



STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION



TO: Superintendents of Schools
Boards of Education
Municipal Chief Fiscal Officers

FROM: Jessa Mirtle, Legal Director

DATE: April 14, 2020

SUBJECT: Frequently Asked Questions Regarding Executive Order 7R

This 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.

General Questions

1. What is the relationship between the Governor's Executive Order 7R and the Federal Coronavirus Aid, Relief, and Economic Security Act ("CARES Act")?

State Executive Order 7R has the force of state law, and should be read consistent with the language in the CARES Act. In particular, the instruction from our Federal partners in Sec. 18006 of the CARES Act, provides, in relevant part: "A local educational agency, State, institution of higher education, or other entity that receives funds under the '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."

This language, and similar language in Executive Order 7R, acknowledges the school community is instrumental to continuing the educational interests of the state, and that Boards of Education should compensate their employees and contractors during this period of disruption, *to the greatest extent practicable*. In accordance with Executive Order 7R, Boards and municipalities should endeavor to keep as many people employed as possible, and focus on maintaining the critical workforce and services necessary to resume operations when schools are able to reopen, at such time as that date is determined.

2. Who determines that a contract with a transportation company or special education provider must be amended?

Executive Order 7R allows a Board or municipality to make the determination to pay a contract in full if the Board determines locally that it is appropriate under the circumstances. Alternatively, Executive Order 7R contemplates that a Board or municipality may determine 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.

Any local decision to pursue an amendment will require good faith negotiation by both parties, and should take into account the educational interests of the state to continue special education during the cancelation of school classes, and for transportation services for students to be available immediately

when school resumes. As indicated in more detail below, generally special education providers will be continuing services during the cancelation of classes and should be paid accordingly.

3. Are Boards compelled to honor contract language requiring payment of all contractual costs under these circumstances, or are Contractors compelled to accept non-payment due to a force majeure clause, under the Executive Order?

Existing contracts may contain negotiated language that includes but is not limited to: (1) excusing a school district from payment under emergency circumstances; (2) defining a payment structure for emergencies; (3) requiring a district honor all costs under the existing contract despite an emergency; or (4) prior prepayment of a full contract. The CARES Act and Executive Order 7R do not directly address reliance on contract language that was previously negotiated in good faith.

Parties should consider, however, that, under some circumstances, holding a party to the originally negotiated terms of an agreement may make the preservation of services in the future difficult, if not impossible. In addition, Boards may run the risk of disqualifying the district for support under the CARES Act for failure to pay a contractor “to the greatest extent practicable.”

The Connecticut State Department of Education (“CSDE”) would encourage all parties to keep in mind the spirit of both Executive Order 7R and the CARES Act and approach this with a unique collaborative effort.

4. If Boards of Education 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, budgets of local and regional boards of education 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 cancellation of all public school classes. Therefore, amendments to contracts may be necessary.

Board of Education Employees

5. What if a board of education staff member was already laid off and received unemployment?

Executive Order 7R requires that Boards restore employment to the greatest extent practicable, but does not mandate back-pay, whether the individual received unemployment or not.

6. What categories of staff does the Board need to employ and pay under this order?

The Executive Order anticipates that Boards will continue to pay board of education staff to the greatest extent practicable, and mirrors the Federal CARES Act language about payment of employees and contractors during the period of any disruptions related to coronavirus.

Interpreting the order as it relates to specific employees and positions requires individualized consideration at the local level. For example, the district will need to address what is practicable for

their schools, consider the anticipated duration and the nature of relationship between the individual and the board, and determine if the person would have been separated for other reasons.

If but-for the COVID-19 pandemic, an employee of a board of education 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 that are not individually enumerated in the executive order, 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 school district in these new circumstances, consistent with safety precautions.

7. What if I do not have tasks for my staff to perform?

Executive Order 7R acknowledges that some staff may not have tasks to perform during the cancelation of classes, but nonetheless directs Boards to continue compensation and health insurance for such staff to the greatest extent practicable. However, CSDE strongly encourages school administration 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.

8. What if I have tasks for my staff to perform, and they do not wish to continue duties, or prefer unemployment?

This would need to be considered on a case-by-case basis. They may be eligible for reemployment and then paid leave under state and federal law, or if the Board had already laid them off indicating no substantial work for them, they may pursue unemployment subject to the applicable laws and regulations.

Special Education

9. Does a Board of Education need to continue to make full payment of tuition to Approved Private Special Education Programs (APSEPS) and other out-of-district placements?

