BoardmanClark

MICHAEL J. JULKA
ATTORNEY
MJULKA@BOARDMANCLARK.COM
DIRECT (608) 286 7238
FAX (608) 283 1709

MEMORANDUM

TO:	John Forester, School Administrators Alliance
FROM:	Michael J. Julka
DATE:	April 10, 2020
CC:	Mike Barry, Wisconsin Association of School Business Officials John Bales, Wisconsin Association of School District Administrators
RE:	CARES Act – Contractor Provision

Overview of the Educational Stabilization Fund in the CARES Act

On March 27, 2020, the President signed the Coronavirus Aid, Relief, and Economic Security (CARES) Act. The law provides funds to be divided among governors and state education agencies for elementary and secondary education in a section of the law titled Education Stabilization Fund. At this point, the Department of Public Instruction does not have information about when these funds will be distributed, what the timeframe for expending funds will be, or the parameters for spending these funds. The Department is committed to following this closely and providing updates as information becomes available. The CARES Act funding does not reduce or replace existing federal education programs, but rather is to help local education agencies and states with costs related to COVID-19 (alternatively referred to as "coronavirus") and school closures.

One specific item in the Educational Stabilization Fund section of the CARES Act provides as follows:

> Section 18006.
> A local education agency, state, institution of higher education, or other entity that receives funds under "Education Stabilization Fund," shall to the greatest extent practicable, continue to pay its employees and contractors during the period of any disruptions or closures related to coronavirus. (emphasis added)

This provision, particularly the reference to the continued payment to school district contractors, has prompted a number of questions from school districts, as well as various initiatives from contractors and their representative organizations. For purposes of this Memorandum, typical school district contractors are bus companies, custodial service companies, daycare providers, food service entities, etc.

Given the fact that the phrase "to the greatest extent practicable" is not defined and is not elaborated upon in the legislation, districts have been put in the position of having to interpret that phrase without the benefit of particular federal guidance or regulations, and prior to the receipt of any funds under the Education Stabilization Fund to which the phrase refers.

Analysis of Section 18006 of the CARES Act

With that in mind, you requested that I give as much guidance as is available to districts challenged with what appears to be a "mandate" in the CARES Act. This Memorandum, as you have requested, will focus on the "contractor" issue as distinct from the "employee" reference that arises under the same provision of the Act.

One initial observation: Despite what contractors or their respective trade associations may suggest, there is nothing in the CARES Act that explicitly or implicitly suggests that a district will lose Education Stabilization Fund monies for what may be deemed noncompliance with Section 18006. Any such "condition" for receipt of such funding being tied to payment of contractors "to the greatest extent practicable" is unlikely without a much more definitive expression of intent and/or interpretation of that phrase by governmental agencies for purposes of implementation. That being said, what analysis do I recommend that districts undertake in recognition of the provisions of Section 18006?

Future Legislation

First, it is very important for districts to realize that both the state and federal governments are considering additional legislation dealing with COVID-19 and its impact upon schools and local governments. Therefore, one potential overriding perspective that may be taken by districts is that it is simply premature to attempt to interpret or implement the provision in the CARES Act regarding contractor payments. It would be hoped that future legislation, guidance, and/or regulations would recognize the provision in the CARES Act that is the subject of this Memorandum, but, as is often the case, it may be that future governmental actions put districts in the interesting position of having to deal with multiple provisions that must be reconciled.

Considerations for School Districts

However, for districts that believe some responsive action is appropriate under the circumstances, particularly with regard to contractors who are requesting (or demanding) that the district respond, the following are the considerations that should be a part of any plan of decision making and action.

Review Existing Contracts
First, districts should begin a process that involves existing contractor contracts. The first question, and it is a fundamental question, is whether the school board authorized the entering into the contract in question. It is fundamental law in Wisconsin that the school board must either approve the contract or explicitly delegate that authority for approval to someone in the district by board action. Unless the contract has been legally entered into in conformance with these principles, the contract with the contractor may not be legally enforceable.

If the contract is determined to have been entered into in accordance with state statutes and their interpretation, the next step in the analysis is to review the specific terms of the contract. Those terms may include provisions that speak to contractual payments only being made upon the receipt of "services" by the district. Clauses to that effect can take on many different forms.

Specific clauses that are fairly common in contracts with contractors are those that excuse performance based upon acts of God, governmental restrictions, fortuitous events, or other circumstances beyond the control of the parties, often referred to as "Force Majeure" clauses. Transportation contracts with bus contractors typically include provisions regarding weather related cancellations of school, but a careful reading of the contract may also provide a broader interpretation of the school cancellation provisions. These clauses can be drafted in such a way as to excuse non-performance by the contractor or to require payment by the district notwithstanding such circumstances.

