

STATE OF SOUTH DAKOTA
OFFICE OF
THE ATTORNEY GENERAL

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P.O. Box 173
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OFFICIAL OPINION NO. 11-02

Ability of School District to Establish Scholarship Program with Funds from an Unrestricted Testamentary Bequest

Dear Mr. Kaufman:

You have requested an official opinion from this Office regarding the following question:

QUESTION:

Can a public school district transfer funds from an undesignated testamentary bequest to a private nonprofit foundation or a municipality to establish a post secondary scholarship program for the district's students?

ANSWER AND OPINION SUMMARY:

No. A public school district lacks the power or authority to transfer funds received from an undesignated testamentary bequest to either a private nonprofit foundation or a municipality for the purpose of establishing a post secondary scholarship program for the district's students.

FACTS:

The Montrose School District 43-2, Montrose, South Dakota, received a bequest from a will provision in a trust established in another state. The bequest distribution was made outright to the District "with the wish that the recipient use the funds for the purchase of equipment

for the physics and chemistry laboratories which the school might otherwise not be able to acquire." The District advises that, under the laws of the other state, this language constitutes a request and not a binding requirement on the recipient of the funds.[1]

The District accepted the bequest and placed the money in a District special revenue fund. A portion of the bequest was used for the science department. The District would like to use the remainder to establish a post secondary scholarship program for students in the District. The District proposes to do this either by transferring the remainder of the bequest from the special revenue fund to a private nonprofit foundation (the South Dakota Community Foundation) who will operate the scholarship program, or by transferring the funds to a municipality under SDCL 9-12-11.

IN RE QUESTION:

School districts are creatures of the Constitution and Legislature. Olson v. Guindon, 2009 S.D. 63, ¶¶ 8, 16, 771 N.W.2d 318, 320, 323; Tschetter v. Doland Board of Education, 302 N.W.2d 43, 45 (S.D. 1981). A school district can exercise only those powers expressly granted or necessarily implied by statute. In re Writ of Certiorari as to the Wrongful Payments of Attorney Fees, 2003 S.D. 101, ¶ 10, 668 N.W.2d 538, 542; Edgemont School District 23-1 v. S.D. Department of Revenue, 1999 S.D. 48, ¶ 15, 593 N.W.2d 36, 40. The powers of districts, such as school districts, are more limited than municipal corporations since districts are created, organized and given certain limited powers *only to carry out their stated public purpose*. Beals v. Pickerell Lake Sanitary District, 1998 S.D. 42, ¶ 14, 578 N.W.2d 134, 136-137.

The public purpose of a school district is established in Article VIII, Sec. 1 of the South Dakota Constitution and in SDCL 13-5-1: to operate a kindergarten through grade 12 educational program that is "equally open to all" children "without charge". The Legislature enacted numerous statutes to allow the school districts to carry out this purpose.

The Legislature has given school districts specific statutory authority to accept and dispose of gifts and bequests. SDCL 13-14-5 states:

Every school district in this state is hereby empowered to accept, own, manage, and dispose of any grant, gift, devise, or bequest of money, or real or personal property; and the school board of such school district shall have power to enter into such agreement for the receipt thereof upon such terms as shall be to the best interest of all parties and to make such rules and regulations as it may deem best for the ownership, management, and control of such property.

This statute does not express the purpose for which a school district may use the money it accepts. SDCL 13-14-5 cannot be construed to expand a school district's authority in this area. As a result, absent a binding directive from the bequestor, the use of money accepted under SDCL 13-14-5 for the benefit of the school district is limited to the purpose of school districts established by the Constitution and SDCL 13-5-1: providing kindergarten through grade 12 educational services.[2]

The scholarship program contemplated by the District is to provide financial assistance for post-secondary education to students who have graduated from grade 12. The Legislature

has not enacted a statute authorizing expenditure of school district funds for scholarships. Further, this activity is outside the stated purpose of providing kindergarten through grade 12 educational services. This interpretation is consistent with SDCL 13-14-13. This statute authorizes benevolent organizations to obtain gifts which, when given to a school district, are required to be used for specified purposes such as curricula, interscholastic activities, extracurricular programs, and school trips. The authorized uses of gifts under SDCL 13-14-13 do *not* include scholarships.

