

Opinion No. 2013-124

January 29, 2014

The Honorable Michael Lamoureux
State Senator
103 West Parkway, Suite 1B
Russellville, Arkansas 72801

Dear Senator Lamoureux:

I am writing in response to your request for my opinion on a matter relating to a proposed agreement, captioned Non-Exclusive Ballfield Improvement and Use Agreement (The “Agreement”), between the City of Russellville (the “City”) and the Russellville School District (the “District”). Pursuant to the Agreement, the City would provide the District the use of certain City-owned baseball/softball facilities in consideration of the District’s improving the City-owned properties. Although you have attached the Agreement to your request, I need not elaborately review its terms, noting only that it is drafted as a contract, with the recited consideration flowing from the District consisting primarily of its proposed improvements to the properties and the consideration flowing from the City consisting primarily of its allowing the District access to the facilities for a term of years to conduct athletic competitions. The Agreement declares itself as intended “to expand the scope of” an earlier contract pursuant to which the District conveyed certain property to the City in exchange for the City’s constructing a driveway connecting the back of the Russellville High School to the City street system. As I understand it, at issue in your request is only the constitutional propriety of the currently proposed Agreement, which envisions the District funding improvements to the City-owned property in exchange for its access to improved athletic facilities.

With respect to this inquiry, you have offered the following observations:

The District believes the Agreement provides a valuable educational benefit to the District and is for a permissible educational purpose as:

- The Russellville High School adjoins the baseball fields and has a road connecting the two;
- The District is not required to purchase and develop additional property for its baseball/softball programs; and
- The proximity of the school to the fields allows for more participation and less travel time and expense.

Against this backdrop, you have posed the following question:

May the District use its funds to construct improvements to City owned property under the terms of the proposed Agreement?

RESPONSE

Not being a finder of fact, I am unable categorically to answer this question, which can only be addressed after careful consideration of all the attendant circumstances. I will opine, however, that a school district is not barred as a matter of law from incurring an expense that might incidentally effect an improvement to municipal property. Under the controlling constitutional standard as interpreted by the Arkansas Supreme Court, the pertinent inquiry in reviewing any expenditure of school district funds is whether the school board, in exercising its considerable discretion, lacked any rational basis to conclude that the expense was “necessary” to advance the educational interests of school-district pupils. Somewhat counterintuitively, the court has defined the term “necessary” – and, indeed, the alternative coinage “absolutely necessary,” which it sometimes uses in its pronouncements on this subject – as meaning only “convenient, useful, appropriate, suitable, proper or conducive to the proper maintenance of the schools.” The court has further pronounced that an expenditure will pass constitutional muster if it is “immediately and directly connected with the establishment and maintenance of a common school system.” Only a reviewing court, based upon its consideration of all the pertinent facts, could determine whether a particular expenditure would comply with this standard.

DISCUSSION

Circumscribing any inquiry regarding a disposition of school district assets is the constitutional mandate that school district resources invariably be devoted to benefiting K-12 district students. In this regard, the Arkansas Constitution directs that “the State shall ever maintain a general, suitable and efficient system of free public schools,”¹ that “[n]o money or property belonging to the public school fund, or to this State for the benefit of schools or universities, shall ever be used for any other than for the respective purposes to which it belongs,”² and that taxes levied for maintenance and operation of the schools will be used exclusively for that purpose.³ Also bearing on any such inquiry are the various statutory directives discussed below, including the mandate restricting a school board’s actions to ones “necessary and lawful for the conduct of efficient free public schools in the district.”⁴

Regarding the application of Article 14, §§ 2 and 3, the Arkansas Supreme Court has declared:

The former section prohibits the use of money or property belonging to the *state school fund* for any other than the purpose to which it belongs. The latter prohibits the *annual tax voted by the electors* of the district from being used for any purpose other than the maintenance of schools, the erection and equipment of school buildings and the retirement of existing indebtedness.⁵

In addition, Amendment 74 to the Arkansas Constitution, establishes a uniform rate of tax for school districts to be “used solely for maintenance and operation of the schools.”⁶ This amendment further allows for the levy of taxes in excess of the uniform rate for “maintenance and operation of the schools and the retirement of

¹ Ark. Const. art. 14, § 1.

² Ark. Const. art. 14, § 2.

³ Ark. Const. art. 14, § 3.

⁴ A.C.A. § 6-13-620(a)(12) (Supp. 2011).

⁵ *Rainwater v. Haynes*, 244 Ark. 1191, 1195, 428 S.W.2d 254 (1968) (emphases added).

⁶ Ark. Const. amend. 74, § (b)(1) and (b)(3).

indebtedness.”⁷ Subsection (d) defines “maintenance and operation” as being “such expenses for the general maintenance and operation of schools as may be defined by law.”

