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June 17, 2003

OFFICIAL OPINION 2003-5

The Honorable Tim Berry
Treasurer of State
Indianapolis, Indiana 46204

Re: Withdrawal from Principal of Common School Fund

Dear Treasurer Berry:

This letter responds to your request for an advisory opinion on the duties and responsibilities of your office as they relate to the retroactive application of House Enrolled Act 1001, (Public Law 224-2003). In your letter dated May 5, 2003 you stated:

Section 115 [of the Act] directs me to transfer \$25 million out of the Common School Fund, back to the Abandoned Property Fund, and then into the General Fund, even though Article 8 of the Constitution appears to prohibit any transfers out of the Common School Fund for any purpose. Although authorized by HB 1001 to make these transfers, I am reluctant to do so in light of the directives contained in the Constitution without your assurance that the transfers would be lawful.

It is our opinion that to the extent that Section 115(b) of House Enrolled Act 1001, (Public Law 224-2003) requires the Treasurer to diminish the principal of the Common School Fund, it violates Article 8 of the Indiana Constitution.

FACTUAL BACKGROUND

According to your letter, on January 30, 2003, the State's Abandoned Property Fund had a balance in excess of \$500,000.00. On that date, the Office of the Treasurer transferred twenty-five million dollars (\$25,000,000) from the Abandoned Property Fund to the Common School Fund. This transfer was authorized by Indiana Code § 32-34-1-34, which provides, in pertinent part:

(b) If the balance of the principal of the abandoned property fund established by [IC 32-34-1-33] exceeds five hundred thousand dollars (\$500,000), the treasurer of state may, and at least once each fiscal year shall, transfer to the common school fund of the state the balance of the principal of the abandoned property fund that exceeds five hundred thousand dollars (\$500,000).

The January transfer was the first and only transfer during the current fiscal year. Subsequently the General Assembly passed, and the Governor signed, the budget bill for the biennium 2003-2005, House Enrolled Act 1001 (Public Law 224-2003). Section 115 provides, in its entirety:

(a) Notwithstanding IC 32-34-1-34, the treasurer of state shall transfer on:
(1) June 30, 2003;
(2) June 30, 2004; and
(3) June 30, 2005;

any balance (excluding amounts needed to fund appropriations to the attorney general for personal services and other operating expenses for the unclaimed property program) in the abandoned property fund that exceeds five hundred thousand dollars (\$500,000) to the state general fund.

(b) After June 30, 2002, and before July 1, 2005, the treasurer of state may not transfer any amount in the abandoned property fund to the common school fund. If any money was transferred before June 30, 2003, in a manner that is inconsistent with this subsection, the treasurer of state shall take the necessary action to restore the money to the abandoned property fund and transfer the money as required under subsection (a). (emphasis added).

(c) This SECTION expires July 1, 2004.

Your question recognizes the conflict between the language in subsection (b) requiring the Treasurer to withdraw principal from the Common School Fund in order to restore it to the Abandoned Property Fund, and Article 8, Section 3 of the Indiana Constitution, which provides:

The principal of the Common School fund shall remain a perpetual fund, *which may be increased, but shall never be diminished*; and the income thereof shall be inviolably appropriated to the support of Common Schools, and to no other purpose whatever. (emphasis added).

The constitutional intent that the principal of the Common School Fund remain forever protected is also expressed in Article 8, Section 7, where it is characterized as a trust:

All trust funds, held by the State, shall remain inviolate, and be faithfully and exclusively applied to the purposes for which the trust was created.

The office of Treasurer of State is created by our Constitution at Article 6, Section 1: “There shall be elected, by the voters of the state . . . a Treasurer of State . . . [who] . . . shall perform such duties as may be enjoined by law . . .” As the holder of a constitutional office, you are required to take an oath to “support the Constitution of this State . . . and also an oath of office.” Ind. Const. art. 15 § 4. Lest there be any question that the constitution prevails over any statutory enactment, Indiana Code Section 1-1-2-1 provides:

The law governing this state is declared to be:
First. The Constitution of the United States and of this state.
Second. All statutes of the general assembly of the state in force, and *not inconsistent with such constitutions*.

