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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 17-IB64

December 22, 2017

Dr. Susan Bunting, Ed.D
Secretary of Education
Delaware Department of Education
Townsend Building
401 Federal Street, Suite 2
Dover, DE 19901-3639

RE: Exclusions of Local Operating Expenditures under 14 *Del. C.* §§ 408 & 509

Dear Dr. Bunting:

On October 13, 2017, the Department of Justice received a request from the Delaware Department of Education for an opinion regarding the application of the formula contained in Title 14, Sections 408(d) and 509(e) of the Delaware Code to "match tax" expenditures that are funded by taxes levied by local school boards under authority granted by 14 *Del. C.* § 1902(b). Your letter indicated that it was being sent pursuant to a request from local school superintendents for an Attorney General's opinion. For that and other case-specific reasons, our response is in the form of a formal opinion from our office pursuant to 29 *Del. C.* § 2504. Our opinion necessarily addresses the Department of Education's position that non-Minor Capital Improvement match tax

expenditures are included in the calculation of per pupil costs that must be paid by Districts under the applicable provisions of the choice and charter school laws of the State, 14 *Del. C.* §§ 408(d) & 509(e). Your question presents an issue of first impression. Accordingly, there are no case decisions that interpret the statutes relating to your questions and our opinion is therefore entirely predictive in nature. We have engaged in no independent factual investigation of these issues and rely entirely on the information you have provided us to assess these issues. With those caveats, our conclusion is that the statutes in question place this issue entirely within the discretion of the Secretary of Education. For that reason, you were permitted to make a discretionary decision regarding this issue so long as your decision was not arbitrary or capricious – and as detailed below, there is no evidence to suggest that your decision was arbitrary or capricious. Similarly, should you or a subsequent Secretary of Education elect to make a different discretionary decision in this area, that decision would also be permissible provided that it was not arbitrary or capricious. Your letter indicates that legislators have expressed an interest in this issue; to the extent that the legislature either disagrees with your exercise of discretion or believes that the matter is one whose conclusion should be dictated by statute, the General Assembly is of course able to amend 14 *Del. C.* §§ 408 & 509 to provide more specific guidance as to how the calculation it requires must be performed.

When a student chooses to attend a Delaware charter school or a public school in a District other than her District of residence, the District of residence is required to pay to the receiving District or the charter the amount of local funds it received attributable to that particular student. 14 *Del. C.* §§ 408(e) & 509(b)(2). The exact amount that follows the child from her District of residence to her charter school or the receiving District is defined in Delaware Code as the "local cost per pupil." 14 *Del. C.* §§ 408(d) & 509(e) (same, using "local cost per student").

The local cost per pupil is determined by calculating the "Total Operating Expenditure in Preceding Fiscal Year" and then dividing this amount by the Total Division I Units minus the Special School Units, or, stated mathematically:

$$\text{Local cost per pupil} = \frac{\text{Total Operating Expenditure in Preceding Fiscal Year}}{\text{Total Division I Units} - \text{Special School Units}}$$

The "Total Operating Expenditure in Preceding Fiscal Year" is calculated by taking the sum of all expenditures from local sources, and subtracting out some identified groups of local expenditures. Stated mathematically:

$$\frac{\begin{array}{l}\text{Sum of all expenditures from local sources} \\ - \quad \text{local expenditures for tuition} \\ - \quad \text{local expenditures for debt service} \\ - \quad \text{local expenditures for Minor Capital Improvement} \\ - \quad \text{local cafeteria expenditures} \\ - \quad \text{any other local expenditures deemed by the Secretary of Education to be inappropriate for inclusion for the purposes of Chapter 4 or 5}\end{array}}{\text{Total Operating Expenditure in Preceding Fiscal Year}}$$

Id. Simply stated, the Department must take the sum of all expenditures from local sources, subtract out the four identified expenditures, subtract out any other local expenditures the Secretary of Education determines in her discretion may be subtracted out, to arrive at the Total Operating Expenditure in the Preceding Fiscal Year. When calculating the Total Operating Expenditure in the Preceding Fiscal Year, the Department has asked whether it is legally appropriate to include a District of residence's non-Minor Capital Improvement match tax expenditures. Because the exclusion of non-Minor Capital Improvement match tax expenditures can only occur pursuant to the exercise of your discretion, it is our opinion that *absent the exercise of that discretion*, such tax expenditures must be included when calculating the Total Operating Expenditure in the Preceding Fiscal Year as a matter of law. The basis for our opinion is set forth below.

