



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 14, 2010

To All Bond Counsel

Re: Ability of a School District to make Payments on Bonds From Funds Other than a Tax Levied for the Payment of Debt Service

By letter dated August 17, 2009, Robert Scott, the Commissioner of Education, sought guidance from the Office of the Attorney General regarding three questions relating to a school district's authority to make debt service payments on bonds using certain specified funds other than a tax levied for the payment of bond debt service.¹ We will address each question separately.

Question 1: May a School District Use Current Year Maintenance Tax Collections to Pay Debt Service on School District Bonds?

Commissioner Scott's first question focuses on whether a school district may use maintenance taxes to pay debt service on school district bonds. The Request Letter asks about the use of "current" maintenance taxes and whether a school district may levy a higher maintenance tax rate "for the purpose of using the proceeds from that tax to pay debt service on existing district bonds."² We will address this question in two parts: (i) whether a higher maintenance tax may be

¹See Letter from Robert Scott, Commissioner of Education, to the Honorable Greg Abbott, Attorney General of Texas (Aug. 17, 2009) (on file with the Public Finance Division) [hereinafter Request Letter]. The Request Letter distinguishes between voter approval of a maintenance tax and a tax to pay debt service on bonds. Request Letter at 1. We will therefore construe the Request Letter to be concerned with bonds described by section 45.001 of the Education Code for which voters have authorized the levy of a tax pursuant to section 45.003 of the Education Code.

²Request Letter at 1-2.

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levied for the purpose of paying debt service on existing school district bonds and (ii) whether *surplus* maintenance taxes may be used to pay debt service on existing school district bonds.

(i) Maintenance Taxes May Not be Levied to Pay Bond Debt Service.

Texas school districts have only such authority as is expressly granted by the constitution or statutes or necessarily implied therefrom.³ The Texas Constitution authorizes the Legislature to pass laws permitting school districts to levy a tax for the further maintenance of public free schools and for the erection and equipment of school buildings so long as the tax is approved by a majority of the qualified voters in the district.⁴ In exercising its authority under this constitutional provision, the Legislature enacted a comprehensive system of statutes governing school districts' taxing power and the expenditure of tax funds. The statutes that comprise this system are *in pari materia* and must be construed together.⁵

A statute conferring the power to tax must be "strictly construed, and must be closely followed."⁶ The Legislature has authorized school districts to levy two separate taxes: (i) an annual ad valorem tax for the maintenance of public schools,⁷ and (ii) an annual ad valorem tax to pay debt service on bonds issued for the acquisition, construction, and equipment of school buildings, and for other purposes specified in section 45.001(a)(1) of the Education Code.⁸ Each of these taxes is levied for a specific purpose, and the levy of each tax must be approved separately by the voters of the district in an election called for that purpose.⁹ Because the Education Code authorizes separate ad valorem taxes for different purposes, the maintenance tax cannot be levied for the purpose of paying bond debt service.

³ See *Geffert v. Yorktown Indep. Sch. Dist.*, 290 S.W. 1083, 1084 (Tex. Comm'n App. 1927, judgment adopted) (explaining that independent school districts have only those powers specifically given or implied as a necessary incident to those expressly conferred and that their powers must be exercised in strict conformity with the mandatory direction of the Legislature); *Fowler v. Tyler Indep. Sch. Dist.*, 232 S.W.3d 335, 338 (Tex. App.—Tyler 2007, pet. denied) ("a school district . . . exercises only such powers that are delegated to it by the state.") (quoting *Braun v. Trs. of Victoria Indep. Sch. Dist.*, 114 S.W.2d 947, 950 (Tex. Civ. App. — San Antonio 1938, writ refused); Op. Tex. Att'y Gen. No. GA-0596 (2008) at 2 n.2 (same).

⁴Tex. Const. art. VII, § 3(e).

⁵See *Madeley v. Trustees of Conroe Indep. Sch. Dist.*, 130 S.W.2d 929, 933 (Tex. Civ. App. — Beaumont 1939, writ dismissed judgment corrected) (citing *Love v. City of Dallas*, 40 S.W.2d 20 (Tex. 1931)).

⁶*Tri-City Fresh Water Supply Dist. No. 2 v. Mann*, 142 S.W.2d 945, 948 (Tex. 1940) (quoting *Frosh v. City of Galveston*, 11 S.W. 402, 404 (Tex. 1889)); see also *Geffert*, 290 S.W. at 1084 (stating that the power to tax is a special grant of authority that must be exercised in "strict conformity with the mandatory direction of the Legislature"); Op. Tex. Att'y Gen. No. JC-0291 (2000) at 4.

