(b) of the Act, which authorizes the program. The NPRM also proposed regulations to clarify that construction and the purchase of real property are allowable expenditures under this program. In addition, it proposed a description of expenditures that are subject to the five percent cap on administrative costs.

Except for minor editorial revisions, there are no differences between the NPRM and these final regulations.

#### Public Comment

In response to the Secretary's invitation in the NPRM, one person submitted comments on the proposed regulations. An analysis of the comments follows.

*Comment:* The commenter thought charter schools that bus students should receive an incentive under the selection criteria. The commenter recognized that the grant funds cannot be used for buses since they are not facilities. However, the commenter noted that the percentage of minority and at-risk students is lower in some charter schools than it is in their communities. In addition, minority and at-risk students are less likely to be able to afford their own transportation, which may be necessary to attend a charter school. The commenter thought that providing an incentive for busing could rectify this problem.

*Discussion:* The Secretary shares the commenter's concern that charter schools should serve minority and at-risk students. It is our understanding that charter schools in general are more likely to serve these students than regular public schools; however, the Secretary wants to focus the Department's efforts on those charter schools that serve particularly high levels of economically disadvantaged students. These students have a greater level of need for the public school choice that charter schools offer, since economically disadvantaged students tend to lack the resources to attend private schools.

The regulations are designed to reward States that target funds to economically disadvantaged students. The selection criterion under § 226.11(b) awards points to States that target charter schools with the greatest need and the highest proportions of students in poverty. Furthermore, the competitive preference priority under § 226.14(a) would award points to applications that target services to communities with large proportions of low-income students.

While the Secretary supports the concept of making buses available to students in order to increase the accessibility of school choice, the more important issue is whether economically disadvantaged students are adequately represented in charter schools. A State applicant may provide buses for charter schools or give an incentive for charter schools to provide buses using their own funds. If the State applicant demonstrated that doing so increased the representation of economically disadvantaged students in charter schools, its grant application might be more competitive than other applications that do not include that type of demonstration.

*Change:* None.

#### Executive Order 12866

We have reviewed these final regulations in accordance with Executive Order 12866. Under the terms of the order we have assessed the potential costs and benefits of this regulatory action.

The potential costs associated with the final regulations are those resulting from statutory requirements and those we have determined to be necessary for administering this program effectively and efficiently.

In assessing the potential costs and benefits—both quantitative and qualitative—of these final regulations, we have determined that the benefits of the regulations justify the costs.

We have also determined that this regulatory action does not unduly interfere with State, local, and tribal governments in the exercise of their governmental functions.

We summarized the potential costs and benefits of these final regulations in the preamble to the NPRM (70 FR 50258). We include additional discussion of potential costs and benefits in the section of this preamble titled *Public Comment*.

#### Paperwork Reduction Act of 1995

The Paperwork Reduction Act of 1995 does not require you to respond to a collection of information unless it displays a valid OMB control number. We display the valid OMB control number assigned to the collection of information in these final regulations at the end of the affected sections of the regulations.

#### Intergovernmental Review

This program is subject to the requirements of Executive Order 12372 and the regulations in 34 CFR part 79. The objective of the Executive order is to foster an intergovernmental partnership and a strengthened federalism by relying on processes developed by State and local governments for coordination and review of proposed Federal financial assistance.

In accordance with the order, we intend this document to provide early notification of the Department's specific plans and actions for this program.

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(Catalog of Federal Domestic Assistance Number 84.282D State Charter School Facilities Incentive Program)

The Secretary of Education has delegated authority to the Assistant Deputy Secretary for Innovation and Improvement to issue these amendments to 34 CFR Chapter II.

**List of Subjects in 34 CFR Part 226**

Charter Schools, Education, Educational facilities, Elementary and secondary education, Grant programs-education, Report and recordkeeping requirements, Schools.

Dated: December 16, 2005.

**Nina Shokraii Rees,**

*Assistant Deputy Secretary for Innovation and Improvement.*

■ For the reasons discussed in the preamble, the Secretary amends title 34 of the Code of Federal Regulations by adding a new part 226 to read as follows:

## PART 226—STATE CHARTER SCHOOL FACILITIES INCENTIVE PROGRAM

**Subpart A—General**

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**Authority:** 20 U.S.C. 1221e–3; 7221d(b), unless otherwise noted.

### Subpart A—General

#### § 226.1 What is the State Charter School Facilities Incentive program?

(a) The State Charter School Facilities Incentive program provides grants to States to help charter schools pay for facilities.

