

EDUCATION & LOCAL GOV'T IC
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Exhibit 6

VOLUME NO. 54

OPINION NO. 6

SCHOOL DISTRICTS - Authority of school district to construct a new school using multiple funding sources;

TAXATION AND REVENUE - Use of property taxes levied to support adult education and transportation funds;

MONTANA CODE ANNOTATED - Title 20, chapters 7, 9; chapter 10, part 1; sections 20-7-701, (2), -702, -704, -705, (2), (3), 20-9-201(1), -203, -208, (1), (2), (a)(i), (B), (ii), -212(1), -311, -502, -508, -516, -533, -541, -542, (1), -543, (1), (a), (ii), -544(1), (2), 20-10-101, -107, -121, -124, -125, -142, -143(1), (a), (b), (c), (d), (e), -144, -145;

MONTANA CODE ANNOTATED (2011) - Section 20-9-208(2)(a)(i)(B);

MONTANA CODE ANNOTATED (2009) - Section 20-9-208(2)(a), (i);

OPINIONS OF THE ATTORNEY GENERAL - 44 Op. Att'y Gen. No. 41 (1992).

HELD: Property taxes levied to support the adult education and transportation funds may be transferred to the school flexibility fund, but the transfer must be within or directly related to the purposes for which the property taxes were raised, i.e., adult education programming and transportation services. A transfer of property taxes for any other purpose is invalid. Once transferred, property taxes levied to support the adult education and transportation funds may not be converted for other purposes or comingled with flex fund revenues or cash balances to cover expenditures authorized for flex funds. The school board and/or the county may demand an accounting to ensure that a valid transfer occurred and the funding sources have been properly spent.

February 3, 2012

Mr. Chris Christensen
Madison County Attorney
P.O. Box 73
Virginia City, MT 59755-0073

Dear Mr. Christensen:

[P1] You have requested an Attorney General opinion concerning the authority of the Ennis School District (District) to construct a new elementary and junior high school using multiple funding sources, including adult education, transportation, and school flexibility funding sources that have been transferred from the adult education and transportation funds to the flex fund account.

Background

[P2] According to your letter, the District has generated substantial revenue for adult education through nonvoted mill levies. Presently, the District's mill levy for adult education is the highest in the State and actually exceeds the District's general fund mill levy. Over the years, the amount of revenue in the adult education fund has grown from \$236,000 in fiscal year 2005 to over \$4 million in fiscal year 2010. At the same time, the actual expenditures for adult education have declined from \$30,528 in fiscal year 2005 to \$24,697 in fiscal year 2009. A portion of the excess balance has been transferred to the school flexibility fund by resolution of the trustees. The resolutions authorizing the transfers indicate that the funding sources will be used to provide adult education as authorized in Mont. Code Ann. § 20-7-702 and to cover flex fund expenses as authorized in Mont. Code Ann. § 20-9-543(1)(a).

[P3] A similar circumstance exists with respect to transportation funding sources. Since fiscal year 2004, the District's transportation fund has realized revenue increases greater than actual expenditures. Consequently, each fiscal year between 2004 and 2008, the trustees approved a transfer of \$120,000 to the school flexibility fund. The resolutions authorizing these transfers are similar to the resolutions authorizing the transfer of adult education funding sources. They state that the funding sources will be used to provide adult education as authorized in Mont. Code Ann. § 20-7-702 and to cover flex fund expenses as authorized in Mont. Code Ann. § 20-9-543(1)(a). There is no mention of the funding sources being used to provide transportation services.

[P4] At some point, it became apparent that the District intended to use the transferred funding sources to construct a new elementary and junior high school. The estimated cost of the new school is \$10 million. In response to inquiries from the Office of Public Instruction (OPI), the District Superintendent represented that the new school would be used for multiple purposes including adult education and transportation services, and that only a portion of the school would be used for K-8 instruction. Information provided by the District's auditor indicates the following uses of the new building based on a percentage of overall square footage: adult education (49%), K-8 education (36%) and transportation (15%).

[P5] You question whether this is a valid use of adult education and transportation funding sources and, if so, what percentage of the building must be used for those purposes. If it is not a valid use of funding sources, you question what remedies are available to the school board or the county now that a substantial portion of the construction project is complete. Your questions require consideration of several factors: (1) under what circumstances may adult education and transportation funding sources be transferred to the flex fund account? (2) for what purposes may transferred funding sources be spent? and (3) may they be comingled with the flex fund revenue and cash balances to cover school district expenditures under Mont. Code Ann. § 20-9-543(1)(a)?

