Monday, August 9, 2010

State Superintendent of Education
ATTN: Dr. Christopher Koch, Superintendent
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Springfield, Illinois 62777
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RE: FOIA Request for both Formal and Informal Opinions of ISBE Legal Advisor.

Dear Superintendent Koch:

This is a request for records under the Freedom of Information Act of Illinois. Please forward it to the appropriate individual serving as your agency’s “F.O.I.A. Officer”.

Section 2-3.7 of The School Code states one of the powers and duties of the State Board of Education is to serve as “legal advisor”.

Section 2-3.7: “Legal adviser of school officers - Opinions. To be the legal adviser of school officers, and, when requested by any school officer, to give an opinion in writing upon any question arising under the school laws of the State.”

The following was stated in Board of Educ. v. Regional Board of Sch. Trustees:

“Statutory interpretations by administrative agencies are an informed source for ascertaining legislative intent; thus, letter opinions stating the position of the legal adviser are, if not binding on courts, persuasive.”
121 Ill. App. 3d 848, 77 Ill. Dec. 241, 460 N.E.2d 100 (5 Dist. 1984)

In reviewing the role of “legal advisor” under Section 2-3.7, I found several documents published/edited by a former “legal advisor” who now works in private practice (See attached documents of Allen D. Schwartz now of Robbins Schwartz Nicholas Lifton & Taylor, Ltd.). I have found the attached documents to be very helpful in understanding the responsibilities of the “legal advisor” as well as understanding both Formal Opinions and Informal Opinions.

Recently, the issue of permanently transferring “surplus life safety taxes” originating from the “Nickel Levy” (17-2.11(j)) authorized by Section 17-2.11 was addressed by the General Assembly in HB5515. That amendment introduced the term “surplus” for the first time to describe the monies remaining after “…the purposes for which the taxes have been levied are accomplished and paid in full, and there remain funds on hand in the Fire Prevention and Safety Fund from the proceeds of the taxes levied…” (Emphasis added)

Section 105 ILCS 5/17-2.11(r) states:

“(r) When the purposes for which the bonds are issued have been accomplished and paid for in full and there remain funds on hand from the
proceeds of the bond sale and interest earnings therefrom, the board shall, by resolution, use such excess funds in accordance with the provisions of Section 10-22.14 of this Act." (Emphasis added)

Section 10-22.14 is entitled “Borrowing money and issuing bonds. To borrow money, and issue bonds for the purposes and in the manner provided by this Act.” Section 10-22.14 states the following regarding “surplus” FP&S monies resulting from a bond issuance.

“When bonds are issued by any school district for fire prevention, safety, energy conservation, and school security purposes as specified in Section 17-2.11 [105 ILCS 5/17-2.11], and the purposes for which the bonds have been issued are accomplished and paid in full, and there remain funds on hand from the proceeds of the bonds issued, the board by resolution shall use those excess funds (1) for other authorized fire prevention, safety, energy conservation, and school security purposes as specified in Section 17-2.11 [105 ILCS 5/17-2.11] or (2) for transfer to the Bond and Interest Fund for payment of principal and interest on those bonds. If any transfer is made to the Bond and Interest Fund, the secretary of the school board shall within 30 days notify the county clerk of the amount of that transfer and direct the clerk to abate the taxes to be extended for the purposes of principal and interest payments on the respective bonds issued under Section 17-2.11 [105 ILCS 5/17-2.11] by an amount equal to such transfer.” (Emphasis added)

1) This F.O.I.A. request is for all Formal Opinions and Informal Opinions since the permanent transfer of “surplus life safety monies” was first authorized by the General Assembly. The requested Opinions would address the usage of “surplus life safety monies” in general that have accumulated as the result of either the “Nickel Levy” (17-2.11(j)) or a Bond Issuance (17-2.11(r)).

2) In addition, this F.O.I.A. request is for all Formal Opinions and Informal Opinions that address the issue of whether or not a school district can substitute a “maintenance project” that they hope will be ruled a “violation” for a “violation” that they have already been ordered by the ISBE/ROE to repair. In other words, does the District need to complete the first set of “violations” in their entirety or can they unilaterally decide not to repair one or more of the “violations” and substitute a “newly” approved violation in its place? The issue is can bonds sold for a list of identified projects be used for other projects that are substituted for the original projects with the intent being the original projects will not be completed?

3) And, finally, this F.O.I.A. request is for all Formal Opinions and Informal Opinions that address the issue of whether or not all of the code violation repairs need to be “accomplished and paid for in full” before any new projects can be undertaken with the original tax proceeds (levy and/or bonds). The issue is can taxes raised and/or bonds sold for a list of identified projects be used for other projects before all of the original projects have been accomplished and paid for in full?
For example, currently the Administration of District 58 contends that all fifty-seven (57) light poles and several HVAC units at Henry Puffer Elementary School that were 1) inspected by the architect and determined to be in violation of one or more codes, 2) ordered repaired by the ISBE/ROE and 3) were listed in both the resolution and a legal action as requiring the use of bond proceeds now do not have to be replaced/repaird. Instead, the Administration is claiming that the “surplus” ... created in part by forgoing the completion of some of these “violations” and assuming that the unfinished roof repair will come in at or under its estimate ... can now be used for “new” violations that will be part of a new round of FP&S amendments.

In addition, the Administration of District 58 contends that all of the original projects do not have to be “accomplished and paid for in full” before using the bond proceeds for “new” violations.

Currently, the Board of Education of District 58 finds itself with a “surplus” as of today of approximately $3,000,000 from the $10,000,000 bond issuance in January 2010. According to the Administration, the only remaining project from the original list identified as part of the bond issuance is the roof of Henry Puffer which is scheduled for the summer of 2012. That roof’s estimate of $1.76M was hyper-inflated by a factor of TWO. Therefore, the total “surplus” once all projects are “accomplished and paid for in full” in September 2012 will be approximately $3,800,000.

You may recall last November I asked you and the ROE to review the estimates because clearly they were all inflated. Both of you refused to intercede. And, I predicted that in all likelihood there would be nearly $4,000,000 in “surplus” bond funds left in the FP&S Fund when the 2009 list of “maintenance projects” turned “violations” are completed.

Now, the District is entering “Stage Two” of its five-year maintenance plan ... using the contrived “surplus” for additional maintenance projects. And, in order to execute that part of the plan, the District must once again call upon both the ISBE and ROE to aid them by approving another batch of FP&S “violations” and looking the other way when it comes to the completion of the previous list of “violations” in need of funding via a bond sale.

Finally, I ask for a waiver of any fees in light of the fact that the disclosure of the requested records will serve a public interest.

Respectfully yours,

Scott O’Connell
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cc: Regional Office of Education
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General Counsel (Hodges, Loizzi, Eisenhammer, Rodick and Kohn)
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