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ATTORNEY GENERAL OPINION  By  MARK BRNOVICH ATTORNEY GENERAL  April 23, 2020	No. I20-007 (R20-007)  Re: Use Of School District Funds For Health-Related And Other Expenditures For Families, Students, And Community Members In Response To COVID-19
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To: The Honorable T.J. Shope  
Representative  
Arizona House of Representatives

**Question Presented**

May a school district use district funds to make health-related and other expenditures for families, students, and community members in response to an emergency health crisis such as COVID-19?

**Summary Answer**

Yes, Arizona school districts have legal authority to make health-related expenditures for families, students, and community members in response to an emergency health crisis such as COVID-19, provided that the expenditure: (1) is statutorily authorized; (2) does not violate the Arizona Constitution's Gift Clause; and (3) complies with any other lawful restrictions or requirements imposed by funding source.

This opinion addresses current circumstances surrounding the outbreak of the coronavirus disease (“COVID-19”), which prompted the United States Department of Health and Human Services’ declaration of a Public Health Emergency on January 31, 2020, and the Governor’s Declaration of a State of Emergency on March 11, 2020.<sup>1</sup> Although the analysis of any expenditure under these unprecedented circumstances is inherently fact-intensive, this opinion is intended to provide guidance and the appropriate legal framework for school districts’ governing boards to consider when making health-related expenditures in combatting the community spread of COVID-19 for the benefit of their schools’ communities.

### **Background**

School districts in Arizona are political subdivisions of the state with geographic boundaries that are organized to administer, support, and maintain public schools. A.R.S. § 15–101(23). A school district’s governing board is “a body organized for the government and management of the schools within a school district or a county school superintendent in the conduct of an accommodation school.” A.R.S. § 15–101(14).

#### **A. Funding Sources**

“Funding for Arizona’s public schools is governed by a complex statutory formula.” *Cave Creek Unified Sch. Dist. v. Ducey*, 231 Ariz. 342, 345 n.1 (App. 2013). School districts receive funds from a variety of sources, including, but not limited to:

- state funding based upon “average daily membership” (“ADM”) calculations, *see* A.R.S. §§ 15–901(1) (defining ADM), 15–902.03 (establishing procedures for determining ADM); *see also* Ariz. Att’y Gen. Op. I08–007 (explaining methods for calculating ADM);
- state equalization funds, *see* A.R.S. § 15–971 (“[d]etermination of equalization assistance payments from county and state funds for school districts”);

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<sup>1</sup> As background, the World Health Organization also declared a pandemic on March 11, 2020.

- state specialty funds, *see, e.g.*, A.R.S. § 15-979 (establishing “[i]nstructional improvement fund” for school districts and charter schools);
- federal grants, *see* A.R.S. § 15-207(B) (providing that monies appropriated from federal grants for the aid of school districts “shall be expended by the school districts for the purposes and in the manner set forth in the federal grant”); and
- property taxes, *see Hull v. Albrecht*, 192 Ariz. 34, 37, ¶ 9 (1998) (once the Legislature has met its responsibility for minimally adequate school system, a school district may “seek local sources of revenue, such as property taxation, to surpass the state standards”).

Even when a school district receives non-taxpayer sourced funds, such funds are generally deposited with the county treasurer and constitute public funds. *See* A.R.S. §§ 15-341(A)(14), (19), -996, -1105(F); Ariz. Att’y Gen. Op. I91-003 (concluding that funds included within a school district’s “maintenance and operation section of the school district budget” are public funds); *see also* A.R.S. § 35-212(F) (defining “public monies” as “all monies coming into the lawful possession, custody or control of a tax-supported political subdivision or an officer, employee or agent of a tax-supported political subdivision in an official capacity irrespective of the source from which, or the manner in which, the monies are received”).

School boards are also authorized to accept monetary gifts from donors, who may attach conditions to their gifts or donations. A.R.S. § 15-341(A)(14); *see, e.g., Dunaway v. First Presbyterian Church*, 103 Ariz. 349, 351-52 (1968) (“where [a] gift has passed into the hands of the donee, there is an implied promise agreeing to the purposes for which it is offered from the acceptance of the donation and there arises a bilateral contract supported by a valuable consideration”). However, “the ability of school districts to agree to certain conditions is limited.” Ariz. Att’y Gen. Op. I00-005. “[B]ecause of their obligations to serve the public

interest, school district governing boards may not enter into agreements that restrict their ability to make future policy decisions in response to changing conditions.” *Id.*

## **B. Authority To Make Expenditures**

“It is axiomatic that a governmental body may disburse funds only for a public purpose.” *Wistuber v. Paradise Valley Unified Sch. Dist.*, 141 Ariz. 346, 348 (1984) (citation omitted). Accordingly, when spending district money, school districts must ensure that the expenditure is authorized by statute and does not violate Arizona’s Gift Clause.

