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October 29, 2015

VIA EMAIL

Ms. Kristen D. DeCato
Milwaukee Public Schools
5225 West Vliet Street
Milwaukee, WI 53208

Re: Request for Legal Opinion regarding Letters of Interest and the Opportunity Schools and Partnership Program (OSPP)

Dear Ms. DeCato:

INTRODUCTION AND QUESTIONS POSED.

On September 28, 2015, you wrote to this office posing the following questions:

1. Pursuant to s. 119.61, what is the deadline for the superintendent of schools to submit a letter of interest regarding eligible school buildings? (Please note our records show that the school building inventory provided under s. 119.61(2) was submitted on August 11, 2015).
2. In the absence of the list of buildings determined to be eligible school buildings under s. 119.61, please provide language that will serve as a "letter of interest" for any school building that is determined to meet the definition of "surplus property," specifically, an "eligible school building" under s. 119.61 at a future date.
3. To whom does the superintendent of schools direct the letter of interest? (i.e. common council? City clerk? Both?).
4. If the superintendent of schools submits a letter of interest for all buildings that are determined to meet the definition of "surplus property" or "eligible school building," does doing so prevent the OSPP commissioner from taking a vacant building under s. 119.9000 or s. 119.61 and leasing it to an educational operator?



ANSWERS.

Because Wis. Stat. §119.61 is a recently enacted statute, no courts have issued any decisions on its interpretation. Therefore, all review and analysis of the questioned issues have been done according to the plain meaning of the terms used in the statute and it has been read in conjunction with Wis. Stat. §119.9000, et. seq.

Answer to Q. 1. Deadline for letters of interest.

We essentially answered this question in our office's August 27, 2015 opinion to Martha Brown, in our response to Ms. Brown's question 3. We further elaborate.

Wis. Stat. §119.61(3) states:

(a) If, within 60 days after receipt of the inventory required under sub. (2)(a) or of a notice under sub. (2)(c), either the commissioner or the superintendent of schools submits a letter of interest regarding an eligible school building, the common council shall immediately proceed to add the commissioner or the superintendent of schools, respectively, as an agent of the board on any existing lease for the eligible school building between the common council and the board.

(b) If, no more than 60 days after providing the commissioner and the superintendent of schools with a copy of the inventory under sub. (2)(a) or of a notice under sub. (2)(c), neither the commissioner nor the superintendent of schools has submitted a letter of interest under par. (a), the city clerk shall post a public notice on the city's Internet site. The city clerk shall include in the public notice under this subsection the address of and the information specified under sub. (2)(a) 1. and 8. for each school building identified on the inventory under sub. (2)(a), or on the notice under sub. (2)(c), that is an eligible school building. The city clerk shall include in the public notice a request for and instructions for submitting letters of interest from persons interested in purchasing an eligible school building.

We used (3)(b) to determine the deadline for the superintendent of schools to submit a letter of interest regarding eligible school buildings because the 60 days referenced in (3)(a) appear to be tied to the commissioner and/or the superintendent being placed on an existing lease, and as of today's date, MPS has not identified any eligible building that has such a lease.

Section 119.61(3)(b) indicates that the city clerk shall post a public notice on the city's website for all eligible buildings concerning which neither the commissioner nor the

superintendent of schools has submitted letters of interest. However, this section provides these parties with 60 days to submit letters of interests from the date that both the commissioner and the superintendent receive the building inventory required by §119.61(2)(a). Although the superintendent of schools received her copy of the §119.61(2)(a) building inventory on August 11, 2015, because the commissioner of the OSPP program has yet to be name (Wis. Stat. §119.9001(2)(a) requires the commissioner to be appointed no later than November 11, 2015, and we are waiting for that appointment to be made), he/she has not received the §119.61(2)(a) building inventory. Therefore, and as our August 27, 2015 opinion letter to Ms. Brown indicated, the 60-day clock under (3)(b) has not yet begun running. The deadline for the superintendent of schools to submit her letter(s) of interest will be 60 days from the date the Board forwards the §119.61(2)(a) building inventory list to the named commissioner.

Answer to Q. 2. Language for letters of interest.

First, we note that Wis. Stat. §119.61(2)(a) specifies the information that is required to be included on an inventory of school buildings in the district. While, oddly, the inventory does not have to specifically designate a building as an “eligible school building” meeting the §119.61(1)(b) definition, the information that is required to be on the inventory includes all the factors listed in §119.61(2)(a) 1 through 8, including (as subsection 6) the duration over the past 36 months that the building has been used in the manner specified in subsections 2 through 5, and (as subsection 7) whether the board has designated the school building as surplus, underutilized, or vacant on any resolution adopted by the board within the previous 5 years. Consequently, from the information that is required to be included on the inventories, the commissioner, superintendent, and interested education operators will be able to make some independent determinations regarding applicability of the “eligible school building” definition to particular buildings. The statute does define “eligible school buildings” in §119.61(1)(b) as including both buildings that the Board declared vacant, surplus and/or underutilized, as well as those buildings that are unused or that fall under the definition of “underutilized” in §119.61(1)(c). Accordingly, we believe the legislature meant for the commissioner, superintendent and interested education operators to make the independent determination of which buildings qualify as eligible using the statute’s criteria and the information on the Board’s August 11, 2015 inventory list.

