



COMMONWEALTH OF KENTUCKY
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The Honorable Robert Stivers, President
Kentucky State Senate
The Honorable David Osborne, Speaker
Kentucky House of Representatives

Dear President Stivers and Speaker Osborne:

I received your letter dated November 15, 2021 asking for a full accounting of what has occurred regarding the ARPA Coronavirus Capital Projects Fund appropriation for the construction and renovation of urgent need schools that was included in the 2021 Regular Session HB 556.

The American Rescue Plan Act was signed on March 11, 2021. It included two new grant programs for State governments with a variety of eligible uses, the Coronavirus State Fiscal Recovery Fund and the Coronavirus Capital Projects Fund. Given the limited amount of days remaining in the 2021 Regular Session of the General Assembly, both my Administration and the General Assembly quickly attended to the legislative text of the Act to determine what funding decisions needed to be made before the Session ended.

Regarding the Coronavirus Capital Projects Fund, the guidance that was ultimately issued by the U.S. Department of Treasury on September 10, 2021, differed significantly from the Commonwealth's reading of the legislative text. This resulted in the likely ineligibility of the capital project appropriations made by the General Assembly: \$127 million for the School Facilities Replacement and Renovation Fund to support school facility construction costs and \$58 million for two capital projects involving the Capitol and Capitol Annex buildings.

The legislative text in the American Rescue Plan Act that described the eligible uses of the Coronavirus Capital Projects Fund reads: "...for making payments to States, territories, and Tribal governments to carry out critical capital projects directly enabling work, education, and health monitoring, including remote options, in response to the public health emergency with respect to the Coronavirus Disease (COVID-19)." The legislative text was shared with the General Assembly and legislative staff. It was discussed in meetings with legislative leadership and with legislative staff. The text was presented by State Budget Director John Hicks to a joint meeting of the two Appropriation and Revenue Committees. There was no expectation on the part of the Administration or the legislators making the appropriation decisions that the two uses would not align with the eligible uses stated in the federal statute.

The public was given a foreshadowing of the eventual guidance in May, 2021 through an unusual “Statement on Purpose and Process” issued by Treasury. This was not official guidance or an interim final rule like that provided for the State Fiscal Recovery Fund. This statement indicated that the Fund was targeted to increasing internet connectivity rather than capital projects that enabled work, education and health monitoring. It added the word “jointly” in explaining the legislative text of “enabling work, education and health monitoring.” At that point I personally reached out to both the White House and the U.S. Department of Treasury and had phone call conversations with both Secretary of the Treasury Janet Yellen and White House’s lead on implementing the American Rescue Plan Act, Gene Sperling. Subsequently, John Hicks had both email communication and a Teams meeting with lead U.S. Treasury officials. I made strong statements to Secretary Yellen and Mr. Sperling that Treasury’s “statement” was at odds with the Commonwealth’s understanding of the legislative text. The calls both notified the federal officials of the General Assembly’s appropriation actions and the rationale behind those decisions. I strongly encouraged them to develop the eventual guidance so that the Fund will permit capital projects that enabled education as the legislative text indicated.

Upon passage of House Bill 556, which made the appropriations from the Coronavirus Capital Projects Fund, I named several members of his Cabinet to lead the Administration’s efforts in implementing the school construction projects, the water, wastewater and broadband infrastructure appropriations from the federal American Rescue Plan Act. I did this to show the high priority my Administration placed on these critical investments. Justice and Public Safety Cabinet Secretary Kerry Harvey was asked to lead the school construction projects effort and work with the School Facilities Construction Commission and the Department of Education to distribute these funds.

After enactment of House Bill 556, my Administration worked with the Kentucky Department of Education and the Kentucky School Facilities Construction Commission (SFCC) to implement the \$127 million appropriation to the School Facilities Replacement and Renovation Fund. House Bill 556 provided that additional offers of assistance would be made “to local school districts for schools that are ranked as the highest on the Kentucky Facilities Inventory and Classification System report as of February 27, 2020, that are A1 schools, that are ranked as Priority 1 or 2 on the local school district’s facilities plan, and that have levied a ten-cent equivalent tax dedicated to capital improvements but remain unable to cash fund or to sufficiently support the required annual debt service for replacement or renovation of the school.” The terms of the appropriation mandated the priority by which school districts were to receive additional offers of assistance, leaving the SFCC with largely ministerial tasks to fulfill in implementing the appropriation.

The SFCC met on June 2, 2021 and voted to issue additional offers of support to thirteen school districts, implementing the appropriation made in House Bill 556. Recognizing that the final federal guidance had not yet been published, the offers of support were expressly conditioned on availability of the federal funds underlying the appropriations. The school districts were notified that there was no projection of when the federal funds might be received. Twelve of the school districts accepted the tentative offers of assistance.