### **1. Statutory Authority**

“A school district governing board’s powers are limited to those that the Legislature has expressly or impliedly conferred upon it.” Ariz. Att’y Gen. Op. I10–003 (citing *Tucson Unified Sch. Dist. No. 1 v. Tucson Educ. Ass’n*, 155 Ariz. 441, 442–43 (App. 1987), and Ariz. Att’y Gen. Op. I00–022); *see also Campbell v. Harris*, 131 Ariz. 109, 112 (App. 1981) (“School boards have only the authority granted by statute, and such authority must be exercised in a manner permitted by statute.”).<sup>2</sup>

A school board’s general and discretionary powers, which include the authority to make various expenditures for express purposes, are found in A.R.S., Title 15. *See, e.g.*, A.R.S. § 15–341 (establishing school board’s “[g]eneral powers and duties”); A.R.S. § 15–342 (establishing school board’s “[d]iscretionary powers”); A.R.S. § 15–764 (powers and duties of the school

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<sup>2</sup> For example, “school districts’ express authority to offer educational programs and instructional activities to pupils and to use such programs to promote a high level of academic achievement in the schools necessarily implies the authority to expend funds for cash awards or other special recognition of such achievement.” Ariz. Att’y Gen. Op. I90–072; *see also* A.R.S. § 15–701(D) (governing board “may prescribe the course of study and competency requirements for promotion that are in addition to or higher than the course of study and competency requirements the state board prescribes”). At a time when graduation ceremonies may be canceled in light of COVID-19, a school district could recognize the academic achievement of its schools’ graduating classes by printing banners and displaying them publicly or making other expenditures aimed to promote academic achievement.

board include providing “special education and related services for all children with disabilities...”). As relevant here, a school board has express authority to, “[i]n conjunction with local law enforcement agencies and emergency response agencies, develop an emergency response plan for each school in the school district in accordance with minimum standards developed jointly by the department of education and the division of emergency management within the department of emergency and military affairs.” A.R.S. § 15-341(A)(31). A school district’s purpose is to promote the education of the State’s youth, and its granted powers are intended to meet that purpose. *See Prescott Comm. Hosp. Comm’n v. Prescott Sch. Dist. No. 1*, 57 Ariz. 492, 495 (1941) (holding lease of school property to a city hospital that was not authorized by statute was *ultra vires* and void, while emphasizing, “school districts are not permitted to give away the property of a district even for the most worthy purpose”).

For example, A.R.S. § 15-341(A)(4) authorizes school districts to acquire school furniture, equipment, and supplies “for the use of the schools.” This Office previously opined that this statute authorized a school district to spend monies to improve fields (by installing lights and building dugouts and fences) owned by a community center where the school’s junior high and high school games were played, even though the school did not own or lease the recreational facilities. *See Ariz. Att’y Gen. Op. I78-93*. This was a permissible expenditure under A.R.S. § 15-341(A)(4) because the funds were spent for the school’s “use.” *See id.* Importantly, the opinion noted that the parties “could avoid the possibility of an improper gift by agreeing with the owner of the playing facility that, in consideration for the district’s making improvements, the owner would guarantee the district use of the facilities during the life of the improvements or, in the alternative, during such period of time as the parties agree represents an equivalency between the fair market value of the property and the cost of the improvements.” *Id.*

Other statutes in Title 15 likewise require that certain funds be used for express purposes designated in the statute. For example, school districts are authorized to lease school property, but expenditures of any funds generated from such leases must be made for “civic center school purposes.” A.R.S. § 15–1105(F). Arizona law also requires that “school monies received from the state and county school apportionment” be used “exclusively for payment of salaries of teachers and other employees and contingent expenses of the district.” A.R.S. § 15–341(A)(17). And school districts may “[e]stablish and operate a community school program in any school in its school district” and “[e]xpend community school monies for operation of [the] program.” A.R.S. § 15–1142(1), (3).<sup>3</sup>

## **2. Limitation Of Authority Under The Gift Clause**

Any expenditure of public funds must also comply with the Arizona Constitution’s Gift Clause, which prohibits public entities from “mak[ing] any donation or grant, by subsidy or otherwise, to any individual, association, or corporation[.]” ARIZ. CONST. art. IX, § 7. This constitutional prohibition “was intended to prevent governmental bodies from depleting the public treasury by giving advantages to special interests[.]” *Wistuber*, 141 Ariz. at 349. Accordingly, school districts’ expenditures of public funds must comply with the Gift Clause. *See id.*; Ariz. Att’y Gen. Op. I00–022.

