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Commissioner

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**TO:** Superintendents of Schools and other School Leaders  
**FROM:** Angélica Infante-Green, Commissioner of Education  
**DATE:** April 24, 2020  
**SUBJECT:** Frequently Asked Questions Regarding the Contractual Obligations of LEAs during the COVID-19 Pandemic

The Rhode Island Department of Elementary and Secondary Education (“RIDE”) has received numerous requests for information concerning how it has handled its own school transportation contracts, as well as for interpretive guidance with respect to how the *Coronavirus Aid, Relief and Economic Security Act* (the “CARES Act” or the “Act”) applies to the obligations of local educational agencies (“LEAs”) to honor contract language involving transportation companies and certain special education providers while schools are physically closed during the COVID-19 pandemic. The Governor’s Office has already weighed in with some recommendations and the April 10 Memo from her Senior Deputy Chief of Staff to the R.I. School Superintendent’s Association is attached.

As you know, RIDE’s Office of Statewide Transportation (“OST”) contracts with private companies to provide school bus service throughout the state to students with disabilities, as well as to various private, parochial, charter schools and career & technical education centers, and then invoices the school district or private school for the service provided. Section 18006 of the Act provides that that an entity which receives grant funds under the Act:

*shall to the greatest extent practicable, continue to pay its employees and contractors during the period of any disruptions or closures related to coronavirus.*

*Id.* at § 18006 (emphasis added). Thus, RIDE’s OST has been in discussion with its vendors and has asked them to identify fixed costs that they believe must be paid if they are to be in a position to provide necessary school transportation services to students when schools are re-opened. RIDE is doing its best to determine whether financial support to help our vendors meet these fixed costs is practicable, *with an emphasis on those costs that will enable employees to stay engaged and employed to the greatest extent possible.* Whether to extend and/or amend existing contracts and/or engage in competitive bidding, and the specific terms of any new agreement, are individual business decisions that have to be made by each LEA, or collectively if an LEA is part of a regional group.

As to the request for more general interpretive guidance with respect to applicable procurement law and/or the CARES Act, there is no “one size fits all” approach, and an LEA’s first step should be to consult with its own attorney. That being said, it is hoped that the following FAQ’s will be of some practical guidance.

**1. Is there an emergency exception to state procurement law which might be applicable during the COVID-19 pandemic to enable LEAs to modify procedures applicable to the usual competitive bidding process applicable to school transportation contracts?**

Yes. Procurement by cities and towns is not governed by the State Purchases Act, R.I. Gen. Laws § 37-2-1, *et seq.*, but rather by ch. 55 of tit. 45 of the R.I. Gen Laws, which establishes “a uniform system for the award of contracts by municipalities, utilizing open cooperative bids,” *see* R.I. Gen. Laws § 45-55-1,<sup>1</sup> and which provides that:

[n]otwithstanding any other provision of this chapter, the purchasing agent may make or authorize others to make emergency procurements when there exists a threat to public health, welfare, or safety under emergency conditions as defined in regulations or where the procurement will be in the best interest of the city as established by properly promulgated rules and regulations; provided, that emergency procurements shall be made with as much competition as is practicable under the circumstances. A written determination of the basis for the emergency, and for the selection of the particular contractor, shall be included in the contract file.

R.I. Gen. Laws § 45-55-8(b). A similar provision is included within the State Purchases Act and the Procurement Regulations promulgated pursuant thereto provide that:

**2. Emergency Conditions Procurement**

- a. The Chief Purchasing Officer or the Purchasing Agent (in his or her absence) may make, or authorize others to make, emergency procurements *when there exists a threat to public health, welfare, or safety under emergency conditions; provided that emergency procurements shall be made with such competition as is practicable under the circumstances.*
- b. The determination of the basis for emergency and for the selection of the vendor must be in writing.

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<sup>1</sup> However, ch. 55 does not apply “to purchases and contracts entered into by those consortia established pursuant to § 16-2-9.2, and such entities shall be exempt from all provisions of this chapter.” *See* R.I. Gen. Laws § 45-55-13.3. Under § 16-2-9.2 “any two (2) or more school committees may establish joint purchasing agreements between and among themselves or with the Rhode Island Association of School Committees for the purpose of purchasing goods and services.” *Id.* Moreover, § 37-2-56 provides that:

[a]ny municipality or regional school district of the state may participate in state master price agreement contracts for the purchase of materials, supplies, services and equipment entered into by the purchasing agent, provided, however, that the contractor is willing, when requested by the municipality or school district, to extend the terms and conditions of the contract and that the municipality or school district will be responsible for payment directly to the vendor under each purchase contract. Unless a state contract is the result of an intergovernmental cooperative purchase contract to which a municipality or school district is a party, the purchasing agent shall not compel a successful bidder to extend the same terms and conditions to a municipality or school district. However, the purchasing agent may, in the interest of obtaining better pricing on behalf of the state and local entities, solicit offers based upon anticipated master price agreement utilization by municipalities and school districts.

