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Michael Williams
Commissioner

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OPINION COMMITTEE

RQ-1223-CA

September 16, 2014

FILE # MC-47644-14
I.D. # 47644

The Honorable Greg Abbott
Attorney General of Texas
P.O. Box 12548
Austin, TX 78711

Dear General Abbott:

I am writing to seek your opinion regarding the appropriate construction of Section 45.0532 of the Texas Education Code. As you know, Article VII, Section 5(d) of the Texas Constitution authorizes the pledge of Permanent School Fund (PSF) assets to guarantee school district bonds issued for the "acquisition, construction, or improvement of instructional facilities including all furnishings thereto." The implementing legislation for the Bond Guarantee Program (BGP) is Subchapter C of Chapter 45 of the Education Code. The Texas State Board of Education (SBOE) has oversight of the BGP, which is administered by the Texas Education Agency (TEA)¹. Prior to 2011, the BGP was authorized to guarantee only bonds issued by school districts. Legislation in 2011² extended the guarantee to bonds issued by open-enrollment charter schools that meet qualifications to be considered "charter districts". After approval by the Internal Revenue Service in 2013³, TEA approved its first round of charter district bond guarantees in April 2014.

The question presented by this request is whether the limit under Section 45.0532 is a limit on each separate issuance of charter district bond guarantees or whether it represents a maximum limit on the cumulative amount of guaranteed charter district bonds. An example of a methodology for the two alternative constructions of the limit under Section 45.0432 is described in this opinion request.

¹ Administrative Rules adopted by the SBOE are available at 19 T.A.C. §§33.65 (school district bonds) and 33.67 (charter district bonds), <http://ritter.tea.state.tx.us/rules/tac/chapter033/ch033a.html>.

² Chapter 4, Acts of the 82nd Legislature, 1st Called Session, 2011.

³ The PSF guarantee is subject to IRS regulations restricting "arbitrage" involving tax-exempt bonds. TEA has received guidance through an IRS notice of proposed rulemaking that charter district bonds may be guaranteed consistent with those limitations. The notice of proposed rulemaking allowed the guarantee to be applied to charter district bonds during the rulemaking process.

Pursuant to SBOE rules, TEA accepts applications from school districts and charter districts on a monthly basis. Because of both state and federal limits⁴ on the dollar amount of bonds that can be guaranteed, it is necessary to recalculate the available guarantee capacity each month before approving any additional bonds.

Under the current SBOE rule (adopted prior to the establishment of charter districts), BGP capacity is determined on a monthly basis by first applying the appropriate multiplier under Section 45.053, Education Code, to the PSF investment asset cost value and then subtracting a 5% reserve adopted by the SBOE under Section 45.0531 from the product. This calculation is understood to represent the absolute maximum amount the BGP may guarantee at a point in time. The maximum dollar amount the BGP can guarantee will fluctuate at each calculation period depending on changes to the PSF asset cost value, decreased capacity due to previous guarantees, and increased available capacity resulting from guaranteed bond maturities. My question involves the construction of Section 45.0532, which limits the amount of bonds issued by open-enrollment charter schools that may be guaranteed⁵. Subsection 45.0532(a) provides that:

"In addition to the general limitation under section 45.053, the commissioner may not approve charter district bonds for guarantee under this subchapter in a total amount that exceeds the percentage of the total available capacity of the guaranteed bond program that is equal to the percentage of the number of students enrolled in open-enrollment charter schools in this state compared to the total number of students enrolled in all public schools in this state, as determined by the commissioner."