In general, Districts raise local funds by passing referenda or by issuing bonds. 14 *Del. C.* §§ 1903 & 2102. However, in certain instances, Districts may raise local funds by levying taxes. 14 *Del. C.* § 1902(b) provides:

> [i]n any instance except major capital improvement and new funds for educational advancement . . . where the State shall make appropriations to school districts for any purpose and the applicable statute requires a local district contribution to the appropriation or expenditure, the local school board may levy such tax as is necessary to support the local district contribution without the necessity of a referendum in the local school district, notwithstanding § 1903 of this title.

The non-Minor Capital Improvement match tax arises from Section 355 of the FY2017 Appropriations Act (providing that "all local districts shall be authorized to assess a local match tax for Fiscal Year 2010 Reading Resource Teachers and Mathematics Resource Teachers/Specialists and Fiscal Year 2008 Extra Time."). This same power to assess a match tax was afforded to the Districts at Section 360 of the FY2018 Appropriations Act. Therefore, when funding Reading Resource teachers, Mathematics Resource Teachers or Specialists or Extra Time programs, Districts may levy a local tax. The power is discretionary and not all Districts levy such a tax.

Like Reading and Mathematics Resource teachers and Extra Time programs, Districts are empowered to levy a tax to match their portion of the Technology Block Grant that they receive from the State. Section 340 of the FY2017 Appropriations Act and Section 345 of the FY 2018 Appropriations Act provide that each District will receive its proportional share of the State appropriated Technology Block Grant and further state that "[l]ocal districts are encouraged to match their allocation pursuant to the provisions of 14 *Del. C.* § 1902(b) . . . ." Again, while Districts are "encouraged" to match this grant with a local tax, it is at the discretion of each District.

When calculating how much of the local funds must follow a child who choices out of the District, 14 *Del. C.* §§ 408(d) & 509(e) provide that the Department must calculate the sum of all

expenditures from local sources, subtract four specifically-identified expenditures, and subtract any other local expenditures the Secretary of Education decides to exclude in the exercise of her discretion. By doing so, the Secretary arrives at the Total Operating Expenditure in the Preceding Fiscal Year. Non-Minor Capital Improvement match tax expenditures are not specifically listed in Section 408(d) or Section 509(e) as expenditures that are required to be subtracted from this calculation. The General Assembly mandated that "all" expenditures from local sources be included in the calculation and expressly required the subtraction of only specifically-enumerated types of funds. The General Assembly did not list non-Minor Capital Improvement match tax expenditures as an authorized subtraction in either Section 408(d) or 509(e). We do not perceive any ambiguity in the language of these statutes or in the epilogue, whether read separately or together.

Assuming that a reviewing court did find such ambiguity and then looked beyond the plain language of the statute to assess legislative intent, we believe that such court would likely conclude that funding categories not specifically listed as mandatory exclusions from the Match Tax calculation were excluded intentionally. *See Leatherbury v. Greenspun*, 939 A.2d 1284, 1291 (Del. 2007) ("[W]hen provisions are expressly included in one statute but omitted from another, we must conclude that the General Assembly intended to make those omissions."). Districts are empowered to levy match taxes pursuant to annual statements in the Appropriations Act epilogue language. If the legislative intent was that these funds be subtracted from the Total Operating Expenditure in Preceding Fiscal Year when calculating per pupil costs, the legislature could have included such language in the epilogue, amending Sections 408(d) and 509(e) and listing non-Minor Capital Improvement match tax funds as a category to be subtracted before computing per pupil costs. Its decision not to do so must be given meaning when interpreting the statute. The

only method by which non-Minor Capital Improvement match tax expenditures could be subtracted out of a District's Total Operating Expenditure in the Preceding Fiscal Year would be for you as Secretary to exercise your discretion and declare that this expenditure type is to be excluded.

Although an agency's decision is subject to legal challenge if it is arbitrary or capricious, for the reasons detailed below and recited in your letter, there is no indication that your discretionary decision in this matter was arbitrary or capricious. First, the statutory language is clear. Calculations of per pupil costs begin with the sum of "***all*** expenditures from local sources." If the statute is not workable, then the remedy is with the legislature. *Wilmington Vitamin & Cosmetic Corp. v. Tigue*, 183 A.2d 731, 742 (Del. Super. 1962). Second, an agency will not be found to have acted in an arbitrary and capricious manner so long as its decision is not "unreasonable or irrational, or . . . that which is unconsidered or which is wilful and not the result of a winnowing or sifting process." *Fox v. CDX Holdings, Inc.*, 2015 WL 4571398, at *30 (Del. Ch. Jul. 28, 2015), *aff'd*, 141 A.3d 1037 (Del. 2016) (quoting *Willdel Realty, Inc. v. New Castle Cnty.*, 270 A.2d 174, 178 (Del. Ch. 1970), *aff'd*, 281 A.2d 612 (Del. 1971)). The concept of arbitrary and capricious decision making refers to action taken "without consideration of and in disregard of the facts and circumstances of the case." *Id.* "Action is also said to be arbitrary and capricious if it is whimsical or fickle, or not done according to reason; that is, it depends upon the will alone." *Id.* A brief overview of the Department's decision making process here clarifies that it was neither arbitrary nor capricious.

