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April 19, 1999

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Opinion Committee

**CERTIFIED MAIL,
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The Honorable John Cornyn
Attorney General
State of Texas
P.O. Box 12548
Austin, Texas 78711-2548

RE: REQUEST FOR OPINION

FILE # ML-40792-99
I.D. # 40792

Dear General Cornyn:

I am requesting that you provide a written opinion to the below-described questions, in accordance with Section 402.042 of the Texas Government Code.

Description of the Plan.

The board of trustees of an independent school district organized under Texas law (the "District") is considering adoption of a plan whereby one or more employees of the District meeting certain eligibility requirements and agreeing to participate in the plan would receive certain payments from the District in the future in exchange for the "early exit" of the employee (the "Plan"). To be specific, employees of the District on active service and with more than 10 years of employment experience with the District [whether or not consecutive] would be eligible to participate in the Plan. The District would like to permit participation by all eligible employees of the District, regardless of category, including teachers and librarians with continuing contracts under Section 21.151 et. seq. of the Texas Education Code (the "continuing contract

employees"), administrators, and others with term contracts under Section 21.201 et. seq. of the Texas Education Code (the "term contract employees"), other employees with one-year contracts (the "one-year employees"), and other personnel with at-will employment arrangements (the "at-will employees").

It is currently proposed that an eligible employee of the District participating in the Plan (the "participant") would receive total payments equal to 105% of his/her basic annual pay if he/she agreed to exit by means of retirement or resignation in the first year of the Plan, total payments equal to 100% of his/her basic annual pay if he/she agreed to exit in the second year of the Plan, and total payments equal to 95% of his/her basic annual pay if he/she agreed to exit in the final, third year of the Plan. The payments, in each case, would be payable to a participant in equal monthly installments over an eight year period commencing after his/her date of exit. Under the Plan, a retirement-eligible participant would also be paid 100% of his/her accumulated sick leave, payable in three installments over approximately 24 months; under current policy, a retiring District employee is to receive 50% of his/her accumulated sick leave in a lump sum at or soon after exit. The sick leave benefits of non-participants would remain the same. A "non-appropriation" clause would be included in the Plan, due to the payments over different fiscal years of the District. See Local Govt. Code § 271.903.

Under the Plan, there would be a relatively short "window" period immediately prior to the first year of the Plan for any eligible employees to apply for participation in the Plan and to select one of several specified exit dates in the first, second, or third years of the Plan. Once the "window" period closes, Plan eligibility for remaining employees immediately ceases, and no further participation in the Plan will be allowed by the District. In short, the Plan would be open for participation enrollment for only a short time, and is not intended to be a long-term, continuing program to be offered to District employees.

The Plan may also include a requirement that a participant performs future services for the District in each of the eight years during which payments are made. This "future performance" requirement would consist of 5 to 8 days of service to the District, as and in the manner determined by the District.

Under the Plan, a participant would be required to execute a release and waiver of all pre-retirement claims against the District, including without limitation any claims for race, sex, age, disability, ethnicity, or other discrimination, and would be required to agree not to seek re-employment in the future with the District without the District's consent.

There are a number of additional or alternative features to the Plan being considered by the District, and which are addressed more fully below. Incidentally, it is the understanding of the District that other independent school districts are reviewing the possibility of adoption of "early exit" plans generally similar to the Plan.

Based upon current feasibility studies, the District believes that, through the operation of the Plan, a significant number of higher-paid, more-experienced employees will choose to participate in the Plan and retire or resign from the District sooner than they might otherwise do. As such, the District expects to be able to replace such early retirees/resignees with entry-level or less experienced [yet still competent] persons with lower salaries or wages. The District hopes to achieve substantial savings by virtue of the "spread" between the salaries or wages of the early retirees/resignees and the lower salaries or wages of their replacements. The District feels that the Plan will prove financially beneficial to the District. The District is interested in implementing the Plan because of the anticipated savings.

