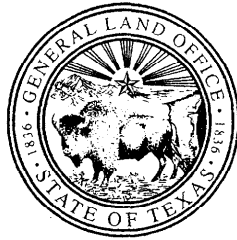


TEXAS



GENERAL LAND OFFICE

JERRY PATTERSON, COMMISSIONER

September 14, 2005

RQ-0397-GA RECEIVED
SEP. 16 2005
OPINION COMMITTEE

The Honorable Greg Abbott
Attorney General of Texas
Supreme Court Building
P.O. Box 12548
Austin, Texas 78711-2548

FILE # ML-44408-05
I.D. # 44408

Re: Permanent School Fund Textbook Purchases

Dear Attorney General Abbott:

I am writing to seek your opinion regarding several provisions of the Texas Constitution (Constitution) involving the Permanent School Fund (PSF) and state textbooks. As you know, my office has the responsibility pursuant to Article VII, Section 4 of the Constitution (Section 4) to manage the real property assets of the PSF. Income from the lease and sale of PSF lands is either retained by my office for up to two years in an escrow account to purchase additional real property or transferred to the State Board of Education (Board) for investment pursuant to Article VII, Section 5 of the Constitution (Section 5). My questions involve whether there is a mechanism by which the additional funds my office has identified can be set aside by the Board as "available funds" to be used specifically for the purchase of these textbooks. The attached Memorandum Brief outlines the background and discussion of this issue, as well as our specific questions.

If you have any questions or need further information, please feel free to call me or Jorge A. Ramirez, GLO staff attorney, at (512) 463-6893.

Sincerely,


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Commissioner, General Land Office

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MEMORANDUM BRIEF

Background

Article 5: Adopting a Percentage of the PSF for the ASF

The PSF equity investments managed by the Board are the source of funding for the Available School Fund (ASF), as described in Section 5. An appropriate percentage of the market value of this portion of the PSF (ASF Percentage), which excludes the value of the real property assets managed by the GLO, is determined by the Board to fund the ASF for each biennium.¹

[The percentage] in each year of a state fiscal biennium must be an amount that is not more than six percent of the average of the market value of the permanent school fund, excluding real property belonging to the fund that is managed, sold, or acquired under Section 4 of this article, on the last day of each of the 16 state fiscal quarters preceding the regular session of the legislature that begins before that state fiscal biennium, in accordance with the rate adopted by:

- (A) a vote of two-thirds of the total membership of the State Board of Education, taken before the regular session of the legislature convenes; or
- (B) the legislature by general law or appropriation, if the State Board of Education does not adopt a rate as provided by Paragraph (A) of this subdivision.²

The ASF is required to be “applied annually to the support of the public free schools” and is distributed on a per student basis within the Foundation School Program³. The ASF is also a source of revenue for the state textbook fund that is appropriated to purchase textbooks adopted by the Board for use in Texas public schools.⁴ Neither the PSF nor the ASF may be appropriated for “any other purpose” besides those described in Section 5.⁵

¹ See TEX. CONST. Art. VII, § 5(a)(1), 5(a)(2) (Section 5 also limits the amount of PSF transferred to the ASF for any biennium to no more than 6 per cent of the value or the total return on all investment assets on a ten-year basis).

² TEX. CONST. Art. VII, § 5(a).

³ TEX. CONST. Art. VII, § 5(c) & TEX. EDUC. CODE ANN §§ 43.001, 43.002, 42.253 (Vernon Supp. 2004-2005) (sections describe the mechanics of transfers from the PSF to the ASF)

⁴ See generally TEX. EDUC. CODE ANN ch 31 (Vernon Supp. 2004-2005) (the Board adopts textbooks meeting the state curriculum, which may be ordered by school districts and charter schools based on their student enrollment. The textbooks remain the property of the state).

⁵ TEX. CONST. Art. VII, § 5(c)(1).

Article 3: Setting Aside Available Funds to Provide Free Textbooks

Aside from Section 5, the Board has a constitutional role with regard to textbooks under Article VII, Section 3(b) (Section 3):

It shall be the duty of the State Board of Education to set aside a sufficient amount of **available funds** to provide free text books (sic) for the use of children attending the public free schools of this State.⁶

Your office, however, has previously found that the Legislature has the authority to limit the amount of funds that the Board can set aside out of the ASF for use in providing free textbooks for public school students.⁷

Discussion

The Board met on November 2004 and adopted 4.5 percent as the ASF Percentage for the 2006-2007 state fiscal biennium⁸. During this process, my office worked cooperatively with the Board to coordinate distributions from the General Land Office (GLO) in a way that maximized revenue consistent with the long-term preservation of the PSF. Subsequently, my office has identified certain receipts from the sale and lease of PSF real property that we may not be able to re-invest in other real estate interests within the allowed two-year period. These receipts would be additional funds that are available to transfer to the Board.

I have spoken with the Board's Chairman, Geraldine Miller, and share her concern that the current state fiscal circumstances may not allow the purchase of all the textbooks that the Board previously adopted for purchase during the 2006-07 biennium. My questions involve whether there is a mechanism by which the additional funds my office has identified can be set aside by the Board as "available funds" to be used specifically for the purchase of these textbooks. My questions are as follows:

1. May the Board adjust the ASF Percentage after the regular session of the Legislature has convened?
2. May the Board, under the authority of Section 3, set aside as "available funds" receipts from the real property assets of the PSF, which were not considered by the Board when determining the ASF Percentage, specifically to provide free textbooks?

⁶ TEX. CONST. Art. VII, § 3(b) (emphasis added).