Analysis

[P6] The statutes governing education funds and the transfer of money between funds are found in Title 20, Montana Code Annotated. As used in Title 20, the term "fund" means "a separate detailed account of receipts and expenditures for a specific purpose as authorized by law or by the superintendent of public instruction." Mont. Code Ann. § 20-9-201(1). The separate and distinct nature of education funds is confirmed in 44 Op. Atty. Gen. No. 41 (1992): "The school finance statutes are very detailed and specify the manner in which each budgeted fund is to be financed." *Id.* at 168. These fundamental principles are important, as they counsel against the conversion or comingling of funding sources absent specific legislative authorization.

[P7] The legislature's intent to maintain separate and detailed accounting methods for school finance is evidenced in Mont. Code Ann. § 20-9-208, which authorizes transfers between budgeted funds. While the Legislature freely authorizes the transfer of any excess appropriation amount to any other appropriation item of the same budgeted fund, Mont. Code Ann. § 20-9-208(1), the transfer from fund to fund is far more restrictive, particularly if the funding source is a property tax levy, whether approved by the voters or raised by a nonvoted levy. Subsection (2) of the statute allows fund to fund transfers only under the following circumstances:

(2) Unless otherwise restricted by a specific provision of this title, transfers may be made between different funds of the same district or between the final budget and a budget amendment under one of the following circumstances:

(a)(i) Except as provided in subsection (2)(a)(ii), transfers may be made from one budgeted fund to another budgeted fund or between the final budget and a budget amendment for a budgeted fund whenever the trustees determine, in their discretion, that the transfer of funds is necessary to improve the efficiency of spending within the district or when an action

of the trustees results in savings in one budgeted fund that can be put to more efficient use in another budgeted fund. Transfers may not be made with funds approved by the voters or with funds raised by a nonvoted levy unless the transfer is within or directly related to the purposes for which the funds were raised. Before a transfer can occur, the trustees shall hold a properly noticed hearing to accept public comment on the transfer.

(ii) Unless otherwise authorized by a specific provision in this title, transfers from the general fund to any other fund and transfers to the general fund from any other fund are prohibited.

Mont. Code Ann. § 20-9-208(2)(a) (2009). (This statute was amended in 2011 to allow a transfer in an additional circumstance, where the transfer “is approved by the qualified electors of the district in an election called for the purpose of approving the transfer, in which case the funds may be spent for the purpose approved on the ballot.” Mont. Code Ann. § 20-9-208(2)(a)(i)(B) (2011). Since the transfers in question occurred prior to the passage of this new provision, and no voter approval was sought, I will limit my analysis to the statute as it existed prior.)

[P8] This statute clearly restricts transfers of nonvoted levies, which would include adult education, transportation and flex funds. See Mont. Code Ann. § 20-9-208(2)(a)(i) (using the term “nonvoted levy” to describe funding sources raised without voter approval). Any transfer of property taxes levied to support the adult education and transportation funds to the flex fund prior to 2011 is permissible only if “the transfer is within or directly related to the purposes for which the funds were raised.” Mont. Code Ann. § 20-9-208(2)(a)(i) (2009). I will analyze the transfers from each fund separately.

A. Transfer and Use of Adult Education Funding Sources

[P9] According to information provided, the trustees’ resolutions transferring adult education funding sources to the flex fund account provided two reasons for the transfer:

1. . . . to provide both basic education and secondary general education, K-12 career and vocational/technical education, vocational-technical education, including courses in the English language and American history and government, or any other areas of instruction approved by the trustees for persons 16 [years] of age or older who are not regularly enrolled, full-time pupils for the purposes of ANB computation

2. . . . for the purchase of technological equipment enhancements and expansions considered by the trustees to support enhanced educational programs; facility expansion and remodeling considered by the trustees to support the delivery of educational programs or the removal and replacement of obsolete facilities; to provide supplies and materials considered by the trustees to support the delivery of enhanced education programs; the development of curriculum materials; the purchase, lease, or rental of real property that must be used to provide enhanced programs.

[P10] The first stated reason for the transfer of adult education funding sources mirrors the statutory language describing an adult education program in Mont. Code Ann. § 20-7-702. The second stated reason mirrors the statutory language describing school district expenditures from the school flexibility fund in Mont. Code Ann. § 20-9-543.