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<sup>3</sup> *See also* A.R.S. § 15–1141(3) (defining “[c]ommunity school program” as “the involvement of people in the development of an educationally oriented community” and stating “[t]he community school serves the purposes of academic and skill development for all citizens, furnishes supervised recreational and avocational instruction, supplies remedial and supplemental education, furnishes meeting places for community groups and provides facilities for the dissemination of a variety of community related services, including extended day resource programs as defined in § 15–1105”).

## Analysis

A school district has authority to make health-related expenditures for students, families, and community members to combat the spread of COVID-19, provided that such expenditures are statutorily authorized, do not violate the Gift Clause, and comply with any lawful restrictions or requirements imposed by the funding source.

### **A. Potential Funding Sources**

Several funding sources may be available for school districts to make health-related expenditures for families, students, and community members for COVID-19 purposes. The following examples are merely illustrative, not exhaustive.

First, state and federal grants are a possible source of funding, provided that expenditures are consistent with the purpose(s) of the grant and comply with legal requirements under A.R.S., Title 15. *See, e.g.*, A.R.S. §§ 15–207(B) (federal grants); 15–341(A)(14) (allowing districts to accept gifts and grants); 15–916 (expenditure of state grant monies). If the language of a state or federal grant is broad enough to encompass spending for community public health purposes, or if such purposes are implied by the grant, such grant funds may serve as a source of funding for health-related expenditures. *See* Ariz. Att’y Gen. Op. I10–003 (opining that if a federal grant “does not specifically authorize the school districts to [make a particular expenditure], such authority may be implied where it is consistent with the intended purpose of the funds”); Ariz. Att’y Gen. Op. I12–003 (reasoning that because school boards are permitted to accept gifts and grants “and to expend the money for the donor’s intended purpose,” there is “no statutory restriction on a school district spending [state] grant funds on district-conducted educational preschool programs in accordance with the terms the grant sets forth”).

As relevant here, Arizona school districts may be eligible for federal grants under the Coronavirus Aid, Relief and Economic Security Act (“CARES Act”), signed into law on March 27, 2020. *See* L. Chew, Ariz. Joint Legis. Budget Comm., CARES Act – COVID 3, U.S. Congress Program Summary, *available at* <https://www.azleg.gov/jlbc/covidphase3summary.pdf> (summary of CARES Act prepared by Arizona legislative staff on the Joint Legislative Budget Committee (“JLBC”) (last visited Apr. 23, 2020). The CARES Act includes an “Education Stabilization Fund” (“ESF”), which “allocates \$30.75 billion to states, school districts/charter schools, and higher education institutions.” *Id.* Based on preliminary estimates, school districts and charter schools in Arizona are expected to receive “at least 90% of the state allocation, or \$257 million, in proportion to the amount of Title I-A funding received,” in the Elementary and Secondary School Emergency Relief Fund (“ESSER Fund”), which is one of three funds included in the ESF. *Id.*<sup>4</sup>

Eligible school districts may use grants awarded under the ESSER Fund for twelve express purposes, which include the following:

- Coordination of preparedness and response efforts of local educational agencies with State, local, Tribal, and territorial public health departments, and other relevant agencies, to improve coordinated responses among such entities to prevent, prepare for, and respond to coronavirus;
- Activities to address the unique needs of low-income children or students, children with disabilities, English learners, racial and ethnic minorities, students experiencing homelessness, and foster care youth, including how outreach and service delivery will meet the needs of each population;

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<sup>4</sup> *See also* R. Skinner, et al., Cong. Research Service Mem., Estimated State Grants Under the Education Stabilization Fund Included in the CARES Act (Mar. 27, 2020), *available at* <https://www.politico.com/states/f/?id=00000171-31b8-da0d-a17b-fffb32a90000> (describing the ESF and appropriations available under each of the three emergency relief funds) (last visited Apr. 22, 2020).



- Developing and implementing procedures and systems to improve the preparedness and response efforts of local educational agencies;
- Providing mental health services and support; and
- Other activities that are necessary to maintain the operation of and continuity of services in local educational agencies and continuing to employ existing staff of the local educational agency.

*See* CARES Act, H.R. 748, 116th Cong. (2019-2020) at 285–87, *available at* <https://www.congress.gov/116/bills/hr748/BILLS-116hr748enr.pdf> (last visited Apr. 23, 2020).

