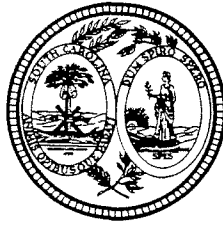


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The State of South Carolina  
OFFICE OF THE ATTORNEY GENERAL

HENRY McMASTER  
ATTORNEY GENERAL

June 3, 2003

The Honorable John D. Hawkins  
Senator, District No. 12  
606 Gressette Senate Building  
Post Office Box 142  
Columbia, South Carolina 29202

Dear Senator Hawkins:

You have requested an advisory opinion from this Office regarding a county's usage of surplus funds from tax levies collected on behalf of and appropriated for school districts within the county. By way of background, you have indicated that it has come to your attention that certain counties around the state are retaining portions of the tax levies that are collected specifically for the school districts and retaining them in the general fund of the county. You inquire as to the legality of this practice, and as to whether the county is required to give one hundred percent of the funds from the levy to the school district.

**Law/Analysis**

We begin with an analysis of the legal relationship between school districts and county government in the state of South Carolina. This Office previously had an opportunity to explore this relationship. See Op. S.C. Atty. Gen., dated March 8, 1978. In that opinion, we noted that both a county and a school district "are separate and distinct governmental, corporate entities and are separately subject to constitutional and statutory provisions applicable to each." S.C. Code Ann. § 4-9-140 (1976), as amended, sets forth the general requirements pertaining to the adoption of operating and capital budgets for county government. Section 4-9-140 states, in pertinent part:

[i]n the preparation of annual budgets or supplemental appropriations, council may require such reports, estimates and statistics from any county agency or department as may be necessary to perform its duties as the responsible fiscal body of the county.

While § 4-9-140 vests broad responsibilities upon County Council in the area of the county's budget, this authority cannot be viewed in isolation from other provisions of the 'Home Rule' legislation, specifically S.C. Code Ann. § 4-9-70 (1976). This section provides, in part:

The provisions of this chapter shall not be construed to devolve any additional powers upon county councils with regard to public school education, and all school districts, boards of trustees and county boards of education shall continue to perform their statutory functions in matters related thereto as prescribed in the general law of the State; provided, however, that except as otherwise provided for in this section the county council shall determine by ordinance the method of establishing the school tax millage except in those cases where boards of trustees of the districts or the county board of education established such millage at the time one of the alternate forms of government provided for in this chapter becomes effective.

Our Supreme Court has noted that “[b]y enacting § 4-9-70, the General Assembly attempted to insure that the taxing power for all school districts would be properly vested in some authority. The clear intent is to vest the power to determine the school tax levy in county council in all cases where it is not vested elsewhere.” Stone v. Traynham, 278 S.C. 407, 410, 297 S.E.2d 420, 422 (1982).

While county council thus plays an important role in the budget of many school districts, it must also be remembered – as § 4-9-70 recognizes – that a school district is a separate governmental entity. As we recently observed, “[s]chool districts are political subdivisions of the State created by Act of the General Assembly. See, § 59-17-10 et seq.” Op. S.C. Atty. Gen., May 8, 2003, quoting Op. S.C. Atty. Gen., May 21, 1979. Each school district is, by Section 59-17-10, constituted a body politic and corporate. As the Supreme Court stated in Patrick v. Maybank, et al., 198 S.C. 262, 17 S.E.2d 530, 534 (1941), “[a] school district ... constitutes one of our most important political subdivisions, having the right to sue and be sued, and is capable of contracting and being contracted with to the extent of its school fund, and may hold both real and personal property.”

Thus, as a general matter, the foregoing statutes and case law make it clear that Home Rule does not alter the separate identity of school districts in South Carolina. As the Supreme Court pointed out in Moye v. Caughman, 265 S.C. 140, 217 S.E.2d 36 (1975),

[c]reation of different provisions for school districts does not impinge upon the ‘Home Rule’ amendment because public education is not the duty of the counties, but of the General Assembly. The General Assembly has not been mandated by any constitutional amendment to enact legislation to confer upon the counties the power to control the public school system. To the contrary the command of new Article XI, Section 3, is ‘the General Assembly shall provide for the maintenance and support of a system of free public schools.’