Concerns have developed, however, over the validity of the Plan under the Texas Constitution. The provisions of the Texas Constitution that are potentially implicated by the Plan include Article III, Sections 52 and 53, and Article XVI, Section 6. Article III, Section 52 of the Texas Constitution basically forbids a political subdivision from granting "public money or thing of value in aid of or to any individual", whereas Section 53 forbids a county or "municipality" from granting "any extra compensation, fee or allowance to a public officer, agent, servant, or contractor, after services has been rendered or a contract has been entered into". The term "municipality" has been held to apply to an independent school district. Harlingen I.S.D. v. C.H. Page & Bro., 48 S.W.2d 983, 986 (Tex. 1932). Article XVI, Section 6 states that "no appropriation for private or individual purposes shall be made", except as otherwise authorized by the Texas Constitution.

Taken together, these constitutional provisions effectively proscribe the application of public funds to private purposes; in other words, the gratuitous grant of public funds to a private individual or entity. State v. City of Austin, 331 S.W.2d 737, 742 (Tex. 1960). Most recently, the El Paso Court of Appeals overturned changes to a sick leave policy for El Paso County on similar grounds. Lee v. El Paso County, 965 S.W.2d 668 (Tex.App.- El Paso 1998). On the other hand, varying forms of arguably "additional" benefits to public employees have been recognized as constitutional by a number of court cases and Attorney General opinions. E.g. Byrd v. City of Dallas, 6 S.W.2d 738 (Tex. 1928); City of Corpus Christi v. Herschbach, 536 S.W.2d 653 (Tex.Civ.App.- Corpus Christi 1976, writ ref'd n.r.e.); City of Galveston v. Landrum, 533 S.W.2d 394 (Tex.Civ.App.- Houston [1st Dist.] 1976, writ ref'd n.r.e.); Devon v. City of San Antonio, 443 S.W.2d 598 (Tex.Civ.App.- Waco 1969, writ ref'd); City of Orange

v. Chance, 325 S.W.2d 838 (Tex.Civ.App.- Beaumont 1959, no writ); Tex. Atty. Gen. Op. H-797 (1976); Tex. Atty. Gen. Op. H-786 (1976); Tex. Atty. Gen. Op. M-836 (1971); Tex. Atty. Gen. Op. WW-215 (1957); Tex. Atty. Gen. Op. O-4140 (1941).

In addition, there are some concerns over whether the plan complies with some provisions of the Texas Education Code and the Texas Government Code, specifically Texas Education Code § 45.105 and Texas Government Code § 609.001 et. seq.

Based upon the foregoing, I would like you to provide written opinions on each of the questions, including sub-parts, set out below. As you can see, a number of the alternative and/or additional features to the Plan are set forth as separate questions below.

Legal Questions.

Question No. 1.

Is the Plan in its stated form valid under the Texas Constitution? Would your answer change if one or more of the four categories of employees were excluded from eligibility under the Plan? Would your answer change if the Plan limited eligibility to employees who are age 40 or above [i.e.- potential claimants based upon age under the Age Discrimination in Employment Act and under Texas Labor Code § 21.051 et. seq.]?

Question No. 2.

With respect to eligible employees who participate in the Plan during the term of their existing contracts, is the Plan in its stated form valid under the Texas Constitution? Would your answer change if the Plan limited such persons from electing early resignation or retirement until the second or third year of the Plan and required continuing performance of services for the District until such time? Would your answer change if one or more of the four categories of employees were excluded from eligibility under the Plan?

Question No. 3.

Is the "future performance" requirement of the Plan essential to its validity under the Texas Constitution? Would your answer change if the Plan excluded the "future performance" requirement for continuing contract and/or term contract employees? Would your answer change if one or more of the four categories of employees were excluded from eligibility under the Plan?

Question No. 4.

