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December 11, 2017

Hon. Ken Paxton  
Attorney General of Texas  
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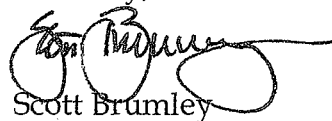
Re: Request for Opinion (Amarillo Independent School District - Participation in ACE Amarillo Scholarship Program)

Dear General Paxton:

The Amarillo Independent School District ("District") Board of Trustees has requested that this office seek an opinion from your office on whether the District can lawfully participate in a scholarship program, known as "ACE Amarillo." As a participant in ACE Amarillo, the District would be one of five financial partners to contribute to a program wherein eligible District students could receive a scholarship for up to sixty (60) credit hours to attend Amarillo College.

Our brief, enclosed herewith, addresses the authorities that we believe bear upon this question. We eagerly anticipate your opinion, and stand ready to provide any further information or material your office may request or require.

Sincerely,



Scott Brumley  
Potter County Attorney

Encl. as stated

cc: Mr. Jim Austin, President, AISD Board of Trustees  
Dr. Dana West, Superintendent, AISD  
Mrs. Andrea Gulley, General Counsel, AISD

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**BRIEF OF POTTER COUNTY ATTORNEY REGARDING  
THE AMARILLO INDEPENDENT SCHOOL DISTRICT'S PARTICIPATION  
IN THE "ACE AMARILLO" SCHOLARSHIP PROGRAM**

In accordance with Texas Government Code § 402.043, the County Attorney of Potter County, Texas submits this brief containing arguments and authorities regarding the questions posed in the accompanying opinion request, as well as the results of his office's investigations into those questions. In support, the County Attorney shows:

**I.  
STATEMENT OF FACTS**

*A. The ACE Program*

In 1994, the Amarillo Area Foundation ("AAF"), a community nonprofit foundation, initiated the ACE scholarship program ("ACE") in partnership with Amarillo Independent School District ("AISD" or "the District"), Amarillo College ("AC") and West Texas A&M University ("WTAMU"). ACE began at the District's Palo Duro High School in 1994 and expanded to Caprock High School in 2002. Three elementary schools in the Tascosa High School cluster were added to the ACE program in 2009 (Lee Bivins Elementary School, Margaret Wills Elementary School and San Jacinto Elementary School). Fifth-graders attending these three elementary schools are eligible for ACE scholarship funds if they go on to attend Tascosa High School and meet the ACE program requirements for grades, attendance and behavior.

ACE provides access to higher education for eligible students by providing numerous preparatory activities throughout each student's school career. ACE guarantees payment for tuition, fees, and books for up to 130 semester hours at AC or WTAMU. ACE requires high school students to pledge annually to maintain at least an 85 grade point average, a 95% attendance record and appropriate behavior while attending high school.

ACE is "last money in" meaning all federal and private aid is applied prior to awarding ACE scholarship funds. The ACE program is in effect for the 2017-2018 school year.

*B. ACE Amarillo:*

In the spring of 2017, the AAF and Amarillo College approached the District's Superintendent about challenges in fundraising for the current ACE program. Specifically, it was reported that the current funding model could not sustain the program, and additional funds would be needed to continue the program. Additionally, the entities discussed the low post-secondary educational attainment in Amarillo, how this lack of attainment impacts AISD students, and the financial impact low wages have on the community and school district. Throughout conversations, the idea of offering ACE to all eligible District students was proffered.

In order to accomplish the goal of offering ACE Amarillo to all eligible District students, rather than limiting eligibility to certain high schools, additional funding partners are needed. It is proposed that five partners will contribute to ACE Amarillo: the District; Amarillo College; the Amarillo Economic Development Corporation; the Amarillo Area Foundation; and donations obtained through the Amarillo Area Foundation's efforts.

Under the proposed new program, the ACE Amarillo Scholarship will cover tuition, fees and book expenses for up to sixty (60) credit hours at Amarillo College, following graduation from any District high school campus. The three-year eligibility period begins with the fall semester immediately following high school graduation. Initially, eligible students must earn a final grade point average of 80 or higher on a 100 point scale, *or* meet Texas Success Initiative ("TSI") college readiness as set by the Texas Higher Education Coordinating Board. Beginning

with the class of 2021 and beyond, eligible students must meet TSI college readiness standards as set by the Texas Higher Education Coordinating Board.