The duties of Treasurer are set by statute, and include the following:

Indiana Code Section 4-8.1-2-1: The treasurer of state is responsible for the safekeeping and investment of moneys and securities paid into the state treasury.

Indiana Code Section 4-8.1-2-5: (a) The treasurer of state may not use or permit any other person to use the moneys or property received by him or paid into the state treasury, except as permitted by law.

Indiana Code Section 21-1-3-1: On and after November 3, 1943, the treasurer of state shall be the exclusive custodian of the common school fund and the Indiana University permanent endowment fund not held in trust by the several counties... The state board of finance shall have full and complete management and control of such funds and is hereby authorized and directed to invest the common school funds and the Indiana University permanent endowment funds as provided in this title and IC 20.

ANALYSIS

The drafters of Indiana Constitution found the right of a state-supported free education to be of such importance that they dedicated Article 8 solely to that subject:

Knowledge and learning, generally diffused throughout a community, being essential to the preservation of a free government; it shall be the duty of the General Assembly to encourage, by all suitable means, moral, intellectual, scientific, and agricultural improvement; and to provide, by law, for a general and uniform system of Common Schools, wherein tuition shall be without charge, and equally open to all.

Ind. Const. art. 8, § 1.

The sole purpose of Article 8 was to establish a perpetual, inviolable source of funds to provide for such education, and the mechanism chosen was the Common School Fund. Thus, Article 8, Section 2 lists sources of funds that as of 1851, were absolutely committed to the Fund; Section 3 creates the Fund and provides that while it “may be increased . . . [it] shall never be diminished”; Section 4 requires the General Assembly to invest the Fund “in some safe and profitable manner” and to make provision by law for distribution of the interest to counties; Section 5 requires reinvestment of unused interest; Section 6 holds the counties liable for “*preservation* of so much of the said fund as may be entrusted to them” (emphasis added); Section 7 emphasizes the intent that the Fund be held in trust by the State and remain “inviolable, and be faithfully and exclusively applied to the purposes for which the trust was created”; and Section 8 creates a state superintendent of public instruction. Very early on, our courts recognized that all sections of Article 8,

being devoted to one subject, all of its sections must be construed together. Regarded thus, we find that the whole section designates what then existing matters should constitute the common school fund, naming such as were appropriated by the state, and also a certain trust fund, viz., the congressional township, donated by congress to be thus used; which aggregate fund, it is declared, *may be increased but not diminished*.

Quick v. White-Water Township, 7 Ind. 570, 576-77 (Ind. 1856) (emphasis added).

Our courts have historically and uniformly held that “the fund set apart for the common schools is a trust fund of a class and character that cannot be diverted, directly or indirectly, to any other purpose than that to which it is devoted by express law.” *Board of Commissioners of Rush County v. State ex rel. Hord*, 3 N.E. 165 (Ind. 1885) (citations omitted). Such cases typically involve an action by the Attorney General to compel an official to turn monies over to the Fund, and the Court holdings consistently refer to the inviolability of the Fund. As an example, in 1892, the court of appeals stated:

[t]he constitution provides that ‘the principal of the common school fund shall remain a perpetual fund, which may be increased, but shall not be diminished.’ It is the property of the State. “Fines and other additions to the school fund” become a part of the permanent principal of the fund. No part of this principal can be divested and applied to uses other than that or which the fund was created.

State ex rel. Michener v. Board of Commissioners of Shelby County, 32 N.E. 92, 93 (Ind. App. 1892), citing *Board of Commissioners of Bartholomew County v. State ex rel. Baldwin*, 19 N.E. 173, 179 (Ind. 1888).

The Office of the Attorney General has previously provided guidance to the General Assembly as to their authority to redirect certain funds by legislative act that are not constitutionally mandated to be made part of the Common School Fund under Article 8, Section 2. This legislative action can be clearly distinguished from redirecting funds once they have been lawfully vested and have accrued to the Common School Fund as a constitutional trust.