In defining the general powers of school districts, the Arkansas Code provides in pertinent part:

The board of directors of each school district in the state is charged with the following powers and required to perform the following duties in order to provide no less than a general, suitable, and efficient system of free public schools:

(6) Understand and oversee school district finances required by law to ensure alignment with the school district's academic and facility needs and goals, including without limitation:

* * *

(D) Entering into contracts for goods and services *necessary* to operate the school district;

* * *

(7) Ensure that:

(A) *Necessary and sufficient facilities* are built or obtained, furnished, and maintained; . . . and

* * *

(11) Do all other things necessary and lawful for the conduct of efficient free public schools in the school district.⁸

You have specifically expressed concern about this office’s tentative application of these provisions in Op. Att’y Gen. No. 2004-118, in which my immediate predecessor addressed “whether a school district can use its funds to build and/or

⁷ *Id.* at subsection (c)(1).

⁸ A.C.A. § 6-13-620 (Supp. 2011) (emphases added).

repair roads which are not on school property, but would provide access to a school in the district.” My predecessor opined that “it would be necessary to analyze all the facts surrounding the location, use and necessity of the repairs or construction and the particular funding utilized in order to definitively determine the answer.” He further opined that “the answer to your question is generally ‘no,’ absent facts indicating that the repair or building of the road is so connected to operation of the school that it could be considered *necessary for school purposes*.” (Emphasis added.) Uncoincidentally, my predecessor’s use of the term “necessary” in this passage echoes the term used in the statute recited above.

Your apparent concern is that the expenditure at issue in your request would likewise involve school district expenditures for the improvement of property that does not belong to the district itself, raising the question of whether such expenditures might be deemed “necessary” as that term is used in this application.

In *Gray v. Mitchell*,⁹ the court directly clarified the scope of the term “necessary” in terms of the constitutional restrictions upon school district expenditures. The court prefaced its analysis with the following summary of its prior pertinent rulings:

This court has previously interpreted article 14, § 2, and said that “[t]he Constitution . . . prohibit[s] the Legislature from applying the common school fund to any other branch of state expenditures except that immediately and directly connected with the establishment and maintenance of a common school system.” *Little River County Bd. of Educ. v. Ashdown Special Sch. Dist.*, 156 Ark. 549, 556, 247 S.W.70, 72 (1923). Thus, a school board, like the legislature, is limited to spending school money for expenses immediately and directly connected with the establishment and maintenance of schools.

This court has also said that “the proper authorities (such as the trustees of a school district) may, in their discretion, make any expenditure of the [public school] funds which is *absolutely necessary* for the proper maintenance of the school intrusted [sic] to

⁹ 373 Ark. 560, 373 Ark. 560, 285 S.W.3d 222 (2008).

their charge.” *Bd. of Educ. of Lonoke County v. Lonoke County*, 181 Ark. 1046, 1054, 29 S.W.2d 268, 272 (1930).¹⁰

Having offered this summary, however, the court interpreted the formulation just quoted as follows:

It is clear, nonetheless, that, by using the term “absolutely necessary,” this court did not intend to limit school boards to those expenditures without which there could be no public schools.

* * *

Given the list of expenditures that the court noted would be permissible, there can be no doubt that *the court intended “absolutely necessary” to mean that which is convenient, useful, appropriate, suitable, proper or conducive to the proper maintenance of the schools*. Moreover, this court has said that “any use of school funds raised from taxation that results in benefits to school funds or property or aids in the stated purposes for which these funds may be expended would not be an unconstitutional diversion. *Rainwater v. Haynes*, 244 Ark. 1191, 1195, 428 S.W.2d 254, 257 (1968).¹¹

As a guide to the practical application of this standard, the court observed that “exactly which expenditures should be made to benefit a school district is a matter for the School Board to determine.”¹² This conclusion is fully consistent with a

¹⁰ *Id.* at 568 (emphasis added).

¹¹ *Id.* at 568-69 (emphasis added). Although it was directly addressing in these formulations the application of Article 14, § 2, the court noted that this standard is for all practical purposes coextensive with that applicable to expenditures made under the authority of Article 14, § 3:

Although this court has not previously interpreted the current version of art. 14, § 3, we hold that it requires nothing more than article 14, § 2. Under section 2, an expenditure must be “immediately and directly connected with the establishment and maintenance of a common school system.” . . . Clearly, any expenditure that meets this requirement will be one that is “for maintenance and operation of the schools.” Ark. Const. art. 14, § 3 (as amended by Ark. Const. amend. 74)

Id. at 469 (citations omitted).

¹² *Id.*

position repeatedly taken by this office – namely, that school districts have broad discretion in pursuing their constitutional duty to “maintain a general, suitable and efficient system of free public schools”¹³ As one of my predecessors has noted:

The Arkansas courts have long interpreted this statute [A.C.A. § 6-13-620, which defines a school district board’s powers] as allowing school boards wide latitude in governing their districts. *See, e.g., Safferstone v. Tucker*, 235 Ark. 70, 72, 357 S.W.2d 3, 4 (1962); *Isgrig v. Srygley*, 210 Ark. 580, 197 S.W.2d 39 (1946). *See also Springdale Board of Education v. Bowman*, 294 Ark. 66, 69, 740 S.W.2d 909, 910 (1987); *Leola School District v. McMahan*, 289 Ark. 496, 498, 712 S.W.2d 903, 905 (1986). The courts have further held that they will not substitute their judgment for that of a school board with regard to policy matters, unless the school board, in enacting the policy in question, abused its discretion or acted arbitrarily, capriciously, or contrary to law. *Id.* The court in *Leola, supra*, explained “arbitrary and capricious” action by a school board as being action that is not supportable “on any rational basis.” *Leola*, 289 Ark. at 498, 712 S.W.2d at 905. It should be noted that the party challenging the school board’s policy has the burden of proving the board’s abuse of discretion by clear and convincing evidence. *Springdale*, 294 Ark. at 69, 740 S.W.2d at 910.¹⁴