⁷ See Op. Tex. Att'y Gen. No. H-507 (1975).

⁸ The Board had previously set a different rate at their September 2004 meeting but revised that decision at the November 2004 meeting.

Adjustment of the ASF Percentage After the Regular Session

My first question involves the Board's authority under Section 5 to adjust the ASF Percentage. Section 5 allows the Board to set the ASF Percentage, conditioned upon a two-thirds vote taken prior to the convening of the regular legislative session.⁹ If the Board fails to set the ASF Percentage at the given time, Section 5 provides that the legislature may set the ASF Percentage.¹⁰ Section 5, however, is silent as to whether the Board may adjust the ASF Percentage after the legislature has convened in regular session. Only one court decision has addressed this issue.¹¹ The court noted that the Board "may rescind, enlarge, reduce, or correct a timely apportionment, at any time which will enable the system to reasonably function in accordance with the spirit of constitutional and statutory provisions."¹² I would thus appreciate your guidance as to whether the Board can increase the ASF Percentage to authorize additional funds to be drawn from the PSF once the legislature has convened. I recognize that this question may involve difficult issues when the comptroller has certified an appropriation based on the percentage adopted.

Setting Aside Available Funds from the PSF to Provide Free Textbooks

My second question involves the Board's authority under Section 3 to set aside available funds. Section 3 specifically gives the Board the duty to set aside a sufficient amount of "available funds" to provide free textbooks.¹³ The question is whether these "available funds" can come from those additional receipts identified by my office, which come from the sale and lease of PSF real property. My office believes that they can, for the following three reasons.

First, Section 3 refers to "available funds," not the Available School Fund.¹⁴ Further, recognizing that the Board has multiple sources of funding, the Section requires that the Board set aside an amount from "available funds," in the plural sense, and not from a specific "fund," such as the ASF.¹⁵ Had the legislature intended for the Board to only set aside funds for textbooks from the ASF, they could have specifically written the Section to read as such.

Second, the additional receipts identified by the GLO are "available funds." As noted above, my office has determined that the GLO may not be able to re-invest the subject receipts within the time allowed. Thus, the funds are available for "the support of the public free schools."¹⁶ Moreover, these funds are not part of the corpus of the PSF that is used to calculate the ASF Percentage because Section 5 specifically excludes the real

⁹ TEX. CONST. Art. VII, § 5(a)(1)(A).

¹⁰ TEX. CONST. Art. VII, § 5(a)(1)(B).

¹¹ See *San Antonio Independent School District v. State Board of Education*, 108 S.W.2d 445 (Tex. Civ. App-San Antonio 1937).

¹² *Id.* at 448.

¹³ TEX. CONST. Art. VII, § 3(b).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ TEX. CONST. Art. VII, § 5(c).

property assets managed by the GLO. This exclusion supports the proposition that those receipts identified by my office are “available funds” that may be set aside by the Board for the purchase of textbooks.

Third, unlike the limit imposed by the legislature of the Board’s use of funds from the ASF for the purchase of textbooks, there is no limitation on “available funds.” Rather, the Board has an affirmative duty to set aside funds in a “sufficient amount” to provide free textbooks to children attending the state’s public schools.¹⁷ In opinion H-507 (1975), your office agreed that the legislature could limit the funds the Board could set aside for textbooks.¹⁸ Prior to that opinion, the Board would set aside funds for textbooks at its discretion, based on an estimated appropriation.¹⁹ The Legislature, however, changed the appropriation from an estimate to a “sum certain,” which is a specific number from which the Board may not deviate. Your office opined that “[t]he Legislature has the authority to limit the amount of funds that the State Board of Education can set aside **out of the Available School Fund** for use in providing free text books for public school students.”²⁰ While the opinion holds that a “sum certain” appropriation limits the amount the Board can set aside from the ASF, it does not discuss any other limitations on the constitutional authority of the Board to “set aside” revenue from other “available funds.”²¹

I would ask you to consider the following sequence of events. My office, in the exercise of its responsibility to manage the real estate assets of the PSF, determines that real property revenue is available that will not be used for the purchase of additional land for the PSF, certifies that fact to the Board, and transfers the funds to the Board. The Board, acting under its authority to set aside available funds for the purchase of textbooks, votes to set aside these funds for that purpose to complete the necessary textbook purchases scheduled for the next biennium. May the comptroller honor a warrant submitted for a textbook purchase under those circumstances?

Thank you for your consideration of this request. I would deeply appreciate your expedited consideration of this request in order for my office and the Board to act to assist those efforts. Should you need any additional information, please feel free to contact me or Jorge A. Ramirez, GLO staff attorney at (512) 463-6893.

¹⁷ TEX. CONST. Art. VII, § 3(b).

¹⁸ See Op. Tex. Att’y Gen. No. H-507 (1975).

¹⁹ At the time of AG Opinion H-507, Article VII, Section 3(b) referred to setting aside amounts from “said tax,” a reference to the state property tax previously dedicated to the ASF but abolished by adoption of Article VII, Section 1-e of the constitution in 1968. The current phrasing of “available funds” was adopted in 1999.

²⁰ See Op. Tex. Att’y Gen. No. H-507 (1975) (emphasis added).

²¹ Section 31.021(b) of the Texas Education Code does describe the Board as setting aside textbook funds from the available school fund. However, we are aware of no prohibition against funds from other sources being used to purchase textbooks. For example, the 2005 Texas Education Agency appropriation contained \$145 million in funds from the state economic stabilization fund to purchase textbooks. See Tex. H.B. 10, 79th Leg., R.S. (2005).