If a participant is unable to meet the "future performance" requirement due to death or disability, is it valid under the Texas Constitution for the Plan to still provide for payment of benefits in the future to the participant or his/her beneficiary? Would your answer change if one or more of the four categories of employees were excluded from eligibility under the Plan?

Question No. 5.

If a participant is unable to meet the "future performance" requirement for any reason, is it valid under the Texas Constitution for the Plan to mandate forfeiture of future, but not past, payments under the Plan? Would your answer change if one or more of the four categories of employees were excluded from eligibility under the Plan?

Question No. 6.

Would the Plan be valid under the Texas Constitution if the sick leave payment under the Plan to a participant consisted of 100% of his/her accumulated sick leave payable over 24 months, as opposed to the current District policy of payment of 50% of his/her accumulated sick leave in a lump sum? Would your answer change if one or more of the four categories of employees were excluded from eligibility under the Plan?

Question No. 7.

If you believe that the Plan as stated is unconstitutional, but that a particular combination of the above-stated basic, additional, or alternative elements or features of the Plan would render the Plan valid under the Texas Constitution, what are such combination(s)?

Question No. 8.

Are the payments to be made under the Plan an authorized expenditure of the District's funds under Section 45.105 of the Texas Education Code, assuming that the District's Board of Trustees determines that it is in the best interests of the District to implement the Plan because of the anticipated compensation and wage savings?

Question No. 9.

Does the Plan constitute a "deferred compensation plan" within the meaning of Section 609.001 et. seq. of the Texas Government Code?

Question No. 10.

May an independent school district adopt a deferred compensation plan that does not comply with Section 609.001 et. seq. of the Texas Government Code?

Discussion.

Admittedly, the Plan would make future payments to participating employees that are not part of their current employment contracts or arrangements; however, in exchange for such payments, the District would be receiving the following additional consideration: (a) the services in the future under the "future performance" requirement; (b) the continued services until the stated exit date; (c) the delayed payment of sick leave benefits; (d) the release of all claims of any kind, including employment discrimination and similar claims; (e) the obtaining of voluntary retirement/resignation by participants without need for the time and expense of any otherwise-required notice or hearings or any litigation; and/or (f) the estimated cost savings for the District in replacing the participant. As to continuing contract employees, the Plan might be viewed as a "buy-out" of their secure employment and minimum salary. As to term contract employees, one may regard the Plan as a "buy-out" of their more limited job security.

The release of claims, by itself, is substantial consideration to the District, and avoids the likely expenditure of much time and expense. Along those lines, regarding employees who are age 40 or above, the release of claims, which includes those under the federal Age Discrimination in Employment Act and Section 21.051 et. seq. the Texas Labor Code, would be of significant benefit. Moreover, the 24 month delay in payment of accumulated sick leave under the Plan also benefits the District. The performance of future services also supports the payments. Taken together, these features arguably provide present and future benefits to the District in exchange for the payments, and justify the payments under the Texas Constitution. One might even suggest that not all of these features need necessarily be included in the Plan to render it constitutional. The matter, though, is not settled and guidance in the form of an Attorney General's opinion is therefore requested.

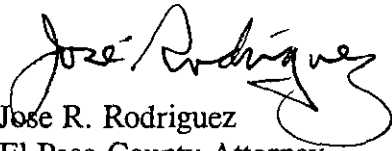
The District had hoped to implement the Plan in the Spring of 1999. During the review process, concerns were raised about the above-described issues. As such, the Board of Trustees

The Honorable John Cornyn
April 19, 1999
Page 7

of the District decided to delay implementation of the Plan. The District, though, is expected to re-consider the Plan for adoption in Spring of 2000. A timely response to this request is thus greatly appreciated, insofar as the District is interested in achieving as soon as possible realization of the anticipated savings from the Plan, assuming it is or can be made valid and constitutional.

Thank you for your consideration. Please do not hesitate to contact me if you have any questions or comments about the foregoing.

Very truly yours,


Jose R. Rodriguez
El Paso County Attorney

JRR/tlg