⁷Tex. Educ. Code Ann. § 45.002 (Vernon 2006).

⁸Tex. Educ. Code Ann. § 45.001 (Vernon Supp. 2009).

⁹Tex. Educ. Code Ann. § 45.003(a) (Vernon Supp. 2009).

The decision in *Madeley v. Trustees of Conroe Independent School District* supports this conclusion.¹⁰ While *Madeley* is concerned with the legality of expending maintenance taxes to pay directly for building improvements rather than to pay bond debt service, the court analyzed article 2784 of Vernon's Civil Statutes, a predecessor statute to sections 45.001, 45.002, and 45.003 of the Education Code.¹¹ The court determined that a tax levied for the purpose of maintenance can be used only for maintenance expenses, to the extent needed for that purpose, and that a tax levied to pay bonds can be used only to pay bonds to the extent needed for that purpose.¹²

Commissioner Scott also asks whether section 45.105(c) of the Education Code provides an independent basis to levy maintenance taxes to pay bond debt service.¹³ Section 45.105(c) states in part:

Local school funds from district taxes, tuition fees of students not entitled to a free education, other local sources, and state funds not designated for a specific purpose may be used for the purposes listed for state and county available funds and for purchasing appliances and supplies, paying insurance premiums, paying janitors and other employees, buying school sites, buying, building, repairing, and renting school buildings, including acquiring school buildings and sites by leasing through annual payments with an ultimate option to purchase, and for other purposes necessary in the conduct of the public schools determined by the board of trustees. . . .¹⁴

In enacting a statute, it is presumed that the entire statute is intended to be effective.¹⁵ A construction of section 45.105(c) that would authorize current maintenance taxes to be levied to pay debt service on bonds issued to finance capital expenditures is not supported by the plain language of section 45.105(c) or consistent with a reading of chapter 45 of the Education Code as a whole.

First, as discussed above, the power to tax must be expressly granted and is strictly construed. Section 45.105(c) does not expressly authorize the levy of maintenance taxes to pay bond debt service, and a construction of section 45.105(c) that would authorize the a school district to levy a

¹⁰See generally *Madeley*, 130 S.W.2d at 933-34.

¹¹*Madeley*, 130 S.W.2d at 932-34.

¹²*Madeley*, 130 S.W.2d at 933; see also *id.* at 934 (holding that *surplus* maintenance taxes could be spent on building improvements).

¹³Request Letter at 2 (in which Commissioner Scott asks for clarification as to whether under the authority of section 45.105 of the Education Code a district may pay debt service on bonds from *current* maintenance taxation).

¹⁴Tex. Educ. Code Ann. § 45.105(c) (Vernon 2006).

¹⁵Tex. Gov't Code Ann. § 311.021(2) (Vernon 2005).

maintenance tax for the purpose of paying bond debt service would be inconsistent with the system of taxation set forth in sections 45.001, 45.002, and 45.003 of the Education Code. It is also instructive that – in contrast to section 45.105(c) – the Legislature elsewhere in chapter 45 of the Education Code provided school districts with express authority to levy or otherwise use the maintenance tax for the payment of specific types of indebtedness.¹⁶

The *Madeley* case offers further support for the conclusion that section 45.105(c) is not authority for a school district to levy maintenance taxes to pay bond debt service. Article 2827 is a predecessor to section 45.105,¹⁷ and the language in section 2 of article 2827 is substantially similar to subsection (c) of section 45.105.¹⁸ In construing then section 2 of article 2827 in conjunction with the taxing power provisions then applicable to independent school districts, the court in *Madeley* determined that the maintenance tax authorized by article 2784, section 1, could be levied only for the purpose of maintenance, which does not include the cost of construction of school buildings.¹⁹ The court did not look to section 2 of article 2827 as independent authority for additional purposes for which a maintenance tax could be *levied*.²⁰ Rather, the court determined that the Legislature had required that maintenance taxes be allocated to the maintenance fund for the purpose of supporting and maintaining the schools.²¹ Only after those purposes had been effectuated, thus resulting in the maintenance tax funds becoming *surplus*, could the district use the *surplus* funds for the constitutional purpose of erection and equipment of school buildings.²² Because the current statutory taxation scheme is similar to the one described in *Madeley*, we do not believe that section 45.105(c) may be read to authorize a school district to levy maintenance tax for the purpose of paying bond debt service.