265 S.C. at 143.

With these general principles in mind, and recognizing the separate identity of school districts, we turn now to your specific question as to whether a county council possesses the authority to retain control of or to appropriate surplus funds from tax levies which are collected on behalf of school districts within the county. As noted above, while a county council has broad power to

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appropriate funds under the Home Rule statutes. Op. S.C. Atty. Gen., Op. No. 89-55 (May 8, 1989), such authority is not unlimited. For example, council possesses no authority through the appropriations process to divert funds previously appropriated for a specific purpose by the General Assembly. See Op. S.C. Atty. Gen., Op. No. 92-30 (June 11, 1992) ["county council has no authority to divert funds, appropriated by the General Assembly for veterans affairs offices, to other purposes."]. And, in Op. S.C. Atty. Gen., Op. No. 91-21 (April 1, 1991), we commented that if § 4-9-140 were interpreted to allow counties to divert funds from taxes levied for specific purposes, "then the constitutionality of the statute could be seriously questioned." Citing, Article X, §§ 5, 7(b) and 8 of the South Carolina Constitution.

With respect to school funds specifically, we have previously opined that "District funds on deposit with the County Treasurer remain funds of the ... School District along with any interest accruing to said School District's funds." Op. S.C. Atty. Gen., Op. No. 78-163 (September 30, 1978). Moreover, we have concluded that taxes levied and collected by a school district on property located within that district cannot be diverted or transferred to another school district. Op. S.C. Atty. Gen., Op. No. 89-18 (February 27, 1989). See also, Moseley v. Welch, 209 S.C. 19, 39 S.E.2d 133 (1946). [transfer of surplus to the credit of one school district to the payment of a deficit already incurred in another school district is unconstitutional].

Even more convincing is an opinion dated March 17, 1978, wherein we advised that Richland County Council could legally apply unappropriated surplus funds to the school board budgets the next year. Additionally, we stated that "it would be impermissible to divert a surplus [from school funds] to any cause other than that for which the original tax was levied." Citing, Parker v. Bates, 216 S.C. 52, 56 S.E.2d 723 (1949). In our opinion, merely carrying forward the surplus school funds to be used in subsequent fiscal year for school purposes, however, did "not constitute such an impermissible diversion."

In a subsequent opinion, this Office advised that not only was county council permitted to carry over unappropriated surplus funds to the school board budget for the following year, it was required to do so by statute. See Op. S.C. Atty. Gen., dated March 16, 1983 (Dorchester County Council not allowed to modify the statutory requirement to carry over school district funds that are in excess of budgeted appropriations to the next fiscal year.) S.C. Code Ann. § 59-69-250 (1976) provides that:

The county treasurer shall carry forward all sums in his hands collected for any previous year or years for school purposes and unexpended to the next fiscal year and credit the same to the school districts respectively, for which they were apportioned. He shall report such sums to the county superintendent of education.

In short, the General Assembly has made it clear that surplus school funds must be used for such purposes. Accordingly, it is our opinion that any retention by county council of surplus funds collected in tax levies specifically authorized by the General Assembly to fund public schools, most likely would be held by a court to be invalid. Section 59-69-250 of the Code expressly requires

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surplus funds to be credited to the school district. In our opinion, such funds cannot be diverted to another purpose.<sup>1</sup>

### Conclusion

Based on the foregoing authorities, it is our opinion that a county council is not authorized to retain any unappropriated surplus school district funds collected from tax levies designated by the General Assembly to fund schools within such county. We further advise that the County Treasurer is required by Section 59-69-250 of the Code to carry forward such funds, in their entirety, to the credit of the school district budget(s) for the following year. In other words, school funds must be used for school purposes.

Very truly yours,



Robert D. Cook  
Assistant Deputy Attorney General

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<sup>1</sup> We note that most of the opinions referenced above, were written after Article X, § 5 was adopted in 1977. New Article X, § 5 modified Article X, § 3, removing the language in the former provision expressly requiring the object of a tax to be applied thereto. See, Myers v. Patterson, 315 S.C. 248, 433 S.E.2d 841 (1993) [fact that new Article X, § 5 removed language from Article X, § 3 which had mandated the application of a tax to its specified purpose was critical to the court's conclusion that SHIMS funds could be devoted to other purposes by the Legislature]. By contrast, the referenced opinions of this Office concluded that school funds could not be devoted to other purposes by county council. Moreover, § 59-69-250 is clear that surplus school funds must be carried over for school purposes only.