

October 29, 2010

Dear Academy Board Members:

Through our mission, which includes both overseeing and supporting the operations of all public school academies (PSAs) authorized by Central Michigan University (CMU), The Center for Charter Schools (Center) has been carefully monitoring both the availability and impact of the federal EduJobs funds.

Background

Recently, the State legislature passed a state aid bill (**HB 5872**) which included a \$318 million dollar supplemental appropriation for FY 2011; however, Governor Granholm utilized the line-item veto for a significant portion of this bill due to technical wording issues. At this time, there is approximately \$69 million in federal EduJobs funding that is available to Michigan school districts which equates to approximately \$45 per pupil for every PSA. Once the legislative appropriation is finalized and approved by the Governor, it is estimated that additional EduJobs funding ranging from \$125-\$175 per pupil will be available to PSAs.

Options

When the federal EduJobs funds were established, specific language was included regarding the employment status of the individuals that would be funded under this grant. In summary, there are five (5) scenarios that PSAs should thoroughly review.

1. PSAs may use EduJobs funds to pay *current* or *new* “direct” employees. The Academy Board is the employer of record; all employees are hired directly by the PSA Board and are participants in the State’s retirement system (MPSERS).
2. PSAs that do *not* have eligible direct employees could choose to become, or by operation of law may become, “joint employers” of any staff compensated with EduJob funds. This option should be reviewed and analyzed by the PSA Board’s legal counsel. The potential risks and financial ramifications of a joint-employer relationship could have extensive financial obligations extending far beyond the EduJobs funding which is currently limited to the 2010/2011 fiscal year.
3. PSAs that do *not* have eligible direct employees (i.e. utilize an educational service provider or employee leasing company) could choose to hire new, “direct” employees. Any “direct” employees of the PSA would be required to participate in MPSERS. As with the second option, this should be reviewed and analyzed by the PSA Board’s legal counsel as it, too, could pose a joint-employer relationship with significant risk and financial ramifications to the PSA.
4. PSAs could opt to contract for school-related services from another school district (or public school academy) that has direct employees. For example, ABC Academy (who has an ESP) could contract with LMN Academy for services so long as LMN Academy is the employer of record for the LMN Academy employees that would be carrying out the contracted services at ABC Academy. As with option #3, PSAs have to diligently review ramifications of this option – including factors such as the requirements of the Internal Revenue Service’s Independent Contractor Test requirements.
5. PSAs may choose not to use EduJobs funds.

This week, the Michigan Department of Education (MDE) issued guidance specifically for PSAs regarding the EduJobs funds. This guidance is attached for further review and consideration.

Issues/Areas of Concern That Need Further Review/Analysis

It is critical that every PSA Board thoroughly analyze the short-term and long-term impact of accepting these EduJobs funds. Based on extensive discussions with CMU's external legal counsel, and after listening to multiple attorneys on today's state-wide conference call – all of whom have significant experience in school labor law (including PSAs) – it is evident that there are critical concerns surrounding any PSA Board that would opt to utilize EduJobs funding to compensate ESP staff as it gives the appearance that the Academy Board is willfully entering into a “joint employer” relationship with the ESP. And as such, the Academy Board could be required to participate in MPSERS and make the required contributions on behalf of all of the employees employed by the Academy Board as well as those employed by the ESP. The legal counsels added that the “joint employer status” could then expose the Academy Board to other significant employment related issues with unintended consequences.

The usage of the EduJobs funds could affect Schedule 5, Staff Responsibilities, of the charter contract; therefore, the PSA Board would be required to follow the established contract amendment protocol including a board-approved resolution consistent with the Terms and Conditions of the charter contract, specifically Article IX - Amendments. Given the potentially significant exposure to the PSA Board under this scenario, the PSA Board would also be required to provide the Center with documentation, including an opinion by the PSA Board's legal counsel, detailing the benefits and risks (including the potential financial impact) associated with the acceptance of the EduJobs funds under this scenario.

