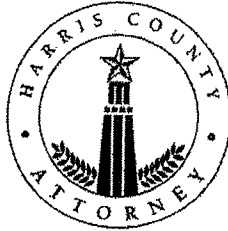


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OPINION COMMITTEE



The Office of Vince Ryan
County Attorney

FILE # ML-48296-18
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RQ-0208-KP

January 24, 2018

Honorable Ken Paxton
Attorney General of Texas
Capital Station
Post Office Box 12548
Austin, Texas 78711-2548

VIA ELECTRONIC FILING

Re: Request for Opinion concerning Hurricane Harvey Relief Fund

Dear General Paxton:

On behalf of Harris County Department of Education ("HCDE"), a county school district located in Harris County, I am requesting your opinion concerning whether HCDE may establish a relief fund to provide grant funding to independent school districts located in Harris County to assist with recovery efforts after Hurricane Harvey and its aftermath.

The issue of providing monetary assistance to fellow governmental entities in the wake of natural disasters is one of concern to governmental entities across the state. It is our opinion that a Texas school district may lawfully provide funds to fellow public school districts without running afoul of the Texas Constitution's prohibition of gifting public funds, and solicit your opinion in this regard.

At its meeting on October 18, 2017, the HCDE Board of Trustees considered the creation of an HCDE fund called the "HCDE Harvey Relief Fund" to benefit independent school districts in Harris County that were impacted by Hurricane Harvey and its aftermath. The Board of Trustees voted to seek an opinion from the Attorney General's Office and to table the creation of the fund until after an opinion is received.

It is anticipated that the HCDE Harvey Relief Fund will be funded with public funds, including tax proceeds generated from HCDE's countywide equalization tax, which HCDE assesses under authority granted to it by Section 11.301 of the current Texas Education Code and Sections 18.21-18.31 of former Chapter 18 of the Texas Education Code.

Public funds are “moneys belonging to [the] government, or any department of it, in [the] hands of [a] public official.”¹ The Texas Court of Appeals has stated, “[p]ublic funds are those belonging to the state or to any county or political subdivision of the state....”² Mark White, as the Attorney General of Texas, opined that “[f]unds collected by a public agency and used for public purposes are clearly public funds.”³

Based on the back-up to the agenda item regarding the creation of the HCDE Harvey Relief Fund that was requested by three HCDE trustees, HCDE would be providing money to the Hurricane Harvey Fund from HCDE taxes and fees for services. Because HCDE is a governmental entity and the funds that would finance the HCDE Harvey Relief Fund would be controlled by a government entity, the money would be deemed public funds.

HCDE’s proposed Harvey Relief Fund is a constitutionally permissible transfer of public funds as it furthers HCDE’s public purpose.

Article III, §§ 52 and 53 of the Texas Constitution prohibit political subdivisions, including HCDE, from making gifts of public funds to private individuals or entities. Section 52(a), furthermore, has been construed to prohibit political subdivisions from *gratuitously* granting its funds to another political subdivision.⁴ Public funds may be granted to another political subdivision, however, to accomplish a purpose of the granting political subdivision.⁵ HCDE may pay or transfer its funds to another political subdivision when two requirements are met: (1) the purpose of the transfer is within the political subdivision’s powers, and (2) the political entity receiving the funds must be obligated by statute or contract to use the funds for that purpose.⁶

The Hurricane Harvey Fund would not be a gratuitous gift to another political subdivision. HCDE, rather, would be aiding other political subdivisions – Harris County school districts - in accomplishing an HCDE public purpose, namely, “help[ing] school districts in the state’s largest county.”⁷ Whether the transfer of funds would serve an HCDE purpose is for the HCDE Board of Trustees to determine, subject to judicial review.⁸ The Hurricane Harvey Fund would certainly be deemed to be within HCDE’s authority to disperse, as it would assist school districts to further develop their collaborative relationships with HCDE and not be distracted by the fiscal burdens of rebuilding after Hurricane Harvey. Contractual terms may provide sufficient control of the expenditure to ensure that the receiving school districts use the funds in a manner consistent with HCDE’s purpose.⁹

¹ *Black’s Law Dictionary* 856 (6th ed. 1991).

² *Austin v. Fox*, 297 S.W. 341, 343 (Tex. Civ. App – San Antonio 1927), *aff’d*, 1 S.W.2d 601 (Tex. Comm’n App. 1928).

³ Tex. Att’y Gen. Op. No. MW-584 (1982).

⁴ *See Fort Worth Indep. Sch. Dist. v. City of Fort Worth*, 22 S.W.3d 831, 842 (Tex. 2000).

⁵ *See State ex rel. Grimes County Taxpayers Ass’n v. Tex. Mun. Power Agency*, 565 S.W.2d 258, 256-66 (Tex. Civ. App.—Houston [1st Dist.] 1978, writ *dism’d*); Tex. Att’y Gen. Op. No. GA-0664 (2008).