In order to receive the scholarship, eligible students must meet the State of Texas compulsory attendance requirements. Students must also avoid any major behavior infractions, *i.e.* expulsion or mandatory disciplinary alternative education program placement. Further, they must apply for and complete admission, financial aid, and scholarship assistance at Amarillo College. The proposed program also includes a family income restriction for the student to be eligible, and will be a “last in” scholarship, like the original ACE Program.

## II. QUESTION PRESENTED

Can the Amarillo Independent School District be a financial partner in the ACE Amarillo Scholarship Program?

## III. ARGUMENT AND AUTHORITIES

### *A. Public Funds*

The Texas Attorney General has determined that “[f]unds collected by a public agency and used for public purposes are clearly public funds.” Op. Tex. Att’y Gen. No. MW-584 (1982). A Texas Court of Appeals has determined that “[p]ublic funds are those belonging to the state or to any county or political subdivision of the state...” *Austin v. Fox*, 297 S.W. 341, 343 (Tex. Civ. App. – San Antonio 1927, *aff’d* 1. S.W. 2d 601 (Tex. Comm’n App. 1928)). In the context of schools, public funds include funds from any taxes or fees imposed by the school district or any funds under the control of the district. Trustees hold school district property in trust for school purposes. *Texas Antiquities Comm. v. Dallas County Comm. College Dist.*, 554 S.W.2d 924 (Tex. 1977); *Love v. City of Dallas*, 40 S.W.3d 20 (Tex. 1931); Op. Tex. Att’y Gen. No. JM-958 (1998).

*B. Restrictions on the Use of Public Funds:*

*1. Texas Constitution*

Three constitutional provisions are relevant to the issue presented. The Texas Constitution, Article 3, Section 51 provides, in relevant part, as follows: "The Legislature shall have no power to make any grant or authorize the making of any grant of public moneys to any individual..." Article 3, Section 52 of the Texas Constitution provides: "Except as otherwise provided by this section, the Legislature shall have no power to authorize any... other political corporation or subdivision of the State to lend its credit or to grant public money or thing of value in aid of, or to any individual, association or corporation whatsoever, or to become a stockholder in such corporation, association or company." Article 16, Section 6 of the Texas constitution provides in relevant part: "(a) No appropriation for private or individual purposes shall be made, unless authorized by this Constitution..."

Case law clearly establishes that an expenditure of public funds for a public purpose is not an unconstitutional grant of public funds. See *Tex. Mun. League Intergovernmental Risk Pool v. Texas Workers' Comp. Comm'n*, 74 S.W. 3d 377, 383 (Tex. 2002); *Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W. 2d 717, 740 (Tex. 1995) ("a transfer of funds for a public purpose, with a clear public benefit received in return, does not amount to a lending of... public funds in violation of article III, sections 51 and 52"). Further, an expenditure to accomplish a public purpose is constitutional even if it incidentally benefits a private interest. See *Graves v. Morales*, 923 S.W.2d 754, 757 (Tex. App. – Austin 1996, write denied); *Brazoria County v. Perry*, 537 S.W.2d 89, 90 (Tex. Civ. App. – Houston [1<sup>st</sup> Dist.] 1976, no writ).

*2. Texas Education Code:*

In Texas, independent school boards of trustees, as a body corporate, are responsible for governing and overseeing the management of the public schools of the district. Tex. Educ. Code § 11.151(a)-(b). School boards may authorize the spending of local funds for various purposes, and are responsible for approving the District's budget. Tex. Educ. Code § 44.004.

Specifically, the law directs that "public school funds may not be spent except as provided by this section." Tex. Educ. Code § 45.105(a). Subsection (b) directs that "[l]ocal school funds from district taxes, tuition fees of students not entitled to a free education, other local sources, and state funds not designated for a specific purpose may be used for the purposes listed for state and county available funds and for purchasing appliances and supplies, paying insurance premiums, paying janitors and other employees, buying school sites, buying, building, repairing, and renting school buildings, including acquiring school buildings and sites by leasing through annual payments with an ultimate option to purchase, *and for other purposes necessary in the conduct of the public schools determined by the board of trustees.*" Tex. Educ. Code §45.105(b) (emphasis added). What constitutes "other purposes necessary" is determined by the board, as explained in detailed below.

