



To: Vermont Superintendents and School Business Officials

From: Vermont School Boards Insurance Trust

Re: Contracted Service Guidance during COVID-19

School closures due to COVID-19 raise complex issues concerning existing contracted service providers. Decisions concerning service contracts involve significant legal considerations and a district should consult with its attorneys before making decisions concerning specific contracts.

Service contracts are enforceable unless they are modified. In most cases, it will be preferable to modify existing contractual obligations given the need for on-going relationships with your providers. We strongly recommend that districts have a discussion with their contracted providers in order to determine what approach makes sense and will work for all parties.

Districts should review their contracts to determine whether any modification or clarification is necessary in the event services are not needed in April or May, but are required in June. If districts continue their payments under the contract even when services are not being provided, then they should have some protection in place to ensure they can access services in the event the school year is extended past the duration of the agreement/term of service.

Generally, parties to a written service contract can amend the terms in a subsequent written agreement, signed by both parties. For instance, an amendment could suspend operation for a period where students are dismissed due to COVID-19, or could substitute new services, such as a provision for buses and drivers to be used to deliver school meals. Any amendment must otherwise comply with laws and regulations concerning the subject matter. An amended contract allows the parties to continue the relationship on different terms and potentially avoid litigation.

There may be other circumstances where a service contractor will not agree to amend the contract, despite the fact that the services can no longer be performed as contemplated in the contract. Contract performance may be excused due to specific contractual clauses and/or legal principles outlined below. Although such exemptions will be strictly construed by a court, if necessary, it is likely that many contractual obligations can be voided or deferred during the dismissal/closure period.

Termination Clause

Service contracts may have specific terms permitting the district to void or terminate the contract under the circumstances. Such terms vary from contract to contract.



Force Majeure/Act of God

Existing contracts may include clauses excusing performance due to a *force majeure*, or act of God. A *force majeure* generally requires an unforeseeable event or circumstance that is beyond the control of and without the fault or negligence of the non-performing party. A *force majeure* event may extend to the COVID-19 pandemic and the government's response.

Impossibility

Similar to *force majeure*, the doctrine of impossibility of performance applies to excuse a party's breach of contract where that party's own performance has become impossible due to an unanticipated change in circumstances. Impossibility means not only strict impossibility, but impracticability because of extreme and unreasonable difficulty, expense, injury, or loss involved. Impossibility of performance may be temporary.

Frustration of Purpose

Contract performance may be excused if the contract's purpose is frustrated or made impracticable without fault of the party seeking discharge. The frustration must be substantial and caused by a change in fundamental assumptions on which the contract was made.

Non-performance and Subsequent Inaction

Contract performance may be excused by non-performance and lack of enforcement by the parties. Failure to enforce the contract may result in waiver of the terms, though there is significant risk that the contract could be subsequently enforced according to its terms.

If a district has questions concerning the application of these principles to specific service contracts, the district should consult with its attorney.