¹⁶*See, e.g.*, Tex. Educ. Code Ann. § 45.006(e) (Vernon 2006) (authority to issue bonds expired June 1, 1996)(authorizing a school district to levy additional maintenance taxes to pay judgment bonds issued by school districts under certain circumstances), Tex. Educ. Code Ann. § 45.108 (Vernon 2006) (authorizing a school district to issue notes payable from and secured by a pledge of available funds, including the proceeds of a maintenance tax), Tex. Educ. Code Ann. § 45.111 (Vernon 2006) (authorizing the issuance of certificates of indebtedness payable from an appropriation and pledge of local school funds derived from maintenance taxes levied and assessed under section 45.002).

¹⁷*See* Act of June 2, 1969, 61st Leg., R.S., ch. 889, 1969 Tex. Gen. Laws 2735, 2905, 3025, §§ 1, 2(a) (repealing art. 2827 and codifying language into section 20.48(c) of Education Code); Act of May 27, 1995, 74th Leg., R.S., ch. 260, 1995 Tex. Gen. Laws 2207, 2439, § 1 (reenacting and revising Titles 1 and 2 of Education Code)(§45.105(c) amended 1997).

¹⁸*See Madeley* at 933 (quoting sec. 2 of art. 2827); *cf.* Tex. Educ. Code Ann. § 45.105(c) (Vernon 2006).

¹⁹*Madeley* at 933 (citing *Love v. Rockwall Indep. Sch. Dist.*, 194 S.W. 659 (Tex. Civ. App.- Dallas 1917, writ ref'd)); Op. Tex. Att’y Gen. No. DM-178 (1992) at 5.

²⁰*Madeley*, 130 S.W.2d at 933, 934.

²¹*Id.*

²²*Id.*

(ii) *Surplus Maintenance Taxes May be Used to Pay Debt Service.*

As discussed above, a school district may levy maintenance taxes only for the purpose of paying maintenance expenses and not for the purpose of paying bond debt service.²³ Applying the *Madeley* analysis, maintenance taxes that were originally levied for maintenance tax purposes but are no longer needed for the support and maintenance of the school district may be characterized as surplus and used for any constitutional purpose.²⁴ The construction and equipment of school buildings is a constitutional purpose under article VII, section 3 of the Texas Constitution.²⁵ Therefore, surplus maintenance tax monies may be used to pay debt service on the bonds that financed the construction of school buildings.

This use of surplus maintenance taxes is consistent with section 45.105(c), which provides that local school funds from district taxes may be used “for other purposes necessary in the conduct of the public schools determined by the board of trustees.” It is within the school board’s discretion, in the first instance, to determine whether an expenditure is necessary, that is, whether the expenditure is appropriate or conducive to the conduct of a public school.²⁶ Thus, it is within the board’s discretion to determine whether the use of surplus maintenance taxes for payment of existing bond debt service would be a necessary purpose under section 45.105(c).

Question 2: May a School District Pay Debt Service on Bonds From the District’s Unrestricted Fund Balance?

The letter next asks whether a school district may pay debt service on bonds from the district’s unrestricted fund balance, describing the unrestricted fund balance as representing current year maintenance tax collections, state aid, allowable administrative overhead on federal grants, and other local sources of revenue such as rentals, gate receipts, and investment income.²⁷ The use of unrestricted state aid will be discussed in response to the third question in the request letter.

²³See generally *Madeley*, 130 S.W.2d at 933; cf. Op. Tex. Att’y Gen. No. JM-142 (1984) at 5 (construing chapter 51 of the Texas Water Code to permit the levy of a bond debt service tax in an amount sufficient to pay debt service, but not to create a surplus). A construction of section 45.002 of the Education Code that would authorize the levy of a maintenance tax for the purpose of paying bond debt service would enable a school district to create intentionally a surplus of maintenance taxes each year larger than the amount needed to pay current maintenance expenses, a purpose not provided in the statute.

²⁴ *Madeley* at 934.

²⁵ *Id.*

²⁶ Op. Tex. Att’y Gen. No. JM-1265 (1990) at 2.

²⁷ Request Letter at 3.

As discussed above, surplus maintenance taxes contained in a district's unrestricted fund balance may be used to pay debt service on school district bonds. To the extent maintenance taxes remaining in the fund are still needed for the support and maintenance of the school district and thus are not surplus, they may not be used to pay bond debt service.

Regarding other local funds not earmarked for a particular purpose, section 45.105(c) permits local school funds to be used for, among other purposes, acquiring and building school buildings and "other purposes necessary in the conduct of the public schools determined by the board of trustees." Therefore, it is within a board's discretion, in the first instance, to use such unrestricted funds to pay debt service on school district bonds so long as the board determines that the payment of bond debt service is necessary in the conduct of the public schools. Finally, we note that the use of federal grant proceeds may be restricted by the terms of the grant award as well as federal statutes or regulations. Therefore, we cannot provide any definitive guidance as to a school district's authority to use such funds for bond debt service payments.

