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MIKE MOSES
COMMISSIONER OF EDUCATION

February 18, 1998

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FEB 24 1998
Opinion Committee

FILE # ML-40105-98

I.D. # 40105

The Honorable Dan Morales
Attorney General of Texas
Price Daniel Building
P. O. Box 12548
Austin, Texas 78701-2548

RQ-1091

Dear General Morales:

Please find enclosed a letter from legal counsel for Hawkins Independent School District that presents questions related to school district maintenance taxes assessed at a rate that exceeds the maximum rate approved by local public election. I am requesting your opinion on the questions presented in the enclosed letter as the questions are critical to the financial operation of the district.

If you have any questions regarding this request, you may contact David Anderson, Chief Counsel, in the Office of Legal Services at 463-9720.

Sincerely yours,

Mike Moses
Commissioner of Education

MM:SHS:kk

Enclosure

De. Ed. ...
Legal

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February 11, 1998

Dr. Mike Moses, Commissioner of Education
Texas Education Agency
1701 N. Congress Ave.
Austin, TX 78701-1494

Re: Hawkins ISD Request for Attorney General's Opinion on Tax Rate Issues

Dear Dr. Moses:

Hawkins ISD respectfully requests that you submit the following questions to the Honorable Dan Morales, Texas Attorney General, as a request for opinion.

1. Has any Legislative action since 1964 to set, increase, or recodify the maximum allowable maintenance tax rate for independent school districts had the effect of superseding a maximum voted maintenance tax rate set by local public election?
2. Assuming a negative answer to the first question, and assuming no protest has been filed by any taxpayer on the basis of excessive levy, is the District liable to its taxpayers for any amount collected in excess of the maximum voted maintenance tax rate adopted in 1964?

A brief history:

The matter of the District's maximum maintenance tax rate came to its attention in late November 1997 when a loan application was denied on the basis of the maximum tax rate set in 1964. So far as the District has been able to determine from available records, the

latest election to set the maximum rate was held on April 11, 1964. The proposed rate, \$1.25, passed. Although the District has held two bond elections since that time (1973 and 1990), it appears that the maximum maintenance tax rate has not been increased by the voters since 1964. In 1993, in the wake of the abolition of County Education Districts, the Hawkins ISD Board--required by S.B. 7 (73rd Regular Session, 1993) to remit more than \$2 million in local revenues to the State, and unaware of the action of the electorate in 1964--first set its annual tax rate above \$1.25. The annual rate has been set annually in excess of \$1.25 in each year from 1993 through 1997.

A brief analysis:

Although it appears that neither question has been addressed directly in a published opinion by any Texas court, we believe the first question is answered in the negative. Current statute continues to require that the local maximum tax rate be approved by the electorate. See Education Code § 45.003(d). The effect of a negative answer would be that Hawkins ISD has in each year from 1993 through 1997 unwittingly exceeded the maximum rate set by the voters of the district in 1964. Property values since 1993 in Hawkins ISD have declined by 37 percent. Hence the serious concern over potential liability for excessive collection.

Assuming the answer to the first question is "no," the second question acquires great importance for Hawkins ISD. We believe the answer to the second question is "no," as well. It appears that, as to taxes already collected, Texas' common law doctrine of voluntary payment requires that the second question also be answered in the negative.

The protest waiver rule:

Texas statutes and decisional law heavily favor certainty and predictability in public fiscal matters. For example, Chapter 41 of the Tax Code permits a taxpayer a variety of grounds for protest of a tax statement. Such a protest, to be effective, must be filed within 30 days. Failure to file a protest in compliance with Chapter 41 constitutes a waiver of the taxpayer's right to protest.

