



MEMBERS ONLY BRIEFING

Maintaining Educational Supports & Continuity of Services

April 29, 2020

This OESCA Members Only Brief was created to provide the OESCA membership and educational stakeholders with guidance on issues related to maintaining staff and contracts with vendors and other third-party providers during the COVID-19 pandemic.

This brief is written in an abbreviated, bulleted fashion to provide a bottom-line oriented analysis based on the latest information available and will continue to evolve and be refined as more information become available.

This Members Only Brief does not constitute legal advice. As always, consult with legal counsel and retain all appropriate opinions and documentation relative to decisions made.

- Nothing in state law precludes city, local, exempted village, or joint vocational school districts, community schools, chartered nonpublic schools and STEM schools from honoring the terms of all service agreements with educational service centers entered into under 3313.843, 3313.844, 3313.845 or 3313.846 of the Ohio Revised Code during a pandemic, epidemic or other public calamity, nor do any of the: (1) Governor’s Executive Orders, including Executive Order 2020-01D declaring a State of Emergency on March 9, 2020, and the resulting school closure effective March 16, 2020, and extended by Director of Department of Health order on March 30, 2020; (2) orders of the Ohio Department of Health; or (3) guidance from the Ohio Department of Education issued either prior to or after the enactment of H.B. 197. Further, nothing in H.B. 197 authorized public school districts, community schools, chartered nonpublic schools and/or STEM schools to discontinue payments under service agreements with educational service centers.

- ESC’s are public school districts. *See* O.R.C. §§3311.05. In this regard, unless a statute expressly refers to a city, local, exempted village, or joint vocational school district, or some specific combination thereof, laws applying to “school districts” also apply to educational service centers. and 3311.055. This is consistent with state law including but not limited to 3319.08(B) and 3319.081(G) of the Ohio Revised Code, which require school districts (including ESCs) to continue to pay employees during an epidemic or other public calamity.
 - o 3319.08(B) Teachers must be paid for all time lost when the schools in which they are employed are closed due to an epidemic or other public calamity, and for time lost due to illness or otherwise for not less than five days annually as authorized by regulations which each board shall adopt.
 - o 3319.081(G) All nonteaching employees employed pursuant to this section and Chapter 124. of the Revised Code shall be paid for all time lost when the schools in which they are employed are closed owing to an epidemic or other public calamity. Nothing in this division shall be construed as requiring payment in excess of an employee's regular wage rate or salary for any time worked while the school in which the employee is

employed is officially closed for the reasons set forth in this division.

- Many ESCs have service contracts or interlocal contracts that specifically obligate the school districts or organizations serviced by the ESC to be responsible for any charges incurred by the ESC for the employment of individuals who are assigned to provide the services. In such instances, since an ESC must continue to pay its teaching and nonteaching employees during the COVID-19 pandemic, those charges would be the responsibility of the school district or organization that contracts with the ESC. Examples include contractual provisions such as:
 - “The district shall be responsible for all net costs incurred by the ESC relating to the employment of the personnel hired by the ESC to provide the services to district. Said net costs shall include, but not be limited to, salary/wages, workers’ compensation, unemployment compensation, Medicare, retirement, retirement system surcharge (if any), benefits, employee leave, severance pay, legal fees, mileage/meeting reimbursements, and any other agreed upon additional personnel costs or substitute personnel (if provided by ESC).”
 - “It is further understood that additional charges such as retirement surcharges, severance payment, unemployment, legal fees and/or mileage/meeting which may be incurred during the employment of employees providing such services, will be billed accordingly, * * *.”
- The federal response focuses on continuity of services and retaining staff including but not limited to Sec.18006 of the federal CARES Act (H.R. 748), which states,
 - *“A local educational 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.”*
- Administrative guidance from the federal government reinforces this focus. Examples include the Office of Head Start (OHS) that directs programs to,
 - *“continue to pay wages and provide benefits for staff unable to report to work during center closures necessary to address COVID-19.... This additional emergency response flexibility is important to ensure critical grants management activities can continue during closures. It will help ensure staff are ready and able to return to work as soon as it is possible to resume operations.”*
- State budget cuts have not yet been announced and are likely to be substantially less than overall budget cuts. States are limited on the degree to which they can cut K-12 education and still receive federal CARES Act education stabilization funding.
- ESCs should continue providing educational and educational support services to the greatest extent possible in support of schools and school districts including but not limited to building the capacity of education and educational support staff through professional development activities.

