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**OPINION COMMITTEE**

October 14, 2009

Jim McReynolds  
DISTRICT 12

FILE # ML-46210-09  
I.D. # 46210

The Honorable Greg Abbott  
Attorney General of Texas  
P.O. Box 12548  
Austin, Texas 78711-2548

**RQ-0833-GA**

Dear General Abbott:

It has been requested by a number of members of the Texas House that I ask you and your staff to examine and render an opinion on the issue contained in this correspondence. So many thanks in advance for your assistance in the following matter:

Opinion Request re: Authority of Prepaid Higher Education Tuition Board to modify terms of contracts under Subchapter F, Chapter 54, Education Code, and obligations of the Comptroller of Public Accounts as trustee for the beneficiaries of those contracts.

Question 1: Does the Texas Prepaid High Education Tuition Board have authority to change the method of calculating refunds for existing Texas Tomorrow Fund contracts?

Under Subchapter F, Chapter 54, Education Code, the Texas Prepaid Higher Education Tuition Board (Board) operates a prepaid higher education tuition program, commonly known as the "Texas Tomorrow Fund" program. Participants in the program deposit money in the fund in amounts and at intervals established by the Board, and the Board subsequently uses proceeds from the fund to pay tuition and fees for a beneficiary when that beneficiary enrolls in an institution of higher education. The program essentially allows participants to "lock in" current tuition and fee rates by prepaying an amount to the fund, and the fund's earnings are used to pay for increases in tuition and fee rates that occur in the interval between the time the prepayment is made until the time the beneficiary enrolls.

Funds for tuition and fee payments are guaranteed by a "first draw" on state general revenue. Under Section 54.619(g), Education Code, if "in any fiscal year there is not enough money in the fund to pay the tuition and required fees of the institution of higher education in which a beneficiary enrolls or the appropriate portion of the tuition and required fees of the private or independent institution of higher education in which the beneficiary enrolls as provided by the prepaid tuition contract, the comptroller

shall transfer to the fund out of the first money coming into the state treasury not otherwise appropriated by the constitution the amount necessary for the board to pay the applicable amount of tuition and required fees of the institution."

Under various circumstances, a prepaid tuition contract may be terminated without the beneficiary using the benefits of the contract to pay tuition or fees. In such cases, the "person named in the contract is entitled to a refund" under Section 54.632. Subsection (a) of that section provides that "A prepaid tuition contract shall specify: (1) the name of the person entitled to any refund if the contract is terminated; (2) the terms under which a person is entitled to a refund; and (3) the method by which the amount of the refund is calculated." Subsection (c) provides that "The board shall determine the method by which the amount of the refund is calculated."

On May 12, 2009, the Board proposed rules, effective November 1, 2009, that modify the refund provisions of existing Texas Tomorrow contracts, "in order to extend the financial viability" of the program (34 TexReg 4488). Under the new rules, all refunds under existing contracts are limited to the amount paid into the fund, less administrative fees in some cases. By contrast, the contracts, as written, allowed certain participants who cancelled their contracts to receive earnings in addition to the amounts they had paid in.

In the Texas Register posting, the Board cited Subsection 54.632(c) as its authority to make this change. However, while Subsection 54.632(c) gives the Board the authority to determine the method by which the amount of the refund is calculated for the purposes of establishing the prepaid tuition contract, the subsection does not appear to give the Board the authority to change the method after the contract has been established. Section 54.632, as quoted above, is entirely about what information must appear in the prepaid tuition contract, and the authority of the Board to determine the method of calculating refunds appears solely in this context. There is no discussion in this section about amendments to the contract at a later date, after it has been entered into by the participant and the state.

As noted above, the Board took this action to "extend the financial viability" of the program. Section 54.640, Education Code, specifically addresses the Board's responsibility to maintain the actuarial soundness of the fund. Subsection (c) of that section specifies that the Board may adjust the terms of *subsequent* prepaid tuition contracts as necessary to ensure the actuarial soundness of the fund". (emphasis ours). While the section authorizes the Board to adjust the terms of *subsequent* contracts to preserve actuarial soundness of the fund, it does not give the Board the authority to adjust the terms of *existing* contracts, nor does there appear to be any other provision that does so.

One other action related to the actuarial soundness is contained in Section 54.604. That section directs the Comptroller of Public Accounts, who serves as the presiding officer of the Board, to "notify the governor and the legislature and recommend that the program be modified or terminated" if the Comptroller "determines the program is financially infeasible". It does not give the Comptroller or the Board any authority to take action to change existing contracts.