The opinion that has apparently prompted your concern is ultimately consistent with the foregoing. In offering his guarded opinion, my predecessor declared that he was guided by the following:

A school board will be granted some discretion in determining necessary expenditures. *See Board of Education of Lonoke County v. Lonoke County*, 181 Ark. 1046, 29 S.W.2d 268 (1930), *citing Taylor v. Matthews*, 75 S.E. 166 (1912). I have previously stated, however, that “the court has held that expenditure of school funds must be ‘confined to public schools’ and ‘absolutely necessary’ for proper maintenance of the school in the discretion of the directors. Additionally, the court in *Magnolia [School District No. 14 v.*

¹³ Ark. Const. art. 14, § 1.

¹⁴ Ark. Op. Att’y Gen. No. 2000-270, quoted in Op. Att’y Gen. No. 2012-060.

Arkansas State Board of Education, 303 Ark. 666, 799 S.W.2d 791 (1990)] has stated that the expenditure must result in benefits to school funds or property or aid in the stated purposes for which the funds may be expended.” Op. Att’y. Gen. No. 2003-349.¹⁵

This formulation, although serving as a basis for my predecessor’s tentative speculation that a fact-finder might question the expenditure there at issue, does no more than summarize the above stated requirements that school district expenditures be “absolutely necessary.”

Although the court in *Gray* did not declare itself as departing from precedent, its pronouncements serve to mitigate what might otherwise be deemed the restrictive effect on school-district expenditures of the “absolutely necessary” standard articulated in *Lonoke County*.¹⁶ The court in *Gray* went out of its way to stress not only that the term “absolutely necessary” should not be read as limiting school boards to approving only expenditures that qualify as crucial to the public schools’ operation, it further stressed that a school board has considerable discretion in determining what expenditures indeed qualify as “convenient, useful, appropriate, suitable, proper or conducive to the proper maintenance of the schools” – i.e., in determining what expenses are “absolutely necessary” in the limited sense of that term that applies in determining their constitutional propriety.

With respect to the expenditure at issue in your request, I can only echo my predecessor’s observation that any determination under the above standard will be “fact-specific,” meaning that only a court could provide you an unqualified answer. Purely by way of guidance regarding the test district counsel might apply in assessing the propriety of the proposed expenditure, I will merely note that, in my opinion, the “absolutely necessary” standard set forth above does not categorically foreclose an expenditure that incidentally benefits parties other than the district itself.¹⁷ In my opinion, the expenditures contemplated in the Agreement would be deemed impermissible only if they could not rationally be

¹⁵ Op. Att’y Gen. No. 2004-118.

¹⁶ I note in this regard that the court’s “absolutely necessary” coinage in *Lonoke County*, which likely prompted my predecessor’s caution regarding the proposed expenditure he addressed, incorporates a restrictive adverb totally absent in the constitutional provisions recited above.

¹⁷ In this regard, the Code contemplates that, subject to monitoring by the State Board of Education, a school district might devote its facilities to “recreation purposes” apparently benefitting non-students, so long as this use is “secondary” and the facilities are used “primarily for the purpose of conducting the regular school curriculum and related activities.” A.C.A. § 14-54-1307 (Repl. 1998).

described as “convenient, useful, appropriate, suitable, proper or conducive to the proper maintenance of the schools.”

In reviewing the Agreement under this standard, a court might well attach significance to what you have highlighted in your bullet-point list of “permissible educational purposes” – namely, that the district would save the costs of facility purchases and development by simply improving and ensuring unfettered access to property conveniently adjacent to the school. A court might conversely attach significance, however, to any circumstance suggesting that the Agreement would trigger district expenditures that in the ordinary course would or should normally have been incurred by another governmental entity in the reasonable exercise of its responsibilities.¹⁸ A reviewing court, in short, would test the sufficiency of the consideration flowing to the district as a result of the Agreement, seeking again to determine whether the district’s decision to enter into this contractual arrangement might be deemed “arbitrary” or “capricious” under the standard discussed above.

As should be apparent from the foregoing, any inquiry of this sort would entail a weighing of factual circumstances of the sort that I, not being a finder of fact, am neither authorized nor situated to conduct. I can do no more than set forth the factors I believe a court might consider in conducting its deferential review of a school board’s determinations. I am unaware of any applicable case law in which a court has conducted such a review involving circumstances that directly parallel those you have described.

Assistant Attorney General Jack Druff prepared the foregoing opinion, which I hereby approve.

Sincerely,

DUSTIN McDANIEL
Attorney General

DM/JHD:cyh

¹⁸ This consideration, for instance, may have informed my predecessor’s speculation about the propriety of the expenditure he addressed in his opinion.