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SECRETARY OF EDUCATION

MICHELLE LUJAN GRISHAM
GOVERNOR

March 13, 2020

Sent Via Electronic Mail

School District and Charter School Leaders

Re: Questions Regarding Payment of Teachers, Staff, and Contractors During School Closure Due to COVID-19

Dear School District Superintendent/Charter School Leaders, and Respective Counsel:

Important questions have been submitted regarding whether teachers and staff may be paid while schools are closed due to COVID-19, and pursuant to the Governor's recent Executive Order. Schools will continue to have the ability to pay for teachers, staff, and contractors at schools, as they otherwise would had schools remained open.

The PED has heard concerns from some schools about whether making such payments would be a violation of the New Mexico Constitution's anti-donation clause, or a violation of any other law. This letter will explain why none of the possible legal concerns expressed by school districts and charter schools prevent them from paying salary and wages to teachers, staff, or contractors during these emergent times.

Regarding the anti-donation clause contained in Article IX, Section 14 of the New Mexico Constitution, the New Mexico Supreme Court has made clear that a "donation" for purposes of that provision is a gift, an allocation or appropriation of something of value, *without consideration*. *Moses v. Ruszkowski*, 2019-NMSC-003, ¶ 50. Incidental aid or resultant benefit to a person is permitted unless the aid or benefit "by reason of its nature and circumstances surrounding it, takes on character as a donation in substance and effect" or constitutes an outright gift of public money. *Id.* (quoting *Vill. of Deming v. Hosdreg Co.*, 1956-NMSC-111, ¶ 37). Maintaining the payment of wages to teachers, staff, and contractors during a state of public

health emergency that has closed schools is not the kind of outright gift lacking consideration that the New Mexico Supreme Court has said is necessary for an anti-donation violation. It is a lawful employment benefit with attendant consideration.

Consistent with this understanding, the New Mexico Court of Appeals has previously held that severance payments to a public employee did not violate the anti-donation clause because those payments were “deemed to be in the nature of wages that have been earned.” *Treloar v. Cnty. of Chaves*, 2001-NMCA-074, ¶ 32, 130 N.M. 794, 32 P.3d 803. The continued payment of wages as an employment benefit during an extraordinary period of emergency is of a similar nature and is also justified by important business needs of schools, such as teacher and staff retention. That is why the anti-donation clause does not bar normal payments to teachers, staff, and contractors during this emergency.

There are others who have expressed concerns regarding whether such payments would violate NMSA 1978, Section 30-23-2, which prohibits the payment or receipt of public funds for services not rendered. However, that provision is not intended “to prevent the payment of public funds where such payments are intended to cover lawful remuneration to public officers or public employees for vacation periods or absences from employment because of sickness, or for other lawfully authorized purposes.” *Id.*

The payments described above would not violate this provision because they would be made for lawfully authorized absences. The lawful authorization for their absences can be found generally in Executive Order 2020-004, declaring a public health emergency, and more specifically in Executive Order 2020-005, which directs the PED to close all public schools. The teachers, staff, and contractors are absent because the Governor has ordered that all schools be temporarily closed due to a public health emergency.

These lawful absences during this extraordinary period, are not what Section 30-23-2 was designed to address. Moreover, these are benefits provided for the teachers and staff, and are not contrary of general expectations of workers during a school term. There is a business need, and a public health need, permitting for this, and this has certain similarities as that other business needs and emergency circumstances.

The PED recognizes the benefit that schools receive in being able to continue to compensate their teachers, staff, and contractors. This will not only ensure that they are available as they are needed during the current emergency, but will also ensure that teachers and staff will be able to return to work when appropriate without interruption, and will be there for the State’s children and families. Currently, the instructional hours requirements for schools are being waived, and additional compensation for make-up hours is not an issue here.

The PED appreciates all the support that school districts and charter schools provide, and that the communities provide in return. School districts and charter schools may need to take a more careful look at certain circumstances in determining whether teachers and staff may be compensated, and the PED can work with you through that process, if needed. However, the PED strongly implores school districts to continue to work with the teachers, staff, and contractors, including most hourly staff, to assist them with receiving the compensation that they would have otherwise had if the schools remained open.

The PED also advises the school districts to work closely with their labor unions with respect to their collective bargaining agreements. The PED appreciates the work that can be accomplished with all parties working together to reach positive solutions.

Sincerely,

/s/Aaron A. Rodriguez
Aaron A. Rodriguez
Deputy General Counsel