Aside from the actions specified in Subsections 54.619(g), 54.640(c) and 54.604, there appear to be no other statutory provisions specifying actions to be taken in response to problems with the actuarial soundness of the program.

The Texas Prepaid Higher Education Tuition Program Master Agreement, which is part of the contract between the participant and the state, provides for changes to the plan at the Board's discretion, and specifies the method of calculating refunds to participants who choose to terminate a contract within 60 days of notification of any such change. (Master Agreement, Article XI, Section 1). However, the mere inclusion of such a provision in the Master Agreement would not seem to give the Board the authority to make changes it has no statutory authority to make.

Further, the Master Agreement also states unequivocally that all payments will be made as due, when it notes that "the Texas Constitution provides that if the assets of the Fund shall be insufficient to enable the Board to make the payments required under the Prepaid Tuition Contract, general state revenues not otherwise appropriate by the Constitution will be transferred to the Fund as necessary to make those payments." (Master Agreement, Article XI, Section 6). Even if one provision of the contract appears to give the Board the authority to make changes to terms, this section would appear to insulate the participant from changes in the payments to be made under the contract that result from actuarial issues.

Question 2: Does either the Comptroller of Public Accounts or the Board, or both, have a fiduciary duty to notify the participants of proposed actions that would be adverse to their interests in a manner more directly than publication in the Texas Register?

The Texas Tomorrow Fund is established as a trust fund under the Article 7, Section 19, of the Texas Constitution. "The assets of the fund are held in trust for the benefit of participants and beneficiaries and may not be diverted. The state shall hold the assets of the fund for the exclusive purposes of providing benefits to participants and beneficiaries and defraying reasonable expenses of administering the program." (Article 7, Subsection 19(a), Texas Constitution). Under Subsection (d), the Comptroller is required to "take the actions necessary to implement" the section. While this would appear to make the comptroller the de facto trustee for the beneficiaries, Subsection (c) gives "an entity designated in general law" the authority to invest the assets of the fund. Since the Board has been given that authority in general law, it could be argued that the Board functions as trustee for the beneficiaries.

In either case (or both), the duty of a trustee to provide timely information to beneficiaries is well-established in common law and case law. "Trustees and executors owe beneficiaries a fiduciary duty of full disclosure of all material facts known to them that might affect [the beneficiaries'] rights." (Huie v. DeShazo, 922 S.W.2d 920). "The trustee has the duty to inform the beneficiary of important matters concerning the trust . . ." (George Gleason Bogert and George Taylor Bogert, *The Law of Trusts and Trustees*, Section 961 Revised Second Edition). "The trustee has the fiduciary duty, without demand, to inform all trust beneficiaries of the material facts, in connection with any non-routine transaction which significantly affects the trust estate and the interest of the beneficiaries, prior to the transaction taking place. This duty was first recognized by the Washington Supreme Court in *Allard v. Pacific National*

*Bank*, 99 Wash.2d 394, 663 P.2d 104 (1983). This duty was first examined by Texas Courts in *Interfirst Bank v. Risser*, 739 S.W.2d 882, 906 (footnote 28.) (Tex. App. - Texarkana, 1987)." (Frank N. Ikard, Jr., *Trust Litigation in Texas*, 2004).

There can be no question that the action taken by the Board materially affects the rights of the beneficiaries. There was a public comment period during which any beneficiary could have expressed objections to the proposed action and, if we are to believe in the process, could have convinced the Board to change the proposed rule or withdraw it entirely. But, aside from publication in the Texas Register, neither the Comptroller nor the Board took any action to perform a trustee's fiduciary duty to notify beneficiaries of this pending action. Certainly one would not expect Texas Tomorrow Fund participants to normally review the Texas Register looking for proposed actions that would affect their investment in the trust.

If neither the Comptroller nor the Board has the duty to protect the rights of the beneficiaries, then the establishment of the Texas Tomorrow Fund as a "trust fund" in the Texas Constitution would appear to be meaningless.

I appreciate your attention to these issues. Given that participants are making major financial decisions based on the action taken by the Board, any consideration you can provide to review this issue promptly would be especially helpful.

Greg, please know that I have nothing but absolute respect for our Comptroller of Public Accounts and the board members who are deeply concerned about the "soundness" of the fund. But, like you, I also have the interests of the many Texas taxpayers who have invested their hard-earned dollars in the fund. Ultimately your opinion in this matter will be helpful to everyone concerned. Wishing you and yours always and only the very best, I remain . . .

Respectfully yours,



Jim