(b) Grantees must use these grants to—

(1) Establish new per-pupil facilities aid programs for charter schools;

(2) Enhance existing per-pupil facilities aid programs for charter schools; or

(3) Administer programs described under paragraphs (b)(1) and (2) of this section.

(Authority: 20 U.S.C. 7221d(b))

#### § 226.2 Who is eligible to receive a grant?

States are eligible to receive grants under this program.

(Authority: 20 U.S.C. 7221(b))

#### § 226.3 What regulations apply to the State Charter School Facilities Incentive program?

The following regulations apply to the State Charter School Facilities Incentive program:

(a) The Education Department General Administrative Regulations (EDGAR) as follows:

(1) 34 CFR part 74 (Administration of Grants and Agreements with Institutions of Higher Education, Hospitals, and other Non-Profit Organizations).

(2) 34 CFR part 75 (Direct Grant Programs).

(3) 34 CFR part 77 (Definitions that Apply to Department Regulations).

(4) 34 CFR part 79 (Intergovernmental Review of Department of Education Programs and Activities).

(5) 34 CFR part 80 (Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments).

(6) 34 CFR part 81 (General Education Provisions Act—Enforcement).

(7) 34 CFR part 82 (New Restrictions on Lobbying).

(8) 34 CFR part 84 (Governmentwide Requirements for Drug-Free Workplace (Financial Assistance)).

(9) 34 CFR part 85 (Governmentwide Debarment and Suspension (Nonprocurement)).

(10) 34 CFR part 97 (Protection of Human Subjects).

(11) 34 CFR part 98 (Student Rights in Research, Experimental Programs, and Testing).

(12) 34 CFR part 99 (Family Educational Rights and Privacy).

(b) The regulations in this part 226.

(Authority: 20 U.S.C. 1221e–3; 7221d(b))

#### § 226.4 What definitions apply to the State Charter School Facilities Incentive program?

(a) *Definitions in the statute.* The following term used in this part is defined in section 5210 of the Elementary and Secondary Education Act of 1965, as amended (ESEA):

Charter school

(b) *Definitions in EDGAR.* The following terms used in this part are defined in 34 CFR 77.1:

Applicant
Application
Award
Department
EDGAR
Facilities
Grant
Grantee
Project
Public
Secretary

(c) *Other definition.* The following definition also applies to this part:

*Construction* means—

(1) Preparing drawings and specifications for school facilities projects;

(2) Repairing, renovating, or altering school facilities;

(3) Extending school facilities;

(4) Erecting or building school facilities; and

(5) Inspections or supervision related to school facilities.

(Authority: 20 U.S.C. 7221d(b); 7221i(1))

### Subpart B—How Does the Secretary Award a Grant?

#### § 226.11 How does the Secretary evaluate an application?

(a) The Secretary evaluates an application on the basis of the criteria in § 226.12 and the competitive preference priorities in § 226.13 and § 226.14.

(b) The Secretary informs applicants of the maximum possible score for each

criterion and competitive preference priority in the application package or in a notice published in the **Federal Register**.

(Authority: 20 U.S.C. 7221d(b))

**§ 226.12 What selection criteria does the Secretary use in evaluating an application for a State Charter School Facilities Incentive program grant?**

The selection criteria for this program are as follows:

(a) *Need for facility funding.* (1) The need for per-pupil charter school facility funding in the State.

(2) The extent to which the proposal meets the need to fund charter school facilities on a per-pupil basis.

(b) *Quality of plan.* (1) The likelihood that the proposed grant project will result in the State either retaining a new per-pupil facilities aid program or continuing to enhance such a program without the total amount of assistance (State and Federal) declining over a five-year period.

(2) The flexibility charter schools have in their use of facility funds for the various authorized purposes.

(3) The quality of the plan for identifying charter schools and determining their eligibility to receive funds.

(4) The per-pupil facilities aid formula's ability to target resources to charter schools with the greatest need and the highest proportions of students in poverty.

(5) For projects that plan to reserve funds for evaluation, the quality of the applicant's plan to use grant funds for this purpose.

(6) For projects that plan to reserve funds for technical assistance, dissemination, or personnel, the quality of the applicant's plan to use grant funds for these purposes.

(c) *The grant project team.* (1) The qualifications, including relevant training and experience, of the project manager and other members of the grant project team, including employees not paid with grant funds, consultants, and subcontractors.

(2) The adequacy and appropriateness of the applicant's staffing plan for the grant project.

(d) *The budget.* (1) The extent to which the requested grant amount and the project costs are reasonable in relation to the objectives, design, and potential significance of the proposed grant project.