Question 3: May School Districts Pay Debt Service from Unrestricted State Assistance under Subchapters B and C of Chapter 42, Texas Education Code?

The letter's third question is whether school districts may pay debt service from unrestricted state assistance under subchapters B and C of chapter 42 of the Texas Education Code. We will address this question in two parts: (i) the use of the basic allotment awarded under subchapter B ("basic allotment"); and (ii) the use of the special allotments awarded under subchapter C ("special allotments").

(i) *Basic Allotment*

State funds may be used to pay debt service on school district bonds under section 45.105(c) so long as the state funds are not "designated for a specific purpose." Because the basic allotment awarded to school districts is not designated for a specific purpose,²⁸ school districts may use the basic allotment to pay school district bond debt service pursuant to section 45.105(c) so long as the board determines that paying debt service on existing school district bonds is a purpose necessary in the conduct of the school.²⁹ This office permits school districts to use the basic allotment to

²⁸See Tex. Educ. Code Ann. § 42.101 (Vernon Supp. 2009) and compare with special allotments in Tex. Educ. Code Ann. §§ 42.151–.156 (Vernon 2006 and Supp. 2009).

²⁹Tex. Educ. Code Ann. § 45.105(c) (Vernon 2006) (providing in part that, "state funds not designated for a specific purpose may be used . . . for other purposes necessary in the conduct of the public schools determined by the board of trustees.").

demonstrate compliance with the \$0.50 test set forth in section 45.0031 of the Education Code.³⁰ In fact, if the school district's compliance is contingent on receiving the basic allotment, or a portion thereof, the amount needed to show compliance must be deposited into the interest and sinking fund for the bonds.³¹

(ii) *Special Allotments*

Unlike the basic allotment, special allotments are designated for specific purposes, causing them generally to fall outside of section 45.105(c). Whether or not a special allotment can be used to pay bond debt service depends on how the use of the allotment is specified in the particular section authorizing the allotment. Our discussion will focus on the "indirect cost" allotments since it appears that they are the only special allotments that generally may be used for capital expenditures for which bonds could be issued.

A portion of each allotment for special education, compensatory education, bilingual education, and career and technology education is an "indirect cost" allotment, and the Legislature authorized the State Board of Education to establish by rule how the indirect cost allotments may be used.³² The State Board of Education adopted rules stating the maximum allowable indirect costs³³ and providing that the indirect cost allotments may be used for any lawful purpose, including purposes comprising capital expenditures, such as acquiring real property or land, improving real property, and constructing or equipping buildings.³⁴ Because these rules authorize indirect cost allotments to be used for any lawful purpose and, further, for enumerated capital expenditures for which a school district may issue bonds, school districts may use the indirect cost allotments for debt service on bonds to the extent that the capital improvements being financed with those bonds are related to the specific program for which the indirect allotment is being awarded.

SUMMARY

Maintenance taxes may not be *levied* to pay debt service for school bonds issued under section 45.001. Section 45.105(c) authorizes *surplus* maintenance taxes not needed for the support and maintenance of a school district to be used to pay school bond debt service so long as the board

³⁰See All Bond Counsel Letter, dated August 17, 1999, Attachment I (defining "T1A" as the basic allotment under subchapter B of Chapter 42 of the Education Code); Tex. Educ. Code Ann. § 45.0031(b) (Vernon 2006).

³¹Tex. Educ. Code Ann. § 45.0031(d) (Vernon 2006).

³²Tex. Educ. Code Ann. §§ 42.151(h), 42.153(b) (Vernon 2006), 42.152(c), 42.154(a-1), (c), 42.1541 (Vernon Supp. 2009).

³³19 Tex. Admin. Code § 105.11

³⁴19 Tex. Admin. Code § 105.12.

of trustees determines that the payment is a necessary purpose in the conduct of the school. A district's board of trustees also has discretion pursuant to section 45.105(c) to use other local sources of revenues not earmarked for a particular purpose or otherwise restricted by law to pay bond debt service if the board determines such use of the revenues is necessary in the conduct of the district's schools.

School districts may use the basic allotment under subchapter B of chapter 42 of the Education Code to pay school district bond debt service pursuant to section 45.105(c) so long as the board determines that paying debt service on existing school district bonds is a purpose necessary in the conduct of the school. Under subchapter C of chapter 42 of the Education Code and in accordance with the rules established by the State Board of Education, school districts may use indirect cost allotments to pay debt service on bonds to the extent that the capital improvements being financed with those bonds are related to the specific program for which the indirect allotment is being awarded.

Very truly yours,



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