There are also other legal doctrines that call into question the enforceability of contracts with contractors during mandated school closures. Those doctrines include "impossibility" of contractor performance, and "frustration of purpose." Given that the expenditure of dollars associated with contractor contracts are quite often taxpayer dollars in one regard or the other, being particularly mindful of the terms of the contract and other legal doctrines that would excuse district payments pursuant to the contract is very important in the analysis associated with any payments under the contracts during school closures.

It is also fairly common that contractor contracts include clauses that require one or both parties to comply with state and federal laws. Certainly, if the contract under review includes such a requirement, Section 18006 of the CARES Act is arguably explicitly incorporated as a mandate into the contract.

Duration of Section 18006
Such an instance, as well as the general obligations of affected school districts to comply with federal law, brings the issue of interpreting Section 18006 directly to the forefront of the analysis. Again, the key words of the provision under consideration are that a district "shall to the greatest extent practicable, continue to pay its . . . contractors during the period of any

disruptions or closures related to coronavirus." But what are the considerations that a district should take into account in interpreting that statutory provision? Certainly, the terms of the contract at issue as discussed above is a very important, but not exclusive, focus. Also note that the period of time referenced is during "any disruption or closures" related to the pandemic. It is likely that the impact due to disruption is going to extend further than the school closures. The point is that there is no current way to assess the impact of the disruption or school closures at this time in order to determine what payments to contactors are "practicable." At this time, school districts cannot even say with certainty that schools will reopen this fall.

Public Purpose Doctrine
In addition, the "taxpayer dollars" component of this interpretation suggests other legal limitations that must be taken into account. First, the "public purpose" doctrine which requires districts to receive "value" for the expenditure of monies is an underlying consideration. Certainly, there are arguments that can be made that providing payments to contractors during a school closure is important in order to make sure that the contractor is viable upon the re-opening of schools. However, given the other components of the CARES Act which provide non-refundable loans to businesses and expanded unemployment compensation for individuals, districts have to be particularly careful that any payments to contractors do, in fact, provide the "value" that they believe are important for the continuing contractual relationship upon school re-opening.

Business Judgment Doctrine
The other legal doctrine that is associated with making the determination of what is "practicable" in terms of payments to contractors is the business judgment doctrine which, as a matter of public policy, requires school boards to make certain that the decisions that they are making are consistent with proper utilization of taxpayer funds. For example, if a school district were to pay a contractor and by doing so the contractor actually receives what could be characterized as "double dipping" funding by also utilizing the CARES Act loan provisions, district payments are likely to be deemed a violation of public policy. Therefore, it is advisable for any district that intends to make payments pursuant to Section 18006 (that go beyond its contractual obligations to its contractor) to make certain that such payments are pursuant to written agreements that provide for the verification and auditing of the contractor's resources such that any payments by the district that exceed the purpose for which the district made such payments shall be returned to the district pursuant to a repayment provision.

Additionally, given the economic uncertainties that contractors face, districts may wish to consult legal counsel regarding protections for any district expenditures to contractors that might be affected by further contractor financial distress, including the potential for contractor bankruptcy.

Making a Determination

Whatever determination is made by a district to establish its ability to make payments to contractors pursuant to Section 18006 of the CARES Act "to the greatest extent practicable" should be able to be substantiated by an accounting that has taken into consideration the bigger picture of the impact of school closures and the pandemic upon district operations and, particularly, the district's budget (which may be affected by future legislation).

Conclusion

As discussed at the beginning of this Memorandum, there are many unknowns associated with the current situation regarding the impact of COVID-19 on school districts. In fact, governors in other states have taken additional steps with regard to requiring via executive order that districts engage in negotiations with contractors during this very critical time, regardless of whether the contract with the contractor requires such. Given that our state legislature and governor have yet to follow-up concerning the CARES Act or any other federal legislation (including any such legislation that is forthcoming that could affect contracts with contractors), I urge caution with regard to proceeding with the determination of what is "practicable" with regard to payments to contractors at this time. This is not to suggest that there will never be a time when such an assessment is appropriate, but rather that the number of "moving parts" and "changing circumstances" may well dictate that districts recognize that making payments to contractors at this time, outside of the requirements of a contract, may be premature.

As always, please feel free to contact me if you have any further questions, particularly with regard to any issues raised in this Memorandum that cause you concern.

f:\docs\wd\36269\1\a3746667.docx