The District suggests that SDCL 13-8-39 and 6-14-2 establish authority for a school district scholarship program. SDCL 13-8-39 provides in part, "As provided and limited by law, the school board has ... control and care of all property belonging to it." The statute then goes on to authorize specific actions by the board, including such things as levying taxes and purchasing necessary equipment. Nothing in this statute, however, changes a school district's public purpose, or gives a school board the authority to take actions to benefit persons who have graduated from grade 12 and are no longer being served by the school district. SDCL 6-14-1 authorizes political subdivisions to create endowment funds. Interest on such a fund is authorized to be spent by the political subdivision "for any legal purpose". SDCL 6-14-2. Again, these statutes do not expand the purposes for which a district may legally *use* the money it generates through an endowment fund.

It is clear that a scholarship program, beneficial as it may be to District students attending college, provides a service outside of the express statutory authority of a school district associated with the operation of a kindergarten through grade 12 school program. While a district also has those powers "necessarily implied" by its statutes (Wrongful Payments, 2003 S.D. 101 ¶ 10), the establishment of a scholarship program is not an activity *necessary* for a district to provide kindergarten through grade 12 educational services.

The District's proposal to transfer the remainder of the bequest to a private nonprofit foundation, the South Dakota Community Foundation, who will manage the funds and operate the scholarship program for the District's students does not alter the conclusion. As explained above, the District does not have the authority to use the bequest for the purpose of a scholarship fund. Transferring the funds to another entity does not alter the limitations on the District's use of district funds. A school district cannot do indirectly what it does not have the power to do directly. Wrongful Payments, 2003 S.D. 101, at n.6.

Alternatively, the District proposes transferring the remainder of the bequest to a municipality within the school district under SDCL 6-5-5 to be used by the municipality as a scholarship program for the District's students. SDCL 6-5-5 authorizes school districts to convey money "to the state or any public corporation thereof, *to be used by such grantee for an authorized public purpose*". While this statute authorizes the District to convey the remainder of the bequest to the City, the City's acceptance and use of the bequest is limited to the City's "authorized public purpose."

The District suggests that SDCL 9-12-11 provides authority for the municipality to establish a scholarship fund. SDCL 9-12-11 provides in part, "A municipality may appropriate money

from its general fund to promote itself." My predecessors have interpreted this statute on several occasions. See AGO 92-06, 88-07, 84-46, 70-41. This Office has previously opined that the term "promotion" in the statute is not limited to advertising and that cities are given broad discretion in determining what falls within the statute. AGO 92-06, 84-46. For example, activities that contribute to or encourage the growth, enlargement, or prosperity of a city, such as building a mall or trade expo center, financing new businesses, and putting on sporting events and plays, fall within the authority granted by SDCL 9-12-11. AGO 84-46.

However, the most recent Opinion from this Office makes it clear that the discretion granted by SDCL 9-12-11 is limited. The fact that there may be some positive economic impact on the city is not in and of itself enough to amount to "promotion" when the proposed project is outside the city's jurisdictional confines. AGO 92-06 (City of Spearfish could not use hospitality tax revenue to directly support the development of an archeological site in Wyoming).

A scholarship program for students within the District, who may or may not live within the municipality, does not clearly provide some positive economic impact to the city. While it is possible students receiving scholarships will return to the municipality to work or start businesses, in my opinion this potential impact is too attenuated and speculative to amount to "promotion" within the meaning of SDCL 9-12-11.

Respectfully Submitted,

Marty J. Jackley
Attorney General

MJJ/RG/rar

[1]This Office takes no position on the accuracy of this statement.

[2]The District's authority under SDCL 13-14-5 to accept and dispose of a bequest with a designated purpose is not addressed in this Opinion. Had the bequest specified expenditure for a post secondary scholarship program, SDCL 13-14-5 may authorize the District's proposed transfer to a nonprofit foundation for implementation. In that case, however, a trust relationship is created and the District, by accepting the bequest, is volunteering to act as a trustee of the funds for the District's students. This is distinct from the situation here, where the District has accepted funds from a bequest without any designations on their use and no trust relationship was created.