Next Steps – For Academy Boards Utilizing Option #1 or Option #2

For those PSAs that have direct employees already and where the Academy Board has approved the use of the EduJobs funds, the following steps must first be completed before the PSA can drawdown any EduJobs dollars:

- Ensure that the Academy has submitted an ARRA Education Stabilization Fund grant application via the Michigan Electronic Grant System (MEGS).
- Submit an EduJobs Fund Certification in MEGS, which assures that the PSA understands the acceptable use of these funds, and that the PSA understands there will be quarterly Section 1512 reporting on jobs created and retained, and must enter a Data Universal Numbering System (DUNS) number and Central Contractor Registration (CCR) information into the Education Entity Master (EEM). The submission of this certification *does not* obligate the PSA to use EduJobs funds, but the certification must be on file should the PSA opt to use these funds at a later date. EduJobs funds are intended to be used during the 2010-11 school year. The deadline to drawdown the fund will coincide with the federal fiscal year-end (September 30, 2012).
- Review the current charter contract to ensure that any positions funded through the EduJobs funding are included in Schedule 5. If new positions are being implemented with this funding, or if current position descriptions require changes, the PSA Board is required to request a contract amendment.

As evidenced by this letter, the EduJobs funds are still evolving and remain fluid at this time. While MDE has issued written guidance, and the Center has participated in a state-wide conference call and continues to confer with CMU's external legal counsel to discuss the benefits and risks associated with the funding, it is clearly in the PSA Board's best interest to review its unique situation and determine, under the guidance of its legal counsel, the best way to proceed.

The Center recognizes that every PSA Board is striving to maximize all available resources in order to better serve its students; and throughout that endeavor, the Center wishes to assist by providing timely information to the PSA Board so that informed decisions can be made and critical missteps can be avoided. The Center will continue to keep the PSA Board informed as new information becomes available. If you have any immediate questions, please contact Amy Van Atten, Director of Charter Accountability, at (989) 774-2100.

Sincerely,

Mary K. Shields

Mary K. Shields

cc: Administrator
Board Corresponding Agent

Enclosure

**Education Jobs Fund Program Grants
Guidance for Public School Academies
Michigan Department of Education
October 25, 2010**

Introductory Note

On October 15, 2010, the U.S. Department of Education issued revised guidance (the "Guidance") on the applicability of the Education Jobs Fund (Ed Jobs Fund) program to charter schools. Please [click here](#) to download this version of the federal guidance.

The Michigan legislature has appropriated a portion (\$68.9 million) of the nearly \$318 million to be distributed to eligible local school districts, public school academies (PSAs), and intermediate school districts. The remaining \$246 million in Ed Jobs Funds will be available when appropriated by the legislature.

1. What administrative steps are necessary in order for a Public School Academy to be eligible to access these particular funds?

First, any newly-opened PSA, or one that has not yet submitted an ARRA Education Stabilization Fund grant application in the Michigan Electronic Grant System (MEGS), must do so in order to access Ed Jobs funds.

Second, ***all*** PSAs planning to utilize Ed Jobs Funds must submit the Ed Jobs Fund certification in MEGS, which assures that the PSA understands the acceptable use of these funds, understands there will be quarterly Section 1512 reporting on jobs created and retained, and must enter a Data Universal Numbering System (DUNS) number and Central Contractor Registration (CCR) information into the Education Entity Master (EEM). This certification must be submitted by a MEGS Authorized Official for the PSA.

2: Does submitting the certification described in the above two paragraphs require a PSA to use Ed Jobs Funds?

No. Submission of this certification does not require a PSA to use Ed Jobs funds.

3: When must a PSA submit the Ed Jobs Fund certification?

There is no formal deadline, however this certification must be submitted before an individual grant award can be processed by the Michigan Department of Education (MDE). Grant awards will be processed starting October 22, 2010.

4: What is the deadline to use Ed Jobs Fund program funds?

The grant period for the grant will be August 10, 2010 through September 30, 2011. It is the intent that Ed Job funds be used during the 2010-2011 school year; however, if circumstances require, LEAs/PSAs will be able to request an extension to the grant end date. Details will be provided at a later date.

5: What are the options available to PSA's as it relates to Ed Jobs Funds?

- a. Use Ed Jobs funds to pay current direct employees (e.g. staff for which the PSA/LEA is the employer).
- b. Use Ed Jobs funds to hire and pay direct employees.
- c. The Guidance recognizes that a PSA may exercise enough common control over staff jointly with a third party vendor (such as a charter/education management organization) that the staff passes the common-law agency test described in the Guidance. In this case, the PSA is deemed jointly the employer of staff with the third party vendor and the PSA may use Ed Jobs funds to pay this staff, provided it gives the requisite certifications called for in the Guidance.
- d. Contract with another local education agency (LEA) to provide building level services. The PSA can pay for the compensation and benefits of these employees.

