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OPINION COMMITTEE

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Michael Williams
Commissioner

December 31, 2015

The Honorable Ken Paxton
Texas Attorney General
Attn: Jennie Hoelscher, Chair, Opinion Committee
P.O. Box 12548
Austin, TX 78711

FILE # ML-47927-16
ID # 47927

RQ-0088-KP

Re: Whether a Board of Trustees of a school district may lawfully enter into a contract for legal services that contains a flat fee agreement

Dear General Paxton:

I write to obtain your guidance about whether an independent school district Board of Trustees (Board) may lawfully enter into a contract for legal services that provides that the district will pay a minimum flat fee for legal services regardless how many hours are worked by the law firm. Specifically, I ask whether this agreement may amount to an unconstitutional gift of public funds under Tex. Const. art. III, § 52(a) under certain conditions.

Recently, I appointed a Board of Managers to replace the Board of Trustees after a school district's accreditation was revoked due to multiple years of failing accountability ratings. It has been publically reported that the Board of Trustees, prior to replacement by the Board of Managers, voted to contract for legal services with a law firm and pay the firm a minimum flat fee of \$300,000 to file suit in the name of the district and three individual members of the Board of Trustees to challenge the closure of the district and placement of the Board of Managers, regardless of how many hours are actually worked on the suit. It has been alleged that the regular hourly fee of the hired firm is \$400 per hour, so the fee would cover all legal services up to 750 hours at which point an additional amount would be billed, *but* in the event the firm worked less than 750 hours, the firm would not refund the fee to the district, because it is a "flat fee" contract. Also, of note, is that the Board of Managers assumed control over the district—and the Board of Trustees lost control of the district—subsequent to execution of the contract and payment of the fee. Thus, presumably, the Board of Trustees lost all authority to direct litigation on behalf of the district.

Generally, the test of whether an expenditure of public funds by a school board violates art. III, sec. 52, has required that a Board: "(1) determines that the expenditure's predominant purpose is to accomplish a public purpose, not to benefit private parties, (2) retains sufficient control over the expenditure to ensure that the public purpose is accomplished, and (3) ensures that the school district receives a return benefit." Tex. Op. Att'y Gen. GA-0076 (2003). While the GA-0076 notes that "[s]chool boards have wide latitude to determine what expenditures are "necessary"

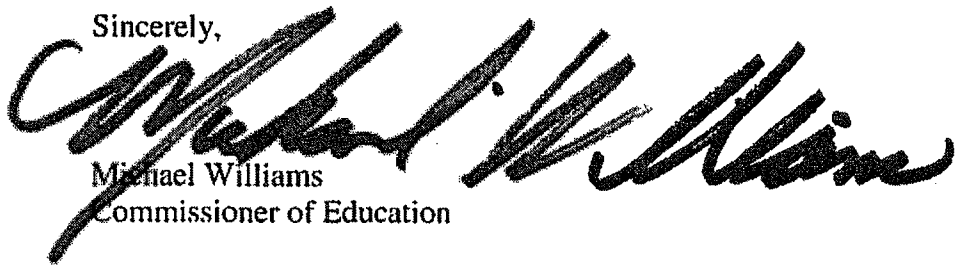
for public schools and thus within the spending authority of Education Code, section 45.105(c), and its predecessor, former Education Code, section 20.48[.]” this case presents a unique circumstance because the Board of Trustees that contracted for legal services and spent \$300,000 of public funds no longer controls the district or has authority to act on behalf of the district. Tex. Op. Att’y Gen. GA-0076.

In this case, I query whether such a contract may present an unconstitutional gift of public funds: (1) because the Board of Trustees (which executed the contract) lost authority to direct the litigation filed on behalf of the district; (2) because the payment of the flat fee for legal services constitutes a windfall to the law firm if the firm works less than 750 hours (at its regular hourly rate of \$400); (3) because payment of the fee ultimately benefits the individual board member plaintiffs rather than the district (which is lawfully controlled by the Board of Managers); because the Board of Trustees who contracted to expend public funds of the district no longer have authority to control litigation on behalf of the district, they consequently have no means to ensure that the services provided are sufficient to accomplish a public purpose for the district); because the Board of Trustees who contracted to expend public funds of the district no longer have authority to control litigation on behalf of the district qua the district sufficient to ensure that a public purpose is accomplished; or (4) because there is no demonstrable public benefit to challenging closure of the district, which lost accreditation after being rated either academically or financially unacceptable each year since the 2010-2011 school year? I, therefore, ask whether such a contract may amount to an unconstitutional gift of public funds to either the named Board of Trustee plaintiffs or the law firm that is being paid a \$300,000 flat fee for representing the district and/or the trustees? Additionally, I ask whether a court might find that the analysis under art. III, § 52(a), differs if the Board of Managers severs the contract with the law firm and the law firm does not refund the unspent funds?

Further, there appears to be a question as to whether a flat fee arrangement with the Board of Trustees is permissible by law under certain circumstances. See Tex. Comm. on Prof’l Ethics, Op. 611, 2011 WL 5831792;¹ see *Cluck v. Comm’n for Lawyer Discipline*, 214 S.W.3d 736 (Tex. App.—Austin 2007). Opinion 611 states that under the Texas Disciplinary Rules of Professional Conduct “[a] lawyer is not permitted to enter into an agreement with a client for a payment that is denominated a “non-refundable retainer” but that includes payment for the provision of future legal services rather than solely for the availability of future services.” *Id.* at 3. The Opinion concludes that such a fee would not be reasonable under Rule 1.04(a) and (b). Therefore, I ask if a Board of Trustees entered into such a contract for legal services, i.e. a non-refundable flat fee for provision of future legal services that violates Rule 1.04, whether such contract would violate art. III, § 52 of the constitution? For example, in this case, if the law firm billed 200 hours prior to severance of the contract, and did not refund the unspent public funds to the district, would that violate the constitution?

¹https://www.texasbar.com/AM/Template.cfm?Section=Texas_Bar_Journal&Template=/CM/ContentDisplay.cfm&ContentID=19965

Sincerely,

A large, stylized handwritten signature in black ink, appearing to read "Michael Williams". The signature is written in a cursive, flowing style with some overlapping strokes.

Michael Williams
Commissioner of Education