### 3. *Public Purpose Test:*

The Texas Supreme Court established the following three-part test to determine if expenditures under statutes accomplish a public purpose:

[T]he Legislature must: (1) ensure that the statute's predominant purpose is to accomplish a public purpose, not to benefit private parties; (2) retain public control over the funds to ensure that the public purpose is accomplished and to protect the public's investment; and (3) ensure that the political subdivision receives a return benefit.

*Tex. Mun. League Intergovernmental Risk Pool*, 74 S.W.3d 377, 384 (Tex. 2002).

The Attorney General subsequently adopted the three-part test to determine constitutional use of public funds and to analyze political subdivisions exercising delegated

legislative authority. Op. Tex. Att’y Gen. No. GA-0076 (2003) at 7; *see also* Tex. Att’y Gen. Op. Nos. JC-0212 (2000) at 3-4; JC-0113 (1999) at 2; DM-256 (1993) at 2-3. This three-part test is applicable when analyzing the issue presented.

*a. Public Purpose*

No case law has been uncovered specifically addressing the authority of a school board to fund a scholarship program using public money. However, an Attorneys General Opinion and a Letter Opinion address the legality of a board of trustees awarding scholarships to its students under the above-noted laws, confirming that the authority to make such a determination has been delegated by the legislature to the board of trustees and that a board might find the use of public funds to provide college scholarships to be “necessary in the conduct of the public schools.” These opinions are discussed in detail below.

In JM-1265, the Attorney General was asked to opine on whether certain funds from school-related activities could be used by a school district to provide scholarships to graduates. Op. Att’y Gen. No. JM-1265 (1990)(analyzing a now superseded statute which allowed the expenditure of public funds “for other purposes necessary in the conduct of the public schools to be determined by the board of trustees”). The requestor asserted that scholarship expenditure would not appear “necessary” to conduct a public school. *JM-1265* at 3. Noting that courts and the Attorney General has repeatedly determined “necessary” does not mean “indispensable,”<sup>1</sup> the Attorney General opined that the term “necessary” “appears to mean appropriate or conducive to the conduct of a public school rather than indispensable thereto.” *JM-1265* at 3. The Attorney General continued:

Determining whether an expenditure is necessary is a matter for a school board in its sound discretion. Attorney General Opinion H-1333. Moreover,

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<sup>1</sup> *See Moseley v. City of Dallas*, 17 S.W. 2d 36 (Tex. Comm’n App. 1929, judgm’t adopted); *Bozeman v. Morrow*, 34 S.W.2d 654 (Tex. Civ. App. – El Paso 1931, no writ); Attorney General Opinions JM-490 (1986); H-133 (1973).

any expenditure of public funds must serve a true public purpose and not merely private ends. Tex. Const. art. III, § 51; see G. Braden, *The Constitution of the State of Texas: An Annotated and Comparative Analysis* 229-36, and authorities cited therein.

Continuing on, the Attorney General noted, “[t]he encouragement and motivation of students in academic achievement would seem to be an appropriate function of the public free schools. Accordingly, it is not possible to say, as a matter of law, that a scholarship could not be structured to further the achievement of a legitimate public purpose of a school district in its conduct of public schools.” *JM-1265* at 4. The Attorney General concluded that the use of funds not otherwise restricted may be used for college scholarships found to be “necessary in the conduct of public schools” within the meaning of state statute. Finally, the Attorney General concluded that such a determination of fact has been delegated by the legislature to the district’s board of trustees. *JM-1265* at 4.

Three years following the issuance of *JM-1265*, the Attorney General’s Office issued a letter opinion on the same topic. Tex. Att’y Gen. LO-93-93 (1993). The question presented in this opinion letter was whether an independent school district may award scholarships to fund its top graduates based solely on academic ranking. The requestor argued, “a scholarship in the strict sense is granted for a private or individual purpose, and payment of public money for a scholarship is not made ‘in return for goods or services for’ the school district.” RQ-601. Further, the requestor predicted that if put to a court test, “a court would probably hold that payment of a scholarship with public money is unconstitutional.” RQ-601. The Attorney General’s Office disagreed.