A school district could construe the above purposes to include the provision of health-related services, supplies, and resources for the school district’s students, parents, and community members. *See* Ariz. Att’y Gen. Op. I10–003 (when a federal grant “does not specifically authorize the school districts to [make a particular expenditure], such authority may be implied where it is consistent with the intended purpose of the funds”).

Second, as noted above, a school board is permitted to accept gifts and donations, *see* A.R.S. § 15–341(A)(14), but “may not enter into agreements that restrict [the board’s] ability to make future policy decisions in response to changing conditions.” Ariz. Att’y Gen. Op. I00–005. Accordingly, school districts that accept donations for health-related expenditures in connection with COVID-19 should ensure that there is sufficient flexibility associated with any conditions placed on the donation, particularly given the rapidly-changing circumstances presented by COVID-19. With permission of the donor, school districts could spend donated funds in their discretion for COVID-19 purposes that benefit the health of students, families, and community members.

Third, school districts may have statutory authorization to spend money for COVID-19 purposes from a fund established by statute. For example, student activity funds, which are subject to approval and oversight by the school board, are monies that are raised by students’

efforts in connection with activities of student organizations and clubs. *See* A.R.S. § 15–1121 to –1126; Ariz. Att’y Gen. Op. I06–002 (“Student activities monies are not district funds, but they are subject to school district governing board oversight” and “constitute public money”). A student organization or club could authorize health-related expenditures of its student activities monies to benefit the school’s community, but “students must be involved in decisions concerning the expenditure of” such money, which “may be expended only after there has been meaningful involvement by students regarding the purposes for which it will be spent.” Ariz. Att’y Gen. Op. I79–188.

Finally, it is noteworthy that A.R.S. § 15–1105(A) allows school boards to “lease school property, including school buildings, grounds, buses and equipment, to any person, group or organization for any lawful purpose, including ... economic, artistic, moral, scientific, social, religious or other civic or governmental purpose in the interest of the community[.]”<sup>5</sup> Although A.R.S. § 15–1105 “does not specifically address health care issues,” Ariz. Att’y Gen. Op. I02–003, health-related services and supplies to prevent the community spread of COVID-19 are likely encompassed in the “economic,” “social,” and “civic” purposes of this statute. School boards have express authority to “charge a reasonable use fee for the lease of the school property, which may include goods contributed or services rendered by the person, group or organization to the school district.” A.R.S. § 15–1105(A); *see also* A.R.S. § 15–1105(G)(3) (defining “[r]easonable use fee”). And school boards “may permit the uncompensated use of school buildings, grounds, buses, equipment and other school property ... by any organization whose membership is open to the public and whose activities promote the educational function

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<sup>5</sup> School boards leasing school property must “require proof of liability insurance[.]” A.R.S. § 15–1105(E).

of the school district as determined in good faith by the school district’s governing board ... except as provided in § 15–511.” A.R.S. § 15–1105(B).

The provisions in A.R.S. § 15–1105 would therefore permit schools to lease their property to organizations in exchange for the provision of health-related goods and services (and charge a reasonable use fee, or allow “uncompensated use” if A.R.S. § 15–1105(B) is satisfied) for those broad purposes that are “in the interest of the community.” A.R.S. § 15–1105(A); *see, e.g.,* Ariz. Att’y Gen. Op. I02–003 (opining that a school district may lease school facilities to a private company that provides dental services to children, “provided that the school [] board concludes that providing access to dental services is a civic purpose in the interest of the community under A.R.S. § 15–1105” and stating the school district “must charge the organization a reasonable use fee”).

#### **B. Gift Clause Considerations**

A school board’s expenditure of public money for health-related purposes in response to COVID-19 likely would not violate the Gift Clause. “A two-prong test determines whether a challenged government expenditure violates the Gift Clause.” *Cheatham v. DiCiccio*, 240 Ariz. 314, 318, ¶ 10 (2016). “The expenditure will be upheld if (1) it has a public purpose, and (2) the consideration received by the government is not ‘grossly disproportionate’ to the amounts paid” to the private person or entity. *Id.* (citing *Turken v. Gordon*, 223 Ariz. 342, 345, 348 ¶¶ 7, 22 (2010)).

Here, using school district money to make health-related expenditures (for example, to pay for services, supplies, or equipment) in response to COVID-19—a declared pandemic—satisfies the first “public purpose” prong of the test. The Arizona Supreme Court has found that similar expenditures made for the health and welfare of the public are made for public purposes.

