



## **New Law Requires School Boards to Continue Payments to Employees, Educational Services Commissions and Contracted Services Providers Impacted by the Pandemic**

On April 13, 2020, both State legislative houses passed and on April 14, 2020, Governor Phil Murphy signed legislation permitting schools to use virtual or remote instruction to meet the 180-day school year requirement, and also requiring school boards to continue paying all employees (union and non-union), as well as contracts with educational services commissions, county special services school districts, jointure commissions and under any shared services or cooperative contract with any public entity. A little-publicized provision of the law also imposed a significant requirement that provides that school boards, charter schools, renaissance schools, educational services commissions, county special services school districts and jointure commissions (referred to collectively in this alert as “Districts”) must continue to pay contracted service providers (i.e., private companies) during the shutdown. Specifically, the law provides that Districts:

SHALL continue to make payment of BENEFITS, COMPENSATION, AND EMOLUMENTS pursuant to the terms of a contract with a contracted service provider or a shared services agreement in effect on the date of the closure as if the services for such benefits, compensation and emoluments had been provided and as if the school facilities had remained open.

(Emphasis added).

The “benefits, compensation, and emoluments” are required to be used by the contracted service providers to meet payroll and fixed costs. Districts are required to use reasonable efforts to renegotiate the contract and the negotiations are not to include indirect costs such as fuel and tolls; however, there is no corresponding requirement that the contracted services providers do the same. The providers are required to advise Districts if they have business interruption insurance. Districts may also direct the contracted services provider to perform modified services that are within the contractor’s general expertise.

Finally, Districts are not required to pay for services that would not have been provided had the schools not been closed, and do not have to make payments to providers who are in material breach that was not a result of the state of emergency. While the new

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law provides for the continued obligation for school districts to make payments, it provides neither a definition of terms nor guidance on how the fiscal requirements of contracts are to be addressed. Moreover, it does not contain any language that lets Districts know which laws it is meant to supersede.

The language of this new legislation presents the educational institutions with a multitude of implementation questions, including:

- Who or what is a “contracted service provider”?
- Does the law apply to month to month contracts?
- How does the law apply to open-ended (requirements) contracts with no minimum guaranteed?
- Does the law apply to hybrid contracts like Food Service Management or Custodial Management Contracts or does it only apply to service contracts for which there is no tangible good associated?
- How does the law apply to service contracts funded through enterprise funds for which funding cannot be certified?
- How are funds to be certified in absence of certification under N.J.S.A. 18A:19-3 and how are appropriations, or the lack thereof, going to be addressed?

The legislation then directs the Commissioner of Education to adopt regulations to implement the provisions of the Act. Until that time, The Busch Law Group suggests a two-tiered approach for Districts to address the new obligation. First, Districts should send a letter to the contractors in order to gather information and documentation about the “compensation, benefits, and emoluments” and fixed costs that are attributable to the services provided to that District, or the various districts under joint or shared agreements. Second, after receiving that information, we recommend an agreement that specifies whether the services have been prevented, in whole or in part, and providing for the

appropriate certification of costs that would substitute for the verification of claims ordinarily required in order for Districts to pay contractors.

The Busch Law Group is preparing samples of letters, contracts and other documents that Districts may use as a starting point to comply with the new law. Please feel free to contact us if your school board requires these forms and documents or any additional information regarding this new law. As always, The Busch Law Group stands ready, willing and able to assist its clients during this unprecedented time.

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