In analyzing the issue presented, the opinion noted that Article III, section 52(a) of the Texas Constitution prohibits the legislature from authorizing any political subdivision of the state to grant public money to an individual. However, the Attorney General confirmed:



This office has interpreted article III, section 52(a) to prohibit any grant for private purposes only; article III, section 52(a) does not prohibit a grant of public money for public purposes – even a grant to an individual – if the political subdivision granting the money places sufficient controls on the transaction to ensure that the public purpose is carried out.

LO 93-93 at 1-2.

Noting that “[n]o fixed rule delineates exactly what constitutes a ‘public purpose,’... the governing board of the relevant political subdivision must determine in the first instance whether a particular grant of public money serves a legitimate public purpose, and whether the political subdivision has placed sufficient controls on the transaction to ensure that the public purpose will be carried out.” *Id.* at 2. Accordingly, prior to institution of such a scholarship program, a board of trustees must determine in the first instance whether awarding the scholarship to graduates based on academic ranking serves a public purpose, and whether the independent school district has placed sufficient controls on the award to ensure that the public purpose is carried out. *Id.* The Attorney General concluded that upon making appropriate findings, the board could determine such scholarships are “necessary in the conduct of the public schools.” *Id.* at 5.

Although not directly on point to the issue presented in this request, Texas Courts and Attorneys General have analyzed a multitude of public fund issues, and determined that a variety of expenditures are legal. *See, e.g. City of Garland v. Garland Indep. Sch. Dist.*, 468 S.W. 2d 111, 111-12 (Tex. Civ. App. – Dallas 1971, writ ref’d n.r.e.) (trustees could determine whether expenditure for paving streets abutting school property was “necessary in the conduct of the public schools”); Tex. Att’y Gen. Op. Nos. GA-0850 (2011) at 3 (the district’s trustees must determine whether the expenditure for a waterline is “necessary in the conduct of public schools” and therefore permitted under Education Code section 45.105); JC-0165 (2000) at 10 (trustees could determine that expenditure for “early exit” retirement plan was necessary); H-

133 (1973) at 5, 7 (trustees could determine that trustees' travel and legal expenses were "necessary"); C-601 (1966) at 3-4 (trustees have discretion to determine whether expending surplus money from operation of school cafeteria to provide lunches to needy pupils is "necessary cost in the efficient conduct of its public schools"); GA-0076 (2003) at 5 (a school board may pay travel costs ancillary to providing medical care for an injured student if it determines, in the exercise of reasonable discretion, that these expenditures are necessary in the conduct of public schools). These authorities establish that boards have broad discretion in making determinations regarding the proper expenditure of public funds.

*b. Control and Return on Investment*

A Texas court has concluded that contractual terms may provide sufficient control of expenditures. *See Key v. Comm'rs Ct. of Marion County*, 727 S.W.2d 667, 669 (Tex. App. - Texarkana 1987, no writ)(if a non-profit obligated itself contractually to perform a function beneficial to the public, the constitutional prohibition would not be applicable to the transaction). The Attorney General opined that a return benefit received by the school district need not be monetary, but instead may be accomplishing the school district's public purpose. Tex. Att'y Gen. Op. GA-0076 (2003) at 7 (determining that voluntary payment of medical expenses, incidental travel and services related to an injury sustained at school does not constitute an unconstitutional gift of public funds if the school board makes appropriate findings).

*C. The District's Participation in ACE Amarillo is Legal if the Board Makes Certain Determinations*

After a thorough review of the above-cited authority, case law and Attorney General opinions, it appears to be clear that participation in ACE Amarillo is legal contingent upon the Board making necessary determinations consistent with the public purpose test. The District's

financial contribution to ACE Amarillo will not constitute a gift of public funds prohibited by article III, section 52 if the school board (1) determines that the expenditure's predominant purpose is to accomplish a public purpose, not to benefit private parties, (2) retains sufficient control over the expenditure to ensure that the public purpose is accomplished, and (3) ensures that the school district receives a return benefit. The District's administration is prepared to recommend that the AISD Board of Trustees make such determinations, and in October 2017, the Board voted in favor of participation in the proposed ACE Amarillo program, contingent upon: (a) an acceptable response from the Texas Attorney General; (b) successful development of design and implementation requirements and standards; and (c) future findings (relating to the public purpose test) as deemed appropriate or necessary by the Board of Trustees.