*See, e.g., Indus. Dev. Auth. of the Cty. of Pinal v. Nelson*, 109 Ariz. 368, 374 (1973) (holding that revenue bonds sold to fund pollution control facilities were for the public purpose of protecting the health of citizens by preventing or limiting air, water, and other forms of pollution); *Town of Gila Bend v. Walled Lake Door Co.*, 107 Ariz. 545, 550 (1971) (holding that supplying water for fire suppression preserved and protected lives and property and was a public purpose); *City of Phoenix v. Superior Court*, 65 Ariz. 139, 145 (1946) (holding that the erection of temporary housing for war veterans and their families through expenditure of municipal funds was spent to prevent crime and disease and was for a public good and general welfare); *Humphrey v. City of Phoenix*, 55 Ariz. 374, 387 (1940) (holding that slum clearance projects are adopted for self-protection against crime and disease, and that money spent for these purposes is for the public good and welfare).

The second prong of the test, which asks whether “the consideration received by the government is not ‘grossly disproportionate’ to the amounts paid” to the private person or entity, *see Cheatham*, 240 Ariz. at 318, ¶ 10, implicates a fact-intensive analysis. Notably, the Arizona Supreme Court has cautioned that its Gift Clause precedent has not dealt with “non-contractual public expenditures, such as direct assistance to the needy,” and “[i]n such circumstances, the private party does not promise to do anything in return, and there thus is no occasion to analyze adequacy of consideration.” *Turken*, 223 Ariz. at 348 n.4. This statement suggests that the second prong under the Gift Clause test may not apply to “non-contractual public expenditures,” which may resemble the type of expenditures contemplated by this opinion. If a public health expenditure for COVID-19 purposes is not contractually based, and is instead in the form of direct assistance to the school’s community at large, the second prong of the Gift Clause test may not apply. In such circumstance, the analysis of such “social safety net programs” may instead

focus on whether “anyone who qualifies for public assistance may obtain it” and whether “large numbers” of persons do qualify. *See generally* Matthew D. Mitchell, Jonathan Riches, Veronica Thorson & Anne Philpot, *Outlawing Favoritism: The Economics, History, and Law of Anti-Aid Provisions in State Constitutions*, George Mason U. Mercatus Center Working Paper (2020), available at <https://www.mercatus.org/system/files/mitchell-outlawing-favoritism-mercatus-working-paper-v2.pdf> (last visited Apr. 23, 2020).

If an expenditure *is* based in contract or is made to benefit the health of specific persons (students, parents, or community members) instead of the community as a whole, prior opinions of this Office provide useful guidance on the interplay between the Gift Clause and school district spending. For example, school districts are permitted to give cash or saving bond awards to students to promote academic achievement, but these awards must be “limited to its value as a token acknowledgment of the pupil’s accomplishment” to avoid an improper gift of public funds. Ariz. Att’y Gen. Op. I90–072. School districts may not give substantial cash awards to individual students for perfect attendance, however, because this would violate the Gift Clause under the second prong of the test. Ariz. Att’y Gen. Op. I87–123. Because school attendance is already required by law, a student’s attendance “cannot constitute consideration for a monetary award.” *Id.*

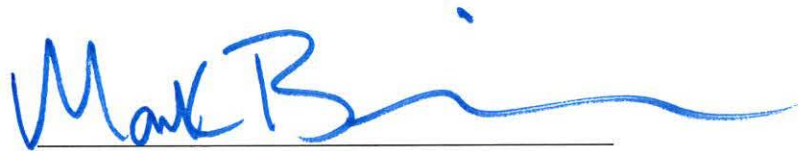
This office has also previously opined that school districts are permitted under the Gift Clause to provide food, beverages, or refreshments to parents who assist at governing board-authorized events after normal school hours or on weekends. Ariz. Att’y Gen. Op. I10–003. In that scenario, to comply with the Gift Clause, “the school district must receive direct benefits from the parents’ participation in the school activities that exceed the expenditure.” *Id.* Thus, volunteer work provided by parents of the district would qualify as sufficient consideration. *See*

*Cheatham*, 240 Ariz. at 321, ¶ 29 (“Consideration is a performance or return promise that is bargained for in exchange for the other party’s promise.”) (internal quotation marks and citation omitted).

In the case of health expenditures for COVID-19 purposes, a school board should be mindful that “[t]he Gift Clause is violated when [the] consideration, compared to the expenditure, is ‘so inequitable and unreasonable that it amounts to an abuse of discretion.’” *Id.* at 322, ¶ 35 (citation omitted).

### **Conclusion**

When governing boards of school districts in Arizona make health-related or other expenditures for families, students, and community members in response to COVID-19, they must ensure that the expenditure: (1) is statutorily authorized; (2) does not violate the Arizona Constitution’s Gift Clause; and (3) complies with any other lawful restrictions or requirements imposed by funding source.



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