⁶ *Id.* at 265.

⁷ *Who is HCDE*, HARRIS CNTY DEP’T OF EDUC., <http://www.hcde-texas.org/who-is-hcde/> (last visited January 3, 2018).

⁸ *See* Tex. Att’y Gen. Op. No. GA-0552 (2007) at 2.

⁹ *See Key v. Comm’rs Ct. Of Marion County*, 727, S.W.2d 667, 669 (Tex. App.—Texarkana 1987, no writ).

HCDE's proposed Harvey Relief Fund falls under the Public Calamity Exception to the prohibition of gifting public funds.

Even if the Hurricane Harvey Fund is not allowed under Article III, Section 52(a), the transfer of public funds is nevertheless constitutionally permissible. The Texas Constitution, Article III, Section 51, *Grants of Public Money Prohibited: Exceptions*, is germane to the Department's grant of public funds under these circumstances. It states:

The Legislature shall have no power to make any grant or authorize the making of any grant of public moneys to any individual, association of individuals, municipal or other corporations whatsoever; provided that the provisions of this Section shall not be construed so as to prevent the grant of aid in cases of public calamity.

"Public calamity" under this gift of public funds exception is generally defined as an occurrence with broad and sweeping devastation to an area.¹⁰ The sentinel case involving public calamity and the use of public funds, *City of Aransas Pass v. Keeling*, 112 Tex. 339, 247 S.W. 818 (1923), provides:

The people of the state at large have a direct and vital interest in protecting the coast cities from the perils of violent storms. The destruction of ports, through which moves the commerce of the state, is a state-wide calamity. Hence sea walls and breakwaters on the Gulf coast, though of special benefit to the particular communities must be regarded as promoting the general welfare and prosperity of the state...But, the state, in promoting the welfare, advancement, and prosperity of all her citizens, or in aiding to avert injury to her entire citizenship, cannot be regarded otherwise than as performing proper function of state government... The use of the cities or counties as agents of the state in the discharge of the state's duty is in no ways inhibited by the Constitution in Section 51 of Article 3.

The Supreme Court of Texas, in so defining public calamity, takes great care to describe the calamity and the subsequent relief as affecting a widespread area, not a particular individual.¹¹ The relief provided by the government entity must also address a disaster "involuntary in nature."¹²

¹⁰ See *Brazos River Conservation & Reclamation Dist. v. McCraw*, 126 Tex. 506, 517, 91 S.W.2d 665, 671 (1936); *Harris Cty. Flood Control Dist. v. Mann*, 135 Tex. 239, 244, 140 S.W.2d 1098, 1101 (1940).

¹¹ See also *Harris County Flood Control Dist. v. Mann*, 135 Tex. 239, 140 S.W.2d 1098 (1940) (providing flood control to a wide spread area, not any single individual).

¹² Ltr. Advisory Tex. Att'y Gen. No. H-144 (1977) (providing that economic distress may be a public calamity).

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The interests served by the public calamity exception are for “people of the state at large” and “promot[ing] the general welfare and prosperity of the state.”¹³

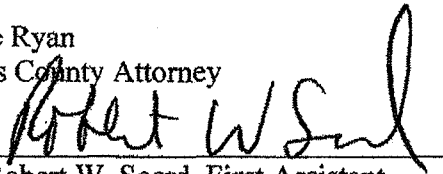
The effects of Hurricane Harvey and its aftermath are widespread and should qualify as a public calamity, given that President Trump declared it a major disaster on August 25, 2017.¹⁴ HCDE, then, may seek a “state” interest in ensuring that the independent school districts of the state recover and are able to continue to provide services to the local communities in Harris County.¹⁵ HCDE, in providing aid to districts, will act within the public calamity exception and gift funds that serve a state interest and have a broad relief for the communities served by those districts.

For all of these reasons, HCDE and the Office of the Harris County Attorney, on HCDE’s behalf, respectively request that you issue an opinion concluding that HCDE may lawfully use public funds to create an HCDE Harvey Relief Fund for the benefit of Harris County independent school districts without violating any applicable law, including the Texas Constitution’s prohibition of gifting public funds.

Very truly yours,

Vince Ryan
Harris County Attorney

By:


Robert W. Soard, First Assistant

cc: Ms. Sarah W. Langlois
Rogers, Morris & Grover, L.L.P.
5718 Westheimer Road, Suite 1200
Houston, Texas 77057
Attorney for Harris County Department of Education

¹³ *City of Aransas Pass*, 247 S.W. at 818.

¹⁴ FEMA (DR-4332).

¹⁵ See Tex. Att’y Gen. Op. No. 0-941 (The legislature has authority to make an appropriation to an independent school district to rebuild a school building destroyed by storm if the storm was of such severity as to impair taxable values in the community and the ability of taxpayers to pay their taxes, and if the legislature finds that it constitutes a public calamity).