[P11] As explained below, I conclude that the first stated reason effectuated a valid transfer of funding sources from the adult education fund to the flex fund under Mont. Code Ann. § 20-9-208(2)(a) (2009) for the purposes described in Mont. Code Ann. § 20-7-702. However, because those purposes do not include capital outlay for facility acquisition and construction services, transferred property taxes may only be used for adult education programming and not for new school construction. Similarly, property taxes transferred from the adult education funds may not be used for the purposes set forth in Mont. Code Ann. § 20-9-543.

[P12] Montana Code Annotated section 20-7-702 authorizes the trustees of a school district to establish and operate an adult education program, to be financed through a "separate adult education fund" as described in Mont. Code Ann. § 20-7-705. The adult education fund is the depository "for all district money received by the district in support of the adult education program." Mont. Code Ann. § 20-7-705(2). The trustees may authorize the levy of a tax on the taxable value of all taxable property within the district for the operation of an adult education program. Mont. Code Ann. § 20-7-705(3). The trustees may also generate revenue for the adult education fund by charging tuition for instruction and fees for the use of equipment and materials. Mont. Code Ann. § 20-7-704.

[P13] "Adult education" is defined as "the instruction of persons 16 years of age or older who are not regularly enrolled, full-time pupils for purposes of ANB computation." Mont. Code Ann. § 20-7-701(2). "ANB" is "average number belonging" and its computation is based on average enrollment of regularly enrolled, full-time students as set forth in Mont. Code Ann. § 20-9-311. An adult education program may provide "both

basic and secondary general education, career and vocational/technical education, vocational-technical education, American citizenship education, including the English language and American History and government, or any other areas of instruction approved by the trustees." Mont. Code Ann. § 20-7-702.

[P14] Because the first stated reason of the resolution transferring the adult education funding sources to the flex fund recites exactly the purposes for which adult education funding sources were raised, it constitutes a valid transfer of property taxes *for those purposes*. The more difficult question is whether those purposes include construction of a new school that will serve (at least in part) regularly enrolled K-8 students.

[P15] While the description of adult education in Mont. Code Ann. § 20-7-702 is seemingly broad in scope, the program itself is narrowly tailored. Adult education serves a distinct population of students which, by definition, does not include regularly enrolled K-8 students. Mont. Code Ann. § 20-7-701, -702. Adult education is to be provided "at any time of the day when facilities and personnel are available," Mont. Code Ann. § 20-7-702, implying that adult education will be provided in an existing facility. Adult education appears in Mont. Code Ann. tit. 20, ch. 7, which addresses "school instruction and special programs," suggesting that adult education is concerned with "programming" and not capital investments. This is in contrast to other funds described in Title 20, chapter 9, where capital outlay for facility acquisition or construction services is specifically authorized. See Mont. Code Ann. § 20-9-502 (authorizing a building reserve fund for new school construction or land acquisition); Mont. Code Ann. § 20-9-508 (authorizing a building fund for building, enlarging, or remodeling a school or other building in the district); Mont. Code Ann. § 20-9-516 (authorizing a school facility and technology account); Mont. Code Ann. § 20-9-533 (authorizing a technology acquisition and depreciation fund).

[P16] Based on these statutory provisions, I conclude that adult education funding sources were not intended to finance capital investments such as school buildings. As discussed in Part C, the transfer of property taxes levied to support the adult education fund to the flex fund does not change the nature of the funding sources or allow them to be used for a different purpose. Therefore, the trustees were only authorized to transfer property taxes levied to support the adult education fund to the flex fund for purposes set forth in Mont. Code Ann. § 20-7-702, as stated in the trustees' resolution. Whether or not a certain square footage of building space is used for adult education is not determinative, since no amount of adult education funding sources can be used as capital outlay for facility acquisition or construction services. If any portion of the new school building will be used for adult education, the trustees may spend 100% of the transferred property

taxes levied to support the adult education fund for related instruction and programming, but only for that purpose.

B. Transfer and Use of Transportation Funding Sources

[P17] As with the adult education funding sources, the propriety of the transfer of property taxes from the transportation fund to the flex fund depends on the purposes for which the taxes were raised as described in Title 20, chapter 10, part 1. These provisions authorize the District to provide transportation services to public school pupils between the ages of 5 and 20 years of age who reside a certain distance from the nearest operating public elementary or high school. Mont. Code Ann. §§ 20-10-101, -121.