*1. Predominant Purpose is to Accomplish a Public Purpose*

As noted above, students will only be eligible for the ACE Amarillo scholarship if they satisfy a grade point average requirement or obtain an acceptable score on the TSI. The TSI, an indicator of college readiness, is a part of the A-F accountability system monitored by the Texas Education Agency, and is included in the Student Achievement Domain. Success on the TSI indicates students are prepared for post-secondary success. Furthermore, the Texas Higher Education Coordinating Board requires all students to show post-secondary readiness before they can be placed into a college level course. Under the proposed ACE Amarillo plan, AC will work collaboratively with AISD to provide AISD students with skills to be more successful on the TSI while they are still high school students.

Not only is college readiness and success beyond high school a priority of AISD's, it is also a State priority, as indicated by the TSI being an accountability factor. The importance of students pursuing higher education is evident by Texas' new strategic plan, *60x30TX*, which

focuses on students' success over the next 15 years. As noted by the 2017 Texas Public Higher Education Almanac:

Achieving the goals of 60x30TX rests heavily on collaboration among stakeholders in higher education, K-12 education... 60x30TX has four student-centered goals in the areas of attainment, completion, marketable skills and student debt.

This goal is supported by Texas Governor Greg Abbott who stated, "The strength of Texas' economy is our workforce, and a skilled and educated workforce gives Texas a competitive advantage... Texas will be better because of our new focus on 60x30TX, and our brightest years are yet to come."

By collaborating with Amarillo College to participate in ACE Amarillo, AISD will provide the encouragement and motivation its students need to attain high academic achievement, college readiness, strong school attendance, and appropriate behavior - which are all appropriate functions of the District. See Tex. Att'y Gen. JM-1265 (1990) at 4. Furthermore, the District's mission is "to graduate every student prepared for success beyond high school." As designed, ACE Amarillo supports this mission and will help the District's students to be prepared for success beyond high school.

*2. The District will Retain Sufficient Control Over the Expenditure to Ensure that the Public Purpose is Accomplished*

Although not yet finalized, an agreement will be presented to the five partners, detailing the controls that will ensure the public purpose is accomplished. The contract will address annual payments by the District to be applied by the AAF to the tuition of successful eligible students who have enrolled in Amarillo College. Furthermore, a cap will be placed on the District's contribution toward ACE Amarillo, limiting its financial exposure.

*3. The District will Receive a Return Benefit*

As noted above, the District will receive a return benefit in the form of students who are motivated and preparing for success beyond high school by achieving high grades and college readiness, attending school, and staying out of trouble. Furthermore, the District anticipates that by making ACE Amarillo available to all eligible students, certain students who have transferred out of the District will want to return to AISD. Last year, 1,876 students who live in the District chose not to attend school at AISD. This results in a loss of \$12,381,600.00 to the District for average daily attendance funding. By appealing to students eligible to attend AISD who have previously chosen to leave by the enticement of a scholarship to Amarillo College, the District may recapture funding and adding much-needed funds to its budget. Either of these benefits, individually, is substantial for the District.

Finally, ACE Amarillo will also strive to increase the level of post-secondary educational attainment of AISD graduates, in turn resulting in graduates who have better paying jobs. In the event these graduates remain in Amarillo, AISD could feel a positive impact because the higher educational attainment should result in fewer students (graduates' children) qualifying for free and reduced lunch. Currently, approximately 75% of students qualify for free and reduced lunch.

IV.  
CONCLUSION

In Texas, boards of trustees of independent school districts have discretion to expend district funds for purposes necessary in the conduct of the public schools. In determining whether to participate in a scholarship program, a board would need to determine (1) financial participation has a predominant public purpose, (2) sufficient controls over the expenditure ensure a public purpose is accomplished, and (3) the district receives a benefit in return for participation in the program. Upon making such findings, financial participation in such a scholarship program is legal.