In the Spring of 2016, the Department of Education undertook a comprehensive analysis of the choice and charter billing process in preparation for FY2017. Following that undertaking, the Department alerted Districts that non-Minor Capital Improvement match tax funds would no

longer be deducted when calculating per pupil costs, beginning with the 2016-2017 school year. The Districts objected to the timing of this notification, arguing the budgets for the next school year had already been set, and the Department agreed to not implement the directive until the following year. As a result of acquiescing to the Districts' objections, on October 4, 2016 the Department of Education and the Christina School District were sued by 15 Delaware Charter Schools, who argued that permitting the deduction of non-Minor Capital Improvement match tax expenditures from the per pupil cost calculation was contrary to clear statutory language. This lawsuit was settled in December 2016. As part of that settlement, the Department of Education agreed that it would bring greater transparency to the process by which it determines each District's local cost per student by establishing a timeline for the approval process, require supporting documentation for requests, including both Districts and charter schools in the process, and allowing for time to meet and discuss determinations before they become final.

Consistent with that settlement agreement, the next month the Department formalized its annual process and timeline for calculating per pupil costs. The "Choice and Charter Process to LEAs" was sent to all Districts on January 13, 2017. Pursuant to that document's timeline, on June 1, 2017, the Department released its tentative determinations regarding exclusions, which included 10 categories of expenditures that were not previously excluded and deferred a decision on the non-Minor Capital Improvement match tax expenditures until the finalization of the State budget as the Joint Finance Committee was contemplating the use of match tax rates to offset reductions in State funding for a variety of expenditures. Districts were notified that they could request a meeting with the Department to discuss the recommended exclusions and were reminded to notify the Department of any questions. No communication or request for a meeting was received from any District.

Following the adoption of the FY2018 budget by the General Assembly, on July 14, 2017 the Department communicated to all Districts that non-Minor Capital Improvement match tax would not be subtracted out when calculating per pupil costs going forward. However, in order to give the Districts sufficient time to prepare and adjust for this change to the calculation methodology, the Department adopted a phase-in approach. Specifically, for the 2017-2018 school year, 50% of a District's non-Minor Capital Improvement match tax funds would be subtracted out. For 2018-2019, only 25% of non-Minor Capital Improvement match tax funds will be subtracted. For the 2019-2020 school year, no non-Minor Capital Improvement match tax funds will be subtracted. The Department again invited Districts to request meetings or ask questions about this proposal and meetings were held with representatives of the Smyrna and Christina School Districts.

The decision to no longer subtract non-Minor Capital Improvement match tax funds was the result of a comprehensive review of District and charter funding that occurred in 2016. Moreover, after notifying Districts that these funds would no longer be subtracted, the Department attempted to stay that determination in response to District objections. That stay was met with litigation by the Charter schools seeking the funding they are entitled to under the statute. In settlement of the Charter lawsuit, the Department formulated and then clearly communicated the timeline for implementing this change. In the letter of August 22, 2017 to legislators who inquired about the situation, the rationale for eliminating this subtraction was explained, indicating there are "inequities in choice/charter payments based on local decisions to implement match tax" and that "[t]he proposed universal implement of including non-MCI tax expenditures will eliminate this inequity." Again, as the local money follows the child, and children have the ability to choice into Charter schools or other Districts, the inclusion of the non-Minor Capital Improvement match

tax funds is not always a net loss for the Districts. As children choice into a District, per pupil costs flow in, as children choice out, per pupil costs flow out. The Department of Education prepared a net impact of the proposed methodology for Fiscal Year 2018 demonstrating the effect of including non-Minor Capital Improvement match tax funds on the Districts. Your decision to no longer subtract non-Minor Capital Improvement match tax funds from per pupil costs was a decision that you were entitled to make in your discretion, and was the result of a logical, deliberative, and analytical process consistent with the clear language of the statute. Should you or a successor wish to exercise your discretion in this area in a different manner, such a change of position would also be permissible under the statute provided that it too was the result of a logical, deliberative, and analytical process.

Respectfully submitted,

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Deputy Attorney General

APPROVED BY:

Aaron R. Goldstein, State Solicitor

cc: Patricia A. Davis, DAG (via email)