Subsection 45.0532(b) further provides:

"For purposes of Subsection (a), the total available capacity of the guaranteed bond program is the limit established by the board under Sections 45.053(d) and 45.0531 minus the total amount of outstanding guaranteed bonds. Each time the board increases the limit under Section 45.053(d), the total amount of charter district bonds that may be guaranteed increases accordingly under Subsection (a)."⁶

Two different calculation methodologies have been proposed for the limit defined in Section 45.0532(a). For purposes of illustration, please assume that the following inputs are being held constant in each calculation: applicable percentage of students enrolled in open-enrollment charter schools at 4%⁷, existing school district guarantees of \$60 million from previous cycles,

⁴ Section 45.053 of the Texas Education Code limits the total amount of bonds guaranteed to 2 ½ times the cost value of the PSF but allows the SBOE to increase the multiplier to up to five times the cost value. The current SBOE rule (19 T.A.C. §33.65(e)) sets the multiplier at three times the cost value. The IRS limit is five times the cost value as of December 16, 2009 (IRS Notice 2010-05). The guarantee may not exceed either limit; the SBOE limit is currently the more restrictive.

⁵ Subsection 45.0532(a-1) additionally limits the percentage of available charter district guarantee capacity that may be used to refund or refinance bonds that were issued prior to the BGP being made available to charter districts.

⁶ See Note 4, Section 45.0531 of the Texas Education Code authorizes a reserve portion of the guarantee limit to deal with fluctuations in the cost value of the PSF which could result in the guaranteed amount exceeding the IRS limit or emergency needs for facilities. The SBOE rule (19 T.A.C. 33.65(e)(2)) currently sets a reserve of five percent of the guaranty capacity.

⁷ SBOE rule requires an annual determination of the percentage of students enrolled in charter schools based on Fall enrollment submissions by both charter schools and school districts pursuant to 19 T.A.C. 33.67(d).

and a limit of \$100 million on the total BGP guarantee capacity (i.e., 3 X the difference between the PSF investment cost value and the a reserve established under section 45.0531, which is currently 5% of the cost value). Calculation of the charter limit begins by subtracting the total outstanding guaranteed bonds of \$60 million from the \$100 million BGP guarantee capacity and applying the percentage of charter enrollment to the resulting \$40 million total available BGP capacity to get the limit defined in Section 45.0532(a) ("charter district capacity"). Both proposed calculations of the charter limit under Section 45.0532(a) begin with this initial calculation and are illustrated mathematically in the attached "Appendix A and Appendix A-1." For both calculation methodologies, we will assume that \$1 million of charter district bonds are requested and approved for guarantee in the first month of charter district participation in the BGP.

Under the first calculation methodology, the maximum amount available for additional charter district bonds *at the end of the first month of charter district guarantee* would then be \$1.56 million ($[\$100 \text{ million total BGP guarantee capacity} - \$61 \text{ million total amount of outstanding guaranteed bonds}] \times .04$). The same calculation would be repeated with current figures each month. More specifically, total cumulative charter district bonds guaranteed in each successive month would be added to total school district bonds guaranteed, and together they would then be subtracted from the total BGP maximum capacity as defined by Sections 45.053 and 45.0531 to arrive at the "total available capacity" as defined in Subsection 45.0532(b) for the following month. Then the charter student percentage as defined in Subsection 45.0532(a) would be applied to the total available capacity to determine the total amount of charter district guarantees the commissioner may approve.

Under this calculation, there is no defined limit on the cumulative total amount of charter district bonds the commissioner may approve. Rather, there is a monthly limit because this methodology does not consider previously guaranteed charter bonds beyond calculation of the total available capacity described in Section 45.0532(b). As a result, each month a new charter district capacity amount would be determined, which would represent the amount available for additional guarantees.

As Appendix A shows, the effect of using this methodology results in 4% of total available capacity being made available to charter districts each month, with no limit or ceiling on the cumulative total amount of charter district guarantees⁸. As a result, the cumulative BGP allocation to charter districts potentially could exceed the charter student ratio (in our example, 4%) in Section 45.0532(a) as illustrated in the attached Appendix A-1, Calculation #1.