The superintendent submitted a letter of interest indicating her interest in “all school buildings determined to be ‘eligible school buildings’”...on October 9, 2015. Because the superintendent has already submitted this general letter of interest to the Common Council, we believe that your request for language is moot. If there comes a time when the superintendent identifies particular buildings for which she wishes to submit letters of interest, please contact this office and we will happily work with you to develop language that is specific to the facts and circumstances of those buildings. We do suggest that when the superintendent submits future letters of interest, they be more specific

including: the superintendent's articulation of specific per-building interest and intended use or re-use. The superintendent's specific letters of interest can also indicate whether the 24-consecutive month period in §119.61(4)(e) has been met, and such things as, for example, whether a particular building is part of "an active expansion plan" envisioned by Wis. Stat. §119.61(1)(c)1.a.

The submission of the superintendent's general letter of interest, however, has started the process established by §119.61. As noted above, the superintendent's letter would have triggered §119.61(3)(a), resulting in the superintendent being placed on an existing lease, however, as of today's date, MPS has not identified any eligible building that has such a lease. Therefore, the posting process mentioned in §§119.61(3)(b) and (4)(b) has been triggered by Dr. Driver's letter – subject however to the delay referred to in our answer to question 1 above regarding the appointment of the commissioner.

The City Clerk has asked that the Department of City Development (DCD) assist the Clerk with the City's internet postings. As such, and given that no OSPP commissioner has yet been appointed, once the OSPP commissioner's time to submit letters of interest has run out (see our answer to question 1 above), DCD will update the City website to note the superintendent's letter of interest and request that other education operators submit letters of interest within 28 days. Depending on whether letters of interest beyond Dr. Driver's are submitted by these education operators, the bidding processes outlined in §§119.61(4)(c) and (4)(d) will take place.

Besides the superintendent's general letter of interest, a letter of interest was also submitted by Risen Savior Lutheran School on October 15, 2015, concerning Fletcher Elementary School located at 9520 W. Allyn Street. The Fletcher School building was identified on the Board's inventory list as a district support facility. The superintendent's letter and Risen Savior's letter will allow us to gain a better idea of how the statute's processes will play out.

Risen Savior, in its letter, specifically indicates that it is an "education operator" as defined in Wis. Stat. §119.61(1)(a). Risen Savior also expresses its opinion in its letter that the Fletcher Elementary School meets the definition of "eligible school building" as used in §119.61.

We note that, under Wis. Stat. §119.61(4)(c)1, the first step in the Common Council's competitive bidding process is to determine whether the prospective buyer is an "education operator" defined in §119.61(1)(a). This is a hurdle for the superintendent's general letter of interest because MPS does not cleanly come under the definition of "education operator" as used in the statute. This is perhaps understandable given the legislature's apparent intent to remove unused/underused buildings from MPS ownership and control. Accordingly, it does not seem likely that the Common Council will be able to entertain these type general letters of interest from the superintendent for an "eligible school

building” until the building qualifies as an “eligible school building” for 24 consecutive months under §119.61(4)(e) so that “[a]ny person” may then submit a letter of interest.

Answer to Q. 3. Custodian for letters of interest.

It appears that per §119.61(3) and (4), the City Clerk is the custodian of letters of interest. The statute indicates that letters from the named commissioner and/or the superintendent should be submitted to the common council and directs the city clerk to update the City’s website regarding letters of interest (either updating information about letters of interest that were received or requesting letters of interest with instruction on how to submit them). Also, under City Charter 3-26-2 subsections a. and b., the City Clerk keeps the papers of the City and keeps a record of Council proceedings. We opine that letters of interest should be addressed to the City Clerk, for distribution to the Council, and that the letters should reference that they are being submitted under Wis. Stat. §119.61.

Answer to Q. 4. Superintendent v. Commissioner.

No. The superintendent’s submission of a general letter of interest for all buildings determined to meet the definition “eligible school building” under Wis. Stat. §119.61 will not prevent the OSPP commissioner from acquiring a vacant building under Wis. Stat. §§119.9000 or 119.61 and leasing it to an educational operator.

Under Wis. Stat. §119.61(2)(b), the school board must submit the Wis. Stat. §119.61(2)(a) inventory of school buildings to the commissioner, the superintendent, the city clerk, the department and the joint committee on finance. Under Wis. Stat. §119.61(3), each of the commissioner and superintendent may submit a letter of interest. The submission of a letter of interest by one does not prevent the submission of a letter of interest by the other.

Under Wis. Stat. §115.28(10m)(a), the state superintendent must submit to the commissioner and to the MPS superintendent an annual report identifying schools in the district placed in the lowest performance category on the most recent published accountability report, that were assigned to that lowest performance category or that were vacant or underutilized as per §119.61(1)(c). Under Wis. Stat. §119.9000(5), those schools are “eligible schools” for purposes of Wis. Stat. Ch. 119, Subch. II (the OSPP program). Under Wis. Stat. §119.9002(1), the commissioner must establish policies to determine whether those §119.9000(5) “eligible schools” are “suitable for transfer to the” OSPP program.

Wis. Stat. §119.9002(2)(b) directs the commissioner to solicit proposals for the operation and management of the “eligible schools” selected for the OSPP from “individuals, groups, persons, and governing bodies of private schools to operate and manage an

eligible school upon transfer of the school...” to the OSPP program. So, the commissioner is directed to request proposals from entities qualifying as education operators under §119.61. Thus, partnership between the OSPP commissioner and education operators is encouraged under Subchapter II of Wis. Stat. Ch. 119.

Under Wis. Stat. §119.9003(4)(c), the commissioner may enter into a lease with a §119.61(a)(a) “education operator” to operate a school building obtained by the commissioner under §119.61(3)(a), and then the commissioner must count that school towards the limits on schools in the OSPP program under §119.9002(2)(a).

We hope this has been helpful. Please call if you have questions or comments.

Very truly yours,



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