

218-2021-CV-01160

Exhibit F

MEMORANDUM

To: Governor Christopher Sununu
From: John Formella, Attorney General
Date: October 8, 2021
Re: Federal COVID-19 Grant Award Fund Requirements

SUMMARY:

You have asked for an opinion regarding the impact of certain language contained within the terms and conditions of two Federal COVID-19 grant awards, specifically items #9B and #9D tabled at the September 15, 2021 meeting of the Governor and Executive Council. This memo is intended to provide the requested opinion, with the most important points being the following:

- (1) the referenced language appears in items that the Governor and Council have already approved;
- (2) the referenced language is likely to appear in future COVID-19 related items; and
- (3) the referenced language does not bind the State to any broad and sweeping federal mandates because the language only applies to a narrow set of guidance and directives, and the Constitution limits the federal government's ability to use the referenced language to bind the State to any broader set of guidance and directives.

BACKGROUND:

Federal grant awards each contain their own terms and conditions related to the particular program. Awards that are funded through certain legislation also have additional general terms and conditions. Some items previously and currently before the Governor and Executive Council include the following language:

Coronavirus Disease 2019 (COVID-19) Funds: A recipient of a grant or cooperative agreement awarded by the Department of Health and Human Services (HHS) with funds made available under the Coronavirus Preparedness and Response Supplemental Appropriations Act, 2020 (P.L.116-123); the Coronavirus Aid, Relief, and Economic Security Act, 2020 (the "CARES Act") (P.L. 116-136); the Paycheck Protection Program and Health Care Enhancement Act (P.L. 116-139); the Consolidated Appropriations Act and the Coronavirus Response and Relief Supplement Appropriations Act, 2021 (P.L. 116-260) and/or the American Rescue Plan of 2021 (P.L. 117-2) agrees, as applicable to the award, to: 1) comply with existing and/or future directives and guidance from the Secretary regarding control of the spread of COVID-19; 2) in consultation and coordination with HHS, provide, commensurate with the condition of the individual, COVID-19 patient care regardless of the individual's home jurisdiction and/or appropriate public

health measures (e.g., social distancing, home isolation); and 3) assist the United States Government in the implementation and enforcement of federal orders related to quarantine and isolation.

The Executive Council previously approved three items containing this language (Item #19 on August 18 and Items # 9A and #9C on September 15) and tabled two items containing the language (# 9B and #9D) at its September 15 meeting. It is likely that future COVID-19 grant award items will contain this same language.

This language has raised a number of questions addressed below.

ISSUE:

The federal grant award language seems to claim the state must comply with “future directives” regarding the control of the spread of COVID-19. Can the federal COVID-19 grant award funds require the State to follow any future initiatives related to the federal COVID-19 response, such as Covid-19 vaccine mandates or other broad sweeping mandates?

SHORT ANSWER:

No. The quoted language is limited to guidance and directives “as applicable to the award” and refers to a very narrow class of guidance and directives. The currently issued guidances are clarifications of existing grant requirements and do not impose new conditions. In addition, federal grant conditions must be unambiguous, and the United States Constitution places significant limits on the federal government’s ability to utilize funding conditions to require the States to adhere to federal directives. There would be strong legal grounds to challenge any guidance or directive that created broadly sweeping new and different conditions, such as a vaccine mandate or quarantine provision.

ANALYSIS:

I. Terms of Federal COVID-19 Grant Awards and Compliance Requirements

The paragraph quoted above is a general reminder that federal grant awards funded by the listed sources may be subject to additional conditions “as applicable to the award.” **This paragraph does not mean that recipients of federal funds must adhere to any and all CDC-issued guidances and directives.** It only requires that they adhere to the guidances and directives specific to the awards they have accepted. The three listed conditions do not all necessarily attach to all of the funding sources, nor would they necessarily be applicable to a particular program.

a. Compliance with existing directives

The grant awards currently before the Governor and Executive Council for review and approval are from an award category titled “CDC-RFA-IP19-1901 Immunization and Vaccines for Children.” The “Remarks” section of these awards also notes that the funding is “related to the activities under COVID-19 Vaccination Supplement 4 (April 2021).” **If the State accepts**

funding from these awards, it only needs to comply with the existing guidance and directives specifically issued relative to these awards, and only if such guidance and directives do not exceed the strict Constitutional limitations discussed in section b below.

Upon reviewing the US HHS/CDC website, it appears that there has only been one two-page guidance for grant awards from the IP19-1901 award category, which is attached to this memo as EXHIBIT A. This guidance explains that the award funds may be used to fund COVID-19 incentive programs. It also specifically states that the guidance is not “intended to conflict with the requirements placed on a vaccine provider under the terms of their CDC COVID-19 Vaccination Program Provider Agreement or the underlying terms of the recipient’s grant award and applicable grant regulations.” In other words, **the only additional guidance issued for this award category provides clarification on how the award may be used, but does not impose additional external conditions on the grantee.**

The COVID-19 Vaccination Supplement 4 (April 2021) program has also issued one twelve-page guidance, which is attached to this memo as EXHIBIT B. This guidance details how portions of grant award funds must be used to serve populations disproportionately affected by COVID-19, such as “People living in rural communities,” “People with disabilities,” “People who are underinsured or uninsured,” and “People in racial and ethnic minority groups.” Like the guidance specific to the IP19-1901 award, this guidance provides additional requirements on how the award money can be spent. **It does not impose additional external conditions on the grantee.**

b. Compliance with future directives

The grant terms referenced above reference compliance “with existing and/or future directives.” There are significant limits on the types and scope of “future directives” that would be enforceable upon a grant recipient.

First, as noted above, the actual requirement is limited to directives and guidance as applicable to the award. **The language does not mean that grant award recipients are bound to any and all future directives of the HHS Secretary.** Based upon the existing guidances that have been issued, it is reasonable to expect that future guidances and directives will be about how the grantee must spend and administer grant funds, not directives imposing additional external requirements on the grantee, such as a vaccine mandate. In fact, as already noted, the existing guidance for the IP19-1901 award category specifically states that it is not intended to modify the underlying grant terms.

Second, the United States Supreme Court has articulated significant Constitutional limitations on the federal government’s ability to impose conditions on grant award funds. As a starting point, grant conditions must be unambiguous and are viewed similar to contract interpretations. “[L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress’ power to legislate under the spending power thus rests

on whether the State voluntarily and knowingly accepted the terms of the ‘contract.’ There can, of course, be no knowing acceptance if a state is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously.” *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) (internal citations omitted). “Though Congress’[s] power to legislate under the spending power is broad, it does not include surprising participating States with post-acceptance or ‘retroactive’ conditions.” *Id.* at 25.

c. Other Conditions

The second item in the quoted grant award language (provide COVID-19 patient care regardless of the individual’s home jurisdiction) appears to be a directive aimed at health care providers who ultimately benefit from the grant awards, not the State. For example, a Massachusetts hospital couldn’t receive funds from the grant award and then refuse to treat someone from Connecticut.

The third item is limited to quarantine and isolation and also does not have any apparent overlap to the announced vaccine mandates. There have not yet been any quarantine or isolation orders from the federal government relating to COVID-19. The CDC has issued isolation recommendations for those who test positive for COVID-19, but they have not been issued under the CDC’s ordering authority and are, instead, recommendations. Further, even if the federal government did issue quarantine or isolation directives, any attempt by the federal government to utilize grant funding conditions to bind States to these types of orders or directives would be subject to the significant Constitutional limitations described in section b above.