By contrast, under the second calculation, the phrase "in a total amount" in Section 45.0532(a) sets a defined ceiling for the cumulative total charter district guarantee program. This methodology views "total amount" to mean the maximum upper limit of BGP capacity available for charter district guarantees. In this view, the initial charter district capacity is calculated in exactly the same way as described above; however, the \$1.56 million would represent the program guarantee limit for charter district bonds. In other words, no more than \$1.56 million in charter district bonds could be guaranteed without changes to some other formula variables (PSF investment cost value, outstanding bonds guaranteed, etc.). After available capacity is calculated (i.e., "total amount"), *all* charter district bonds guaranteed (charter district guarantees in the current month as well as all charter district guarantees from prior months)

⁸ Of course, total BGP guarantees would still be limited by the total guarantee limit of \$100 million in the example.

are subtracted from the "total amount" of charter district capacity allowed by Section 45.0532(a) to determine how much of the calculated charter district capacity remains for future guarantees. As such, the \$1 million in charter guarantees from the example above is subtracted from the first month's \$1.56 million "total amount" to arrive at \$0.56 million, which represents the maximum value of additional charter district bonds that may be approved going forward unless the overall BGP capacity increases.

Using the same parameters and assumptions as in the first calculation discussed above, the second calculation's methodology would result in a sum certain of approximately \$1.54 million of guarantee capacity for charter districts. Of course, as guaranteed bonds are paid off and the book value of TPSF assets increases, charter districts would be allocated incremental capacity each month because "total available capacity" would be increasing. Nonetheless, the allocation of BGP capacity to charter districts would never exceed the charter student ratio limitation (4% in our example) at any point, as illustrated in the attached Appendix A-1, Calculation #2.

Proponents of the first methodology argue that it follows the simple wording of the statute to subtract "the total amount of outstanding guaranteed bonds" from the maximum BGP program capacity and then allow charter districts access to the appropriate enrollment-based percentage of that amount each month.

Proponents of the second methodology say that the plain language of Section 45.0532(a) imposes a limit on the "total amount" of charter district bonds that may be approved, and that "total amount" is cumulative of all charter district bond guarantees. Therefore, as charter district bonds are guaranteed (and become a part of the "total amount of outstanding guaranteed bonds" under Section 45.0532(b)), the amount available to guarantee future charter district bonds necessarily must decline. (See calculation in the right column of attached Appendix A-1 which shows the decline of the amount available to guarantee future charter district bonds each time charter district bond guarantees are added to the program).

The difference between the two methodologies is the meaning assigned to "total amount" in Section 45.0532(a). In the first methodology, the "total amount" equals the calculation of charter district capacity per Section 45.0532(a) for that month, without further regard of any previously guaranteed charter district bonds. The charter district student percentage limitation as described in Section 45.0532(a) could potentially be exceeded without consequence to the amount of charter district bonds guaranteed. In the second methodology, "total amount" equals the calculation of charter district capacity for the entire portion of the BGP allocated to charter districts, which additionally subtracts all charter district bonds that have been previously guaranteed by the BGP, and any additional amounts that have been guaranteed in the current month, from the calculated "total amount" to determine the portion of the "total amount" remaining for future guarantees. The charter district portion of the BGP would discontinue making charter district bond guarantees once the student percentage limitation as described in Subsection 45.0532(a) was reached.

Additionally, the second methodology is consistent with the enabling legislative bill analysis (82nd Legislative Regular Session, SB 597) in which the bill author's statement of intent says, "This bill provides that the amount of the guarantee for eligible charters corresponds to the percent of public students enrolled in charters compared to the total number of public school students," and with the related fiscal analysis, which states "The bill would limit the total amount of charter school bonds to be guaranteed to the portion of total available capacity in

the PSF school bond guarantee program that is equal to the proportion of charter school enrollment to total enrollment.”

Which of the two methodologies for calculating the amount of guarantee capacity available to charter districts is allowable under Section 45.0532?

Should you have further questions regarding this request, you may contact Von Byer, General Counsel or Susan Hunter Smith, Senior Counsel in the Office of Legal Services at (512) 463-9720.

Sincerely,

A large, stylized handwritten signature in black ink, which appears to read "Michael Williams". The signature is written over the typed name and title of the Commissioner of Education.

Michael Williams
Commissioner of Education
Texas Education Agency

MW/vb/ds