The Connecticut State Department of Education (CSDE) strongly encourages school districts **to continue current contracts with APSEPs** 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. This was communicated in the below guidance:

<https://portal.ct.gov/-/media/SDE/Digest/2019-20/March-31-2020-BSE-Memorandum-APSEPs-COVID-19.pdf?la=en>

While this guidance indicates there may be room for discussion about an amendment, it is likely the scope of such amendment would be *narrow* because APSEPs 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 PPT if there is any change to services for any individual student.

In addition, the local or regional board of education remains legally responsible for the education of each of the students, and the placement at the APSEP or other special education providers has typically been determined by their PPT. Generally, Boards should be continuing to pay APSEPS, and APSEPS should be continuing to provide services.

Transportation

10. What should be the scope of an amendment?

The amendments must be prompt and consistent with the goals outlined in the Executive Order. This includes ensuring the business will be able to provide service when school resumes, paying and insuring active employees, and considering reasonable documentation to safeguard taxpayer monies by ensuring the companies are not enriched beyond the actual and reasonable costs associated with these goals. The Executive Order 7R is not intended to allow for broad renegotiation of contracts; instead, any amendment should be “prompt” to safeguard employees and the continuity of services once classes resume.

11. For a larger company, how is it possible to expect renegotiation of multiple contracts with multiple districts?

Executive Order 7R does not require “renegotiation” of contracts, but prompt amendment where appropriate.

12. What are the minimum requirements for payment to a transportation contractor, or in what cases would a contractor need to pay back a Board that has paid in full? Is a district required to pay all “home-to-school” transportation costs?

The “home-to-school” transportation typically includes fixed costs, which include employees' and drivers' pay. “Home-to-school” transportation does not include field trips or athletic trips, which did not occur. In this context, the goal for “continuity of services” is very important. There is not a minimum requirement for payment, or for reimbursement of pre-paid balances, in the Executive Order. An amendment will need to consider these costs, including home-to-school payments, rent, and other administrative costs as well as potential savings, such as fuel and unnecessary maintenance.

13. Does the Order direct Boards to also pay for maintenance and fixed costs for transportation companies, such as bus maintenance, insurance, etc.?

Executive Order 7R specifically references reasonable “fleet” costs, and therefore contemplates negotiation of certain fixed costs beyond employee-related costs. Again, the delineated goal for “continuity of services” is important. Costs should be limited to reasonable costs.

14. Does the order direct Boards to pay contractors for the salaries of managers and owners?

Executive Order 7R requires contractors pay active employees, to the greatest extent practicable. There is no exclusion for certain categories of employees, including but not limited to managers, owners, IT staff, mechanics, etc.

15. Who has the authority to negotiate the school transportation contracts? Does the Board of Education need to approve the renegotiated contract?

It will depend upon the district and the delegation of authority provided by the local or regional board of education. However, Connecticut Association of Boards of Education (“CABE”) has provided a policy consideration for Boards to address additional delegation of authority to Superintendents in the context of the COVID-19 pandemic, available here:

https://www.cabe.org/uploaded/Policy/6114.8_Pandemic_Policy_2020.pdf. Boards may consult with CABE and counsel, and consider if such guidance related to contracts referenced in Executive Order 7R is appropriate.

16. What is the definition of "active" employee for a contractor? Does it include employees that have been laid off/furloughed?

The contractors must consider the input of their legal counsel related to the requirements of the CARES Act in this area. Executive Order 7R does not specifically require transportation companies to rehire laid off employees. This may be negotiated at the local level.

17. What do school transportation operators do if their employee union representatives do not agree with the renegotiated contract or threaten to strike?

Generally, employee salary and health insurance should remain unchanged by contract amendments, given that the amendment scope should be narrow and continued compensation is contemplated by the order.

18. What type of “reasonable documentation” is required to substantiate employee salary and insurance costs? Is there a requirement to provide certified payroll information and hire an accounting firm to perform the audit?

There is no requirement that an audit be performed. Executive Order 7R requires only that reasonable documentation be provided illustrating these costs. For example, a Board could request confirmation of the employees being rehired, and an invoice that shows the bi-weekly payroll based on the number of routes prior to the COVID-19 pandemic disruption, along with the detail of what else the bus company is invoicing, such as fixed costs.

If you have questions, please feel free to contact Attorney Jessa Mirtle at Jessa.Mirtle@ct.gov.