(2) The extent to which the costs are reasonable in relation to the number of students served and to the anticipated results and benefits.

(3) The extent to which the non-Federal share exceeds the minimum percentages (which are based on the percentages under section 5205(b)(2)(C) of the ESEA), particularly in the initial years of the program.

(e) *State experience.* The experience of the State in addressing the facility needs of charter schools through various means, including providing per-pupil aid, access to State loan or bonding pools, and the use of Qualified Zone Academy Bonds.

(Approved by the Office of Management and Budget under control number 1855–0012)

(Authority: 20 U.S.C. 7221d(b))

**§ 226.13 What statutory funding priority does the Secretary use in making a grant award?**

The Secretary shall award additional points under a competitive preference priority regarding:

(a) *Periodic Review and Evaluation.* The State provides for periodic review and evaluation by the authorized public chartering agency of each charter school at least once every five years unless required more frequently by State law, to determine whether the charter school is meeting the terms of the school's charter and is meeting or exceeding the student academic performance requirements and goals for charter schools as set forth under State law or the school's charter.

(b) *Number of High-Quality Charter Schools.* The State has demonstrated progress in increasing the number of high-quality charter schools that are held accountable in the terms of the schools' charters for meeting clear and measurable objectives for the educational progress of the students attending the schools, in the period prior to the period for which the State applies for a grant under this competition.

(c) *One Authorized Public Chartering Agency Other than an LEA, or an Appeals Process.* The State—

(1) Provides for one authorized public chartering agency that is not a local educational agency (LEA), such as a State chartering board, for each individual or entity seeking to operate a charter school pursuant to State law; or

(2) In the case of a State in which LEAs are the only authorized public chartering agencies, allows for an appeals process for the denial of an application for a charter school.

(d) *High Degree of Autonomy.* The State ensures that each charter school has a high degree of autonomy over the charter school's budgets and expenditures.

(Approved by the Office of Management and Budget under control number 1855–0012)

(Authority: 20 U.S.C. 7221b; 7221d(b))

**§ 226.14 What other funding priorities may the Secretary use in making a grant award?**

(a) The Secretary may award points to an application under a competitive preference priority regarding the capacity of charter schools to offer public school choice in those communities with the greatest need for this choice based on—

(1) The extent to which the applicant would target services to geographic areas in which a large proportion or number of public schools have been identified for improvement, corrective action, or restructuring under title I of the ESEA;

(2) The extent to which the applicant would target services to geographic areas in which a large proportion of students perform poorly on State academic assessments; and

(3) The extent to which the applicant would target services to communities with large proportions of low-income students.

(b) The Secretary may award points to an application under a competitive preference priority for applicants that have not previously received a grant under the program.

(c) The Secretary may elect to consider the points awarded under these priorities only for proposals that exhibit sufficient quality to warrant funding under the selection criteria in § 226.12 of this part.

(Approved by the Office of Management and Budget under control number 1855–0012)

(Authority: 20 U.S.C. 7221d(b))

## Subpart C—What Conditions Must Be Met by a Grantee?

**§ 226.21 How may charter schools use these funds?**

(a) Charter schools that receive grant funds through their State must use the funds for facilities. Except as provided in paragraph (b) of this section, allowable expenditures include:

(1) Rent.

(2) Purchase of building or land.

(3) Construction.

(4) Renovation of an existing school facility.

(5) Leasehold improvements.

(6) Debt service on a school facility.

(b) Charter schools may not use these grant funds for purchasing land when they have no immediate plans to construct a building on that land.

(Authority: 20 U.S.C. 7221d(b))

**§ 226.22 May grantees use grant funds for administrative costs?**

State grantees may use up to five percent of their grant award for administrative expenses that include: indirect costs, evaluation, technical

assistance, dissemination, personnel costs, and any other costs involved in administering the State's per-pupil facilities aid program.

(Authority: 20 U.S.C. 7221d(b))

**§ 226.23 May charter schools use grant funds for administrative costs?**

(a) Except as provided in paragraph (b) of this section, charter school subgrantees may use grant funds for administrative costs that are necessary and reasonable for the proper and efficient performance and administration of this Federal grant. This use of funds, as well as indirect costs and rates, must comply with EDGAR and the Office of Management and Budget Circular A–87 (Cost Principles for State, Local, and Indian Tribal Governments).

(b) Consistent with the requirements in 34 CFR 75.564(c)(2), any charter school subgrantees that use grant funds for construction activities may not be reimbursed for indirect costs for those activities.

(Authority: 20 U.S.C. 1221e–3; 7221d(b))

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