



HENRY McMASTER
ATTORNEY GENERAL

March 17, 2010

The Honorable Jim Rex
Superintendent of Education
South Carolina Department of Education
1429 Senate Street
Columbia, South Carolina 29201

Dear Superintendent Rex:

We received your letter requesting an opinion of this Office as to our interpretation of section 59-3-100 of the South Carolina Code (Supp. 2009), specifying the method of allocation of the proceeds received from Qualified School Construction Bonds. In your letter, you provided the following background information:

As part of the American Recovery and Reinvestment Act of 2009, the United States Congress established the Qualified School Construction Bond (QSCB), the intent of which is that QSCB obligations will be issued with an interest rate at or near zero. The federal law did not specify the method for allocating the bonds. As a result, the General Assembly passed the Federal Educational Tax-Credit Bond Implementation Act (H3148) on May 27, 2009. The South Carolina Department of Education (SCDE) received applications for the QSCB funds in response to its application process and there are funds remaining that need to be allocated. The SCDE is requesting clarification from the Attorney General as to how to allocate the remaining Qualified School Construction Bonds under H3148.

Law/Analysis

With your request, you included a copy of the Federal Educational Tax-Credit Bond Implementation Act (the "Act"), which is codified as section 59-3-100 of the South Carolina Code. This statute provides, in pertinent part:

(A)(1) Issuance authority for Qualified School Construction Bonds (QSCB) obligations allotted to the State pursuant to the provisions of 26 U.S.C. