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MEMORANDUM

TO: Teresa Tate, Colorado League of Charter Schools

FROM: Bill Bethke

RE: NLRB Issue

Date: May 4, 2023

You have asked whether the refundable Employee Retention Tax Credit (or ERC) is available to Colorado charter schools. In our opinion, it is not. To be eligible an employer must:

- “have been carrying on a trade or business” *and not been,*
- “the Government of the United States, the government of any State or political subdivision ... or *any agency or instrumentality of*” the United States, a State or a political subdivision, *unless*
- the governmental entity was “a college or university or the principal purpose or function of the entity is providing medical or hospital care.”¹

That is, the general rule is one has to operate a “trade or business.” An exception that excludes an employer (even if they operate a trade or business) from participation if it has *any form* of governmental status. And an exception to the exception (restoring the ability to take the tax credit) exists for public colleges and public medical facilities. (There is also an exception to the exception for federally created charitable corporations, like the Smithsonian Institution.)

Public schools may or may not be a “trade or business.” If they are, the definition of excluded governmental entities is sweeping. In our view, Colorado charter schools have always been within this definition. Most decisively, the IRS term “instrumentality” applies. In plain language, an entity is an “instrumentality” of a political subdivision (here, a school district or CSI) if it is used as an instrument to implement a public purpose: here, providing public schooling. The IRS definition is more complex, but not ambiguous. Of the six factors stated by the IRS we believe all six are met. Even allowing some room for error (if, for example, only five of six are found satisfied), Colorado charter schools are IRS “instrumentalities” of government and are not eligible for the ERC.

This question may remind some of the issue that arose under the PPP. A number of schools received PPP payments without any severe consequences. But the issues are not the same. First, the definitions applied under the PPP had been interpreted by the Small Business

¹ <https://www.irs.gov/pub/irs-drop/n-21-23.pdf>, p. 4 (emphasis mine).

Administration with some inconsistency, which made it impossible to say with full confidence that charter schools were or were not eligible. Second, in the interest of getting money out the door during a world-wide crisis, the SBA ended up creating a safe harbor and strongly signaling over time that it would likely only look for serious abuses of program, not every technical misstep or misapplication. That sense of urgency and preference for overlooking honest mistakes does not apply here. Third: the IRS is not the SBA. Indeed, instead of something like the SBA safe harbor, the IRS is warning the public that this tax credit is being promoted in ways likely to lead to misuse and that the entity claiming the credit is fully responsible for performing due diligence to avoid IRS enforcement actions.

Again, it is our opinion, with a significant level of confidence, that Colorado charter schools are not eligible for the ERC refundable tax credit.