Case law confirms the principle that once monies are vested in the Common School Fund, they must remain in the trust. In *State v. Elliott*, 357 N.E.2d 276 (Ind. App. 1976), the trial court had properly entered a judgment of forfeiture on a surety bond. The surety did not obtain a stay pending appeal and the funds were remitted to the State Treasurer for deposit in the Common School Fund. The trial court ultimately held that the surety was entitled to return of the bond, and ordered the Treasurer to remit the funds. In reversing, the court of appeals reasoned simply, “[a]fter such funds are received by the Treasurer of the State, they become vested in the Common School Fund and cannot be remitted”. *Id.* at 280. *See also* 1952 Op. Att’y Gen No. 29, at 123-4 (“[t]he Constitution has provided that funds may not be withdrawn from the Common School Fund ... Funds once lawfully vested in the Common School Fund are beyond recall.”).

The only instance in which monies have been allowed to be withdrawn from the principal of the Common School fund appears to be *State v. Long*, 568 N.E.2d 1108 (Ind. App. 1991). In *Long*, when a criminal defendant failed to appeal, the trial court issued a warrant for his arrest and ordered his bail forfeited. The clerk of court then sent the money to the Common School fund. However, the trial court did not mail notice of the forfeiture either to the defendant or to the father who posted bail, nor did it enter judgment against the bond, both of which were required by statute. On these facts, the court of appeals held,

The clerk independently and improperly sent the money to the State Auditor without an order from the trial court to execute judgment of forfeiture, and in such case we do not conclude the money accrued to the

fund. The trial court could still, and did, exert control over the improperly placed funds.

Id. at 1112. The narrow holding in *Long* stands for the proposition that before a forfeiture can be made part of the Common School Fund, it must indeed be a forfeiture and furthermore, money improperly or erroneously placed in the Common School Fund may be re-directed to the correct recipient.

However, the transfer of funds from the Abandoned Property Fund made in January 2003 by the Office of the Treasurer was, at the time it was made, neither improper nor erroneous. No judicial order or other determination terminating the rights of a third party was (or is) necessary. The Treasurer was required and authorized by statute to make such a transfer, and in doing so followed the statutory duty and mandate. As held in *State v. Elliot*, upon the proper transfer, the funds vested as part of the principal and accrued to the Common School Fund, which we have noted, *may be increased, but shall never be diminished*.

The general rule in Indiana is that legislation may apply retroactively with two exceptions: (1) the General Assembly shall not impair vested rights; and (2) the General Assembly shall not violate a constitutional guarantee. *State ex rel. Mass Transportation Authority of Greater Indianapolis v. Indiana Revenue Board*, 253 N.E.2d 725, 730 (Ind. App. 1969); *Guthrie v. Wilson*, 162 N.E.2d 79 (Ind. 1959).

To sanction the withdrawal of the funds transferred on January 30, 2003, would appear to be a direct violation of the constitutional guarantee of Article 8 of the Indiana Constitution that the Common School Fund remain inviolate and be used only for the support of the common schools and for no other purpose. Any other conclusion would concede an unfettered authority by the General Assembly to redirect all principal not originating from the sources listed in Article 8, Section 2 to other purposes. Based on the language of the Indiana Constitution as to the inviolability of the Fund, as well as the consistent holdings by the state judiciary on this matter, we do not perceive that to be the constitutional intent.

CONCLUSION

It is our opinion that to the extent House Enrolled Act 1001 (Public Law 224-2003) requires the Treasurer to diminish the principal of the Common School Fund, it is unconstitutional as a violation of Article 8 of the Indiana Constitution.

You should be aware that this opinion is not binding on a court, which could reach a different conclusion. *Welliver v. Coate*, 114 N.E. 775, 780 (Ind. App. 1917).

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However, we believe it to be the correct answer, one upon which you may rely in your actions, and one which this office will be prepared to defend if subject to court challenge.

Sincerely,

Stephen Carter
Attorney General

Gregory F. Zoeller
Deputy Attorney General