[P18] To provide transportation services, the trustees are authorized to purchase or rent school buses (Mont. Code Ann. § 20-10-107), contract with a private party for individual transportation (Mont. Code Ann. § 20-10-124) or contract with a private party for bus services (Mont. Code Ann. § 20-10-125). The trustees of a district furnishing transportation to pupils who are residents of the district "shall provide a transportation fund budget that is adequate to finance the district's contractual obligations and any other transportation expenditures necessary for the conduct of its transportation program." Mont. Code Ann. § 20-10-143(1). The transportation fund budget must include:

- (a) an adequate amount to finance the maintenance and operation of school buses owned and operated by the district;
- (b) the annual contracted amount for the maintenance and operation of school buses by a private party;
- (c) the annual contracted amount for individual transportation, including any increased amount because of isolation, which may not exceed the scheduled amounts prescribed in 20-10-142;
- (d) any amount necessary for the purchase, rental, or insurance of school buses; and
- (e) any other amount necessary to finance the administration, operation, or maintenance of the transportation program of the district, as determined by the trustees.

Mont. Code Ann. § 20-10-143(1).

[P19] Unlike the adult education statutes, the transportation statutes specifically authorize funding sources to be used for capital investments and expenditures related to transportation services or part of the transportation program. I conclude that the transfer of property taxes levied to support the transportation fund to the flex fund is permissible

under Mont. Code Ann. § 20-9-208(2)(a)(i), if the transfer is within or directly related to the funding purposes identified in Mont. Code Ann. § 20-10-143(1). Here, there is a question about whether the trustees effectuated a proper transfer of transportation funding sources, since the resolution authorizing the transfer recited the same reasons as the transfer of adult education funding sources, i.e., to provide adult education and to cover flex fund expenditures, with no provision for transportation expenses.

[P20] Even if there was a valid transfer of property taxes from the transportation fund, those taxes were generated for specific purposes which do not include classroom construction. While it would be permissible for the trustees to budget for transportation program needs in the flex fund to purchase buses or for construction services associated with transportation under the catch-all provision of Mont. Code Ann. § 20-10-143(1)(e) (allowing “any other amount necessary to finance the administration, operation, or maintenance of the transportation program”), the trustees may not budget for or expend property taxes levied to support the transportation fund for new school construction because that is not a purpose for which transportation funding sources were raised. Any other result would thwart the legislature’s directive that school funds are “separate detailed account of receipts and expenditures for a specific purpose.” Mont. Code Ann. § 20-9-201(1).

[P21] Whether or not a certain amount of square footage will be used to provide transportation services does not alter the fact that property taxes levied to support the transportation fund cannot be used for classroom construction. If a portion of the new school building will provide transportation services, it is permissible to spend 100% of the property taxes levied to support the transportation fund for those services, but for no other purpose.

[P22] It has been suggested that the transfer of transportation money to the flex fund, insofar as it involves state reimbursement money and not property taxes, is a valid transfer as long as the trustees determine, in their discretion, that “the transfer of funds is necessary to improve the efficiency of spending within the district or when an action of the trustees results in savings in one budgeted fund that can be put to more efficiency use in another budgeted fund.” Mont. Code Ann. § 20-9-208(2)(a) (2009). This proposition assumes that it is permissible to generate surplus revenue from the state transportation reimbursement described in Mont. Code Ann. § 20-10-145, and transfer that surplus to the flex fund to be spent for flex fund purposes. I am informed that that assumption is inconsistent with OPI’s principles of accounting for transportation reimbursements. OPI assumes that state monies deposited in the transportation fund are “first in” when deposited and “first out” when spent. This principle is based on the language of Mont. Code Ann. § 20-10-144, which requires the district to anticipate the amount of

transportation reimbursements it will receive from the state, and determine its property tax requirements based on any additional revenue requirements. I am not inclined to second-guess OPI's accounting methods, since they are consistent with the relevant statutes and also with the overall legislative intent for separate and detailed accounting of school finances.

C. Comingling of Funding Sources in the School Flexibility Fund

[P23] Assuming there was a valid transfer of adult education and transportation funding sources based on the limited purposes for which the funding sources were raised, the question becomes whether the funding sources may be converted to or comingled with school flexibility funding sources to cover expenditures authorized in Mont. Code Ann. § 20-9-543.