The voluntary payment rule:

Furthermore, the state's common law provides that payments of excessive or even unlawfully assessed and imposed taxes are "voluntary" if they are not paid "under protest" in accordance with state law. The voluntary payment doctrine provides that the tax becomes incontestable once paid voluntarily. The concept of "voluntariness" has been treated rather expansively by the Texas courts "to secure the taxing authority in the orderly

conduct of its affairs. See, for example, Johnson Controls, Inc. v. Carrollton-Farmers Branch ISD, 605 S.W.2d 688 (Tex. App.--Dallas 1980, writ ref'd n.r.e.). Only two exceptions are noted to the "voluntary payment" rule, (1) paid under protest (the statutory exception) and (2) paid under duress (the common law exception), neither of which applies to Hawkins ISD's circumstance.

Following applicable law, the board has acted each year since 1993 to set the tax rate in a meeting that was open to the public, has afforded its citizenry any required hearing on the tax rate, has published its effective tax rate annually, has adopted its budget in an open meeting, and has caused tax statements that specified the tax rate to be mailed to taxpayers.

No taxpayer has paid taxes under any protest asserting an excessive tax rate; no rollback petition has been successful--or even initiated; no taxpayer has asserted in any tax rate or budget hearing an excessive rate; no taxpayer has sought injunctive relief or other similar judicial relief on the issue. Not only has no person challenged the authority of the board to set the rate above the 1964 maximum, no person had ever brought the matter to the District's attention in any manner whatsoever until the District's participation in TASB's Capital Acquisition Program was declined.

Fiscal stability favored:

Texas law favors stability and certainty in the acts of its public entities. See, e.g., Bower v. Edwards Co. Appraisal Dist., 752 S.W.2d 629 (Tex. App.--San Antonio 1988, writ ref'd). For example, if a public entity should expend its funds for some purpose that a member of the public believes is unlawful, a citizen may have standing to seek to have enjoined any further expenditures of that nature. However, importantly, once the expenditure has been accomplished, the citizen loses standing to have that expenditure declared void. Texas' well-established common law rule on taxpayer attempts to recoup money that governmental entities have spent is this: Taxpayers have standing to enjoin future unlawful expenditures (or other acts, for that matter) by public officials. But they cannot maintain actions for damages "against Trustees for money allegedly already spent by the Trustees." Rawson v. Brownsboro ISD, 263 S.W.2d 578, 579 (Tex. App.--Dallas 1953, writ ref'd n.r.e.). Only the school district can sue to recover its wrongly spent funds. See, e.g., Glass v. City of Austin, 533 S.W.2d 411 (Tex. App.--Austin 1976, no writ).

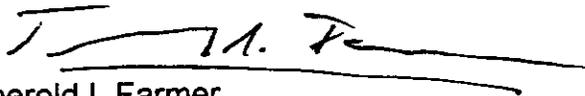
Thus we see demonstrated the strong judicial favoring of the stability of political subdivisions' expenditure decisions. If the stability of *expenditure* decisions is favored, how much more should the judicial favoring of stability apply to a school district's *receipt* of funds pursuant to annual budgetary calculations, the majority of which are non-discretionary.

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Although we are not aware of any cases precisely on all-fours with Hawkins' circumstance, the public policy of supporting the durability a public body's revenues is certainly as important as the protection of the stability of its expenditures. Indeed, the stability of expenditures could hardly be protected if there were no corresponding stability of revenues. The voluntary payment doctrine, thus, may properly be seen as the other side of the same public-policy coin. Indeed, the purpose of voluntary payment rule has been described for over 100 years as being based upon the premise that "if one voluntarily makes a payment which the law would not compel him to make, he cannot afterward assign his ignorance of the law as a reason why the state should furnish him with legal remedies to recover it." Johnson Controls, supra, at 689, citing City of Houston v. Feizer, 76 Tex. 365, 13 S.W. 266 (1890).

At the time of this writing, Hawkins ISD is in the process of seeking federal pre-clearance for holding a maximum-tax-rate election this spring or summer. If you need further information for the submission of the opinion request, please contact either Hawkins ISD Superintendent Robert Mark Pool or me. To the extent that the General Counsel's office will be involved in the submission, I would welcome communications with Mr. David Anderson or his designee.

Sincerely,



Therold I. Farmer
Attorney for Hawkins ISD

cc: Mark Pool, Supt.
Hawkins ISD