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Attorney General Update

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Attorney General Opinions[1]

The forty-nine Attorney General Opinions from 2018 (and one from 2017) are summarized below and arranged in chronological order. Issues that directly affect school districts are underlined and, when necessary, explored in more detail. This paper was current as of December 18, 2018.

Tex. Atty. Gen. Op. KP-0177 (Jan. 17, 2018)

Whether a school district may use public funds to provide transportation for employees or students to and from polling place; and whether a school district may use public funds to influence voters for or against a particular measure or candidate.

Article III, section 52(a) of the Texas Constitution prohibits the gratuitous payment of public funds for a private purpose. However, "[a] transfer of funds for a public purpose, with a clear public benefit received in return, does not amount to a lending of credit or grant of public funds in violation of Article III, sections 51 and 52." Edgewood Indep. Sch. Dist. v. Meno, 917 S.W.2d 717, 740 (Tex. 1995). The Legislature and the State Board of Education have expressly directed school districts to promote voter education among the students of a school district. However, absent an educational purpose in providing students transportation to the polling locations, the transportation serves no public purpose of the school district and therefore violates Article III, section 52(a) of the Texas Constitution.

If a district employee is not engaged in the performance of some educational function on behalf of the district's students, then it is unlikely that providing transportation for employees to and from polling places serves a public purpose of the school district. See Tex. Mun. League Intergov't Risk Pool v. Tex. Workers' Comp. Comm'n, 74 S.W.3d 377, 384 (Tex. 2002) (explaining that the predominant purpose of an expenditure of public funds must serve a public purpose, not benefit private parties). A prior Attorney General opinion concluded that a school district could not fund travel expenses "of persons who have no responsibilities or duties to perform" on behalf of the school district. Tex. Att'y Gen. Op. No. MW-93 (1979) at 2. If a school district employee has no responsibility or duty to perform on behalf of the school district at the polling location, then a school district's funding of transportation for that individual to the polling location serves no public purpose of the school district and violates Article III, section 52(a) of the Texas Constitution.

Two separate provisions prohibit a school district from supporting a candidate or measure in an election. Section 11.169 of the Education Code states ". . . the board of trustees of an independent school district may not use state or local funds or other resources of the district to electioneer for

[1] Credit for the research and writing of this paper goes to April Philley, Associate in the firm of Eichelbaum, Wardell, Hansen Powell & Mehl, P.C.. The responsibility for any errors or commentary is strictly owned by Dennis Eichelbaum.

or against any candidate, measure, or political party." Tex. Educ. Code § 11.169. In addition, subsection 255.003(a) of the Election Code provides: "An officer or employee of a political subdivision may not knowingly spend or authorize the spending of public funds for political advertising." Tex. Elec. Code § 255.003(a). Thus, in addition to prohibiting the actual publishing of political advertising, subsection 255.003(a) prohibits the use of school district staff, facilities, or other resources to advertise for or against a candidate or measure.

Tex. Atty. Gen. Op. KP-0178 (Feb. 13, 2018)

The authority of the West Travis County Public Utility Agency to impose impervious cover requirements on certain new customers.

The City of Bee Cave, Hays County, and West Travis County Municipal Utility District No. 5 created the West Travis County Public Utility Agency ("Agency") and entered into a contract with the Agency to provide water and wastewater services to customers in northern Hays and western Travis counties. The Agency's board of directors adopted a policy requiring certain new customers to limit development to 20% impervious cover as a condition of receiving water service (impervious cover is any type of manmade surface that does not absorb rainfall, such as concrete). This impervious cover requirement applied only to new customers seeking water services outside the service area boundaries of the Agency's certificate of convenience and necessity.

The Attorney General concluded that a public utility agency has statutory authority to contract with private entities seeking water services under terms that its board of directors deems appropriate and that are within the agency's permissible scope of authority. However, determining whether the West Travis County Public Utility Agency has authority to impose impervious cover limits on private entities outside the service area boundaries of the Agency's certificate of convenience and necessity as a contractual condition to extending its water services raises questions of fact and contract interpretation beyond the scope of an attorney general opinion.

Tex. Atty. Gen. Op. KP-0179 (Feb. 13, 2018)

Whether certain Department of Insurance directives regarding Health Reimbursement Arrangements are preempted by changes to the Internal Revenue Code.

In 2006, the Texas Department of Insurance ("Department") issued a bulletin identifying a health reimbursement arrangement as a plan or program subject to state regulation of group health plans under chapter 1501 of the Insurance Code. However, in late 2016, Congress passed the Twenty-first Century Cures Act, which provides that a specified type of health reimbursement arrangement (a qualified small employer health reimbursement arrangement) is not considered a group health plan and thus does not have to comply with federal requirements for group health plans. 26 U.S.C. § 9831(d)(1); 21st Century Cures Act, Pub. L. No. 114-255, § 18001, 130 Stat. 1033, 1338-1344

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