- Through H.B. 197, the Ohio General Assembly has provided school districts the authority to continue education and complete mandated hourly instruction requirements through distance or online learning, complete employee evaluations, and finish the school year despite buildings being closed to students. *See* Section 15 of H.B. 197. Guidance from the Ohio Department of Education has advised that, generally, providers are encouraged to serve students remotely as much as possible while complying with the “Stay at Home” order. <http://education.ohio.gov/Topics/Student-Supports/Coronavirus/Autism-and-Jon-Peterson-Special-Needs-Scholarship>. This includes the provision of special education services.

Lastly, the frequently asked questions (FAQs) section of the Auditor of State’s website (accessed 04/28/2020) includes the following the relate to this specific issue:

7. As a local school district, how do we deal with employee pay during this crisis?

While the Auditor of State does not serve as legal counsel to local school districts, we recognize the challenges school districts are facing in this emergency. While the situation is still fluid, the following statutes provide direction to schools regarding employee contracts, including in some cases, authority to pay employees during an epidemic. Schools districts should consider the statutes below, taken together with the terms and conditions of their individual bargaining agreements and employee contracts, as they consult with their legal counsel on the appropriate course of action. As always, during an audit, the Auditor of State will defer to the well-reasoned opinions of legal counsel on interpretations of the law. 3319.08* 3319.081* 3311.77* 3311.81 3319.02 for administrators 3319.0811 (supplemental contracts) 3319.224 (contracts for speech and audiology services) 3319.0810 (transportation staff) 3313.72 and 3313.721 and 3313.68 (services of physician, dentist, or nurse) 3313.812 (contract for food service) 3319.01 (superintendent of district) 3319.088 (education assistants) 3319.141 (sick leave) 3313.482 *The statutes marked with an asterisk include specific guidance regarding paying employees during an epidemic.

28. There was mention about \$100 million being provided through the Emergency Support Fund to provide payments to public employees and contractors. As it relates to contractors, school districts would like more guidance on how auditors will evaluate contractors paid during the pandemic in light of the Ohio proper public purpose laws. The group is seeking guidance as to what the AOS will be looking for this year and if they have any advice or want to share anything to watch out for.

Refer to FAQ Nos. 1 and 11 in the CCIP COVID guidance from the Ohio Department of Education (ODE) Office of Federal Programs with ODE’s Document Library. (Note the CCIP COVID Guidance is the version as of April 22, 2020, and schools should go to the Document Library to find the most recent, updated information.) In FAQ No. 1, the U.S. Department of Education (USDE) answers the question of paying employee contracts during the pandemic. In FAQ #11, ODE responds to questions pertaining to paying contracts during the pandemic. While there are no specific answers from USDE on paying contractors yet, ODE provides good advice to schools. For vendor contracts, the CARES Act suggests that school districts can continue to pay contractors for reduced services and in situations where the contract cannot be broken- assuming it is a lawful contract. However, there could be provisions in a contract that allow it to be broken

for force majeure events or generally unforeseeable circumstances that prevent someone from fulfilling a contract. Therefore, AOS strongly encourages school districts to consult with legal counsel regarding payments to contractors when they are unable to provide services or are providing services at significantly reduced levels. AOS will audit according to the guidance provided by USDE and ODE, which may still be evolving. Additionally, AOS will defer to well-reasoned legal opinions school districts obtain from their legal counsel. AOS will not issue Findings for Recovery for expenditures that appear to conform to this guidance and have documentation to support the district's due diligence in performing an evaluation of the matters at hand. Additionally, AOS will consider the facts and circumstances present and the information available to schools while district officials were making relevant decisions as AOS evaluates potential questioned costs in a Single Audit. We anticipate the Federal Office of Management and Budget (OMB) along with USDE will provide further clarification on flexibilities related to these determinations for both schools and their auditors in the coming weeks.

29. Can school districts terminate contracts with Educational Service Centers (ESCs) during the pandemic due to the building closures and an inability for the ESC to provide the contracted services?

Presently the law provides that city, exempted village and local school districts with an average daily enrollment of 16,000 or less must enter into an agreement with an ESC under ORC Section 3313.843. In addition to service contracts under ORC Section 3313.843, city, exempted village, local and joint vocational school districts may set up contracts with ESCs for various services based on agreed upon fees beyond those covered by ORC Section 3313.843 contracts. ESC contracts cannot be broken, unless it is within the parameters provided by Ohio law. Because the pandemic declaration is outside the window to cancel an ESC contract, federal funds could be used to subsidize the cost of the contracts so long as it is an allowable expense of the funds. The language in certain Federal COVID programs may make use of the COVID funds allowable for subsidizing the cost of these contracts.

Bottom Line & Conclusion

It is expected that additional information and clarification will continue to be provided as issues and questions arise. As is always the case, it is important to include documentation to support a decision (e.g., statutory reference, legal opinion, etc.) in any audit/contract files in preparation for auditor review. OESCA will continue to keep the membership updated.