*Id.*

- c. *An emergency means a situation to which an urgent response is required because of immediate dangers to health and safety, threats to property and necessary functions, or failures of critical equipment. Inadequate anticipation of need is not considered justification for “emergency” procurement. Commitments that extend beyond the immediate response to the emergency conditions are prohibited.*

*Id.* at 855 R.I. Admin. Code 00-00-1.2.5(A)(2) (emphasis added).

**2. Does the CARES Act mandate that LEAs honor contract language involving transportation companies and special education providers that require payment of all contractual costs while schools are physically closed during the COVID-19 pandemic, or are contractors compelled to accept non-payment due to a *force majeure* clause or other contractual provision?**

Existing contracts may contain negotiated language that includes but is not limited to: (a) excusing an LEA from payment under emergency circumstances; (b) defining a payment structure for emergencies; (c) requiring an LEA to honor all costs under the existing contract despite an emergency; or (d) prior prepayment of a full contract. The CARES Act simply does not directly address reliance on such contract language that was previously negotiated in good faith, nor the applicability of traditional principles of contract law. However, as noted, the CARES Act does provide that LEAs should pay such contractors “to the greatest extent practicable,” and LEAs may be found ineligible for CARES Act support if they fail to do so.

Thus, some LEAs may decide to pay a contract in full if it determines locally that it is appropriate under the circumstances, or alternatively, may conclude that it is necessary to amend a contract with a transportation company or special education provider where there is a need to more accurately reflect the actual costs incurred during the duration of the public health and civil preparedness emergencies. RIDE encourages all parties to keep in mind the spirit of the CARES Act and approach this question with a unique collaborative effort requiring good faith negotiation by both parties. In so doing, LEAs should take into account the educational interests of the state to continue special education during the cancellation of school classes, and the need for transportation services for students to be available immediately when school resumes, *with an emphasis on those costs that will enable employees to stay engaged and employed to the greatest extent possible.*

**3. If LEAs will continue to receive state funding and also federal stabilization funding, why are they not just instructed to fully pay all contracts even when services are not being provided as anticipated?**

While funding will continue, local and state school budgets and others did not anticipate costs associated with their response to the COVID-19 pandemic, and may be further strained by lost revenue from cafeteria and other operations due to the physical closing of all public school classes. Therefore, amendments to contracts may be necessary.

**4. Does the CARES Act require that certain categories of LEA staff continue to be paid during the epidemic?**

As with respect to other contracts, the CARES Act requirement that LEA efforts to pay staff be made “to the greatest extent practicable” requires individualized consideration at the local level. For example, an LEA will need to address what is practicable for their schools, consider the anticipated duration and the nature of relationship between the individual and the LEA, and determine if the person would have been separated for other reasons. If but for the COVID-19 pandemic, an LEA employee would have remained in employment for the remainder of the school year, generally the individual’s employment should continue, to the greatest extent practicable. This includes staff such as health professionals (e.g., nurses, occupational therapists, physical therapists, mental health counselors). Staff should also remain available to provide services and support the students and LEAs in these new circumstances, consistent with safety precautions.

**5. What if the LEA does not have tasks for certain staff to perform?**

The CARES Act nonetheless requires LEAs to continue compensation and health insurance for such staff “to the greatest extent practicable.” RIDE thus encourages LEAs to consider the myriad of assistance employees can provide, such as virtual student outreach and teacher lesson planning support, to engage the student community. In some situations, this may require consideration of applicable collective bargaining agreements and consultation with counsel.

**6. Do LEAs need to continue to make full payment of tuition to approved private special education programs and other out-of-district placements?**

RIDE strongly encourages LEAs to continue current contracts with such programs and out-of-district placements to allow for the students placed in these programs to receive continued educational opportunities and the special education and related services in their individualized education programs (“IEPs”), to the greatest extent possible. *See Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus 2019 Outbreak*, Mar. 12, 2020, U.S. Dept. of Education, <https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/qa-covid-19-03-12-2020.pdf>. While this guidance does not preclude discussion about amendments to such contracts, it is likely the scope of such amendment would be *narrow* because approved private special education programs and other out-of-district placements are expected to actively participate in continued educational opportunities for students. For example, if there were hourly fees for a specific service that is impossible to provide during the period of school disruption, it would be appropriate for parties to discuss those costs, but they would likely also need to have a corresponding change in plan if there is any change to services for any individual student.

In short, LEAs remain legally responsible for providing students with a disability with a free, appropriate public education (a “FAPE”), and thus, as a general matter, should continue to pay approved private special education programs and other out-of-district placements, and such programs and out-of-district placements should be continuing to provide services.

I hope this has been helpful, and please be advised that this is a “guidance document” under R.I. Gen. Laws § 42-35-2.12, and moreover, keep in mind that *this also is a working document, which may be updated due to the rapidly changing response to this pandemic emergency and ongoing Federal guidance updates related to the CARES Act and other federal legislation.*

Sincerely,

A handwritten signature in cursive script that reads "a. Infante-Green".

Angèlica Infante-Green  
Commissioner of Education