The Federal definition of LEA includes ISDs, local school districts, and PSAs.
e. Choose not to use Ed Jobs Funds allocated on their behalf.

PSA are advised to seek advice from counsel experienced in the area of school labor law to familiarize themselves with the implications of each option above.

6: How may a PSA with direct employees use Ed Jobs Funds?

A Public School Academy must use its Ed Jobs funds only for compensation and benefits and other expenses, such as support services, necessary to retain, recall, rehire or hire direct employees to provide early childhood, elementary, or secondary educational and related services. Eligible employees are those that fit the definition included in the federal guidance, which is:

An LEA may use the funds to pay the salaries of teachers and other employees who provide school-level educational and related services. In addition to teachers, employees supported with program funds may include, among others, principals, assistant principals, academic coaches, in-service teacher trainers, classroom aides, counselors, librarians, secretaries, social workers, psychologists, interpreters, physical therapists, speech therapists, occupational therapists, information technology personnel, nurses, athletic coaches, security officers, custodians, maintenance workers, bus drivers, and cafeteria workers.

7. If a PSA does not have any employees, how may it use its Ed Jobs funds?

If a PSA does not have any employees who provide school-level educational and related services, it may use the funds to hire employees to provide these services. It may also pay for the compensation and benefits of an employee of another LEA who provides such services to the charter school under a contract with the other LEA.

8. Are there implications for a PSA hiring direct employees?

PSAs who choose to hire direct employees must have the capacity to perform all of the duties of a traditional "employer," which include the ability to administer payroll, taxes, social security, workers' compensation, benefits and other required and regulated functions of an employer. As the employer of record, PSAs must enroll at least the employees in question in the Michigan Public School Employees Retirement System (MPSERS).

9. Can Ed Jobs funds be used to pay compensation and benefits for staff providing school-level services who aren't direct employees of the PSA?

No. A PSA may not use Ed Jobs funds to pay for the compensation and benefits of employees of a charter/education management organization who provide school-level educational and related services in the school.

Under limited circumstances, however, a PSA may maintain a sufficient level of control over a contract employee that the individual would be considered an "employee" of the PSA under a common-law agency test, as that test is set forth in the Guidance. This determination would have to be made based on the specific facts and circumstances of the relationship of the contract employee to the PSA. For purposes of certifying allocation of the Ed Jobs funds, the Guidance relies on a number of factors in determining whether an individual is an employee under a common-law agency test, including: (1) who possesses the authority to hire and fire employees, promulgate work rules and assignments, and set conditions of employment, including compensation, benefits, and hours; (2) who engages in day-to-day supervision of employees, including employee discipline; and (3) who retains or possesses control of employee records, such as payroll, insurance and taxes. If a PSA determines that a contract employee is an employee of the PSA under a common-law agency test and uses Ed Jobs funds to support that individual, the

Department recommends that the PSA document clearly describe the basis for that determination, including obtaining a certification from the school's attorney that the common-law agency test has been met.

10. What are the risks for a PSA being a joint employer?

PSA's who share control over staff provided by a third party may be deemed "joint employers" of such staff. In the event a PSA undertakes the requisite certifications described in paragraph 9, above, it will likely be deemed a joint employer with a charter/education management organization. Consequences of such circumstances lead to the need to enroll the affected employees, and possibly all staff, in the Michigan Public School Employees Retirement System (MPERS), as well as responsibility jointly with the charter/education management organization for other employment law issues. Conversion of staff from employment by a third party vendor to staff of the PSA or jointly employed staff of the PSA and the vendor carry risk of increases scrutiny, as well as the need to prove business-related reasons unrelated to the receipt of Ed Jobs funds for this undertaking. PSA's considering this option are urged to seek the counsel of attorneys experienced in the area of public sector labor law and school law.

11: What if I have additional questions about Ed Jobs Fund and PSA's?

Additional information on the Ed Jobs Fund can be found on the Michigan Department of Education [website](#) under Grants or by contacting Alyssa Sagolla at 517-335-9618 or sagollaa@michigan.gov.