[P24] While the trustees have discretion to establish adult education and transportation funds, the creation of a school flexibility fund is mandatory. Montana Code Annotated section 20-9-543 directs the trustees of a district to establish a school flexibility fund (flex fund) to receive funding allocated by the superintendent of public instruction to each school district pursuant to Mont. Code Ann. § 20-9-542. Each school's total allocation is determined in accordance with the formula in Mont. Code Ann. § 20-9-542(1) and the definitions in Mont. Code Ann. § 20-9-541. The trustees may also submit a proposition to the qualified electors of the district to approve a levy to finance the school flex fund. Mont. Code Ann. § 20-9-544(1). The amount of the levy may not exceed 25% of the district's allocation in Mont. Code Ann. § 20-9-542. *Id.* Money collected from the levy must be deposited in the district's school flexibility fund and spent in accordance with Mont. Code Ann. § 20-9-543. Mont. Code Ann. § 20-9-544(2).

[P25] The trustees may use the flex fund, in their discretion, for school district expenditures listed in Mont. Code Ann. § 20-9-543. There are nine specific expenditures listed, one of which is for "facility expansion and remodeling considered by the trustees to support the delivery of educational programs **or the removal and replacement of obsolete facilities[.]**" Mont. Code Ann. § 20-9-543(1)(a)(ii) (emphasis added). This subsection allows the trustees to use flex fund money to remove or replace obsolete buildings, but it does not allow the trustees to spend property taxes transferred from other funds for those purposes. Transferred funding sources such as adult education and transportation property taxes are in the flex fund solely by virtue of the fact that the transfer was within or directly related to the purpose for which the property taxes were raised. The transferred property taxes are not converted to flex fund revenues, nor may they be comingled with and spent for flex fund purposes. To conclude otherwise is

inconsistent with the restrictions on the transfer statute and the purposes of the original fund as designated by the Legislature.

D. Conclusion

[P26] 1. The resolution authorizing the transfer of property taxes levied to support the adult education fund to the flex fund was effective only for the purposes set forth in Mont. Code Ann. § 20-7-702. The transfer of property taxes levied to support the adult education fund cannot be for the purposes set forth in Mont. Code Ann. § 20-9-543 (authorizing expenditures from the flex fund). Once transferred, the property taxes levied to support the adult education fund cannot be converted to or comingled with flex fund revenues and cash balances. They remain property taxes and must be spent for the purposes for which they were raised. Since adult education funding sources are not raised for capital outlay for facility acquisition or construction services, the trustees cannot budget to expend property taxes levied to support the adult education fund from the flex fund to construct a new school.

[P27] 2. The resolution authorizing the transfer of property taxes levied to support the transportation fund to the flex fund did not result in a valid transfer under Mont. Code Ann. § 20-9-208(2)(a) because the stated purposes of the transfer are not within or directly related to the purposes for which the property taxes were raised. Even if the trustees effect a valid transfer in the future or retroactively, the transferred property taxes may only be used for transportation services, which may include capital outlay relating to transportation but no others. Once transferred, the property taxes from the transportation fund cannot be converted to or comingled with flex fund revenues or cash balances. They remain transportation revenue and must be spent for the purposes authorized in Title 20, chapter 10, part 1.

[P28] 3. Flex fund revenues and cash balances may be used for the purposes set forth in Mont. Code Ann. § 20-9-543(1)(a), including facility expansion and remodeling or the removal and replacement of obsolete buildings; however, they may not be comingled with property taxes transferred from other budgeted funds.

[P29] 4. The school board and/or the county may demand an accounting of funding sources to ensure that they were transferred, budgeted, and expended in accordance with this opinion. See Mont. Code Ann. § 20-9-203 (describing audit procedures for first, second, and third-class school districts); Mont. Code Ann. § 20-9-212(1) (assigning accounting duties to county treasurer). Depending on the results of that accounting, it may be appropriate to reimburse the transportation and adult education funds with available cash balances, pursuant to Mont. Code Ann. § 20-9-208(2)(i)(B). Ultimately,

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however, the trustees (as the term implies) must answer to the taxpayers of the District, particularly where property taxes are in question. If there is a basis for liability, those remedies may be pursued by the school board, the county, or any other citizen with standing as provided by law.

THEREFORE, IT IS MY OPINION:

Property taxes levied to support the adult education and transportation funds may be transferred to the school flexibility fund, but the transfer must be within or directly related to the purposes for which the property taxes were raised, i.e., adult education programming and transportation services. A transfer of property taxes for any other purpose is invalid. Once transferred, property taxes levied to support the adult education and transportation funds may not be converted for other purposes or comingled with flex fund revenues or cash balances to cover expenditures authorized for flex funds. The school board and/or the county may demand an accounting to ensure that a valid transfer occurred and the funding sources have been properly spent.

Sincerely,

STEVE BULLOCK
Attorney General

sb/jma/jym