Representatives of my Administration and the staff of the SFCC held a ZOOM conference with leadership of the subject school districts on July 26, 2021. The school districts received an update on the status of the federal funding supporting the House Bill 556 appropriation. They were advised that the final federal guidance had not yet been published. Absent the guidance, it was uncertain as to when, or if, the federal funding would be available. The school districts were advised that, given the uncertainty it might be unwise to make any preliminary expenditures related to the affected projects.

On September 10, 2021, the U.S. Department of Treasury issued its guidance on the Coronavirus Capital Projects Fund. In part due to my entreaties to the federal government officials, the guidance did permit the use of the Fund for “Multi-purpose Community Facility Projects” in addition to broadband infrastructure and digital connectivity projects.

Our review of the guidance concludes that it is unlikely that the school projects in question would qualify for Coronavirus Capital Projects funding. The 20-plus page guidance document excludes the school construction and renovation projects contemplated pursuant to 2021 Regular Session HB 556 for at least three reasons.

First, the guidance states that the “Capital Project invests in capital assets designed to directly enable work, education, and health monitoring” (emphasis in original). In other words, to be eligible, a project must enable all three activities. The proposed school district projects were designed before the pandemic and in all likelihood only satisfy the education prong of this criteria. Further, the guidance makes clear that these projects must be made available to the communities in which they are situated and strongly implies that the projects should not benefit only a subset of the surrounding population, such as students at a particular school.

Second, the guidance states that the Capital Project must be “designed to address a critical need that resulted from or was made apparent or exacerbated by the COVID-19 public health emergency.” The text of 2021 Regular Session HB 556, however, directs the School Facilities Construction Commission to allocate these funds to local school districts for schools ranked as the highest on the Kentucky Facilities Inventory and Classification System report as of February 27, 2020. This list, of course, was already in existence prior to the COVID-19 public health emergency and was not generated in response to it.

Finally, in a section of the guidance entitled “Ineligible Projects and Projects Not Presumed to be Eligible,” general construction and improvement of hospitals and traditional schools are specifically highlighted as examples of projects to be excluded from funding. This is in contrast to broadband infrastructure, digital connectivity technology projects, and multi-purpose community facility projects, all of which are identified as “Presumptively Eligible Projects.” While the guidance does provide that traditional school projects may be approved on a case-by-case basis, all eligibility criteria would still need to be satisfied.

Based on the above analysis, it is highly unlikely, if not wholly improbable, that any of the contemplated school construction and renovation projects would meet the criteria set forth in the guidance. It should be noted that we are not familiar with the details of each school construction and renovation project pulled from the February 27 report, but it our understanding that these are

traditional school projects, which were identified as critical needs prior to the COVID-19 public health emergency. Moreover, if applications for these projects were submitted, we should expect lengthy delays in reviewing and adjudicating the applications, further postponing these necessary projects.

Based on this analysis, representatives of my administration and the SFCC recently held another conference with the subject school districts. The participants were notified of the release of the federal guidance and the conclusions drawn therefrom. While disappointing, the districts were informed that I am committed to working with the General Assembly to provide an alternate funding mechanism so that these important projects can proceed.

I am offering a proposal to resolve this issue by swapping the funding for the \$127 million for the School Replacement and Renovation projects with other federal American Rescue Plan Act funds. This would take action by the General Assembly.

My proposal to solve this problem and achieve the intended aims of the original appropriations is to swap the appropriation of the \$127 million to the School Facilities Construction Commission from the Corona Capital Projects Fund to the Coronavirus State Fiscal Recovery Fund. Specifically, this would involve reducing the \$300 million appropriation from the Coronavirus State Fiscal Recovery Fund made to the Kentucky Infrastructure Authority's Broadband Deployment Fund by \$127 million and add \$127 million to it from the Coronavirus Capital Projects Fund.

One eligible use of the State Fiscal Recovery Fund is for "revenue losses" with the funds being directed to eligible governmental services. Based on a preliminary calculation of revenue loss as of December 31, 2020 required by the federal guidance, the Commonwealth will have approximately \$220 million that will be eligible to be used for the "provision of government services." One example of government services in the federal guidance is "pay-go funding" of capital projects, which fits with the planned \$127 million in school construction projects. The use of \$127 million for broadband deployment projects from the Coronavirus Capital Projects Fund also fits with that Fund's eligible uses.

I hope we can work together to accomplish this purpose. As a part of the record on this issue I am attaching the U.S. Department of Treasury guidance issued just recently on the Coronavirus Capital Projects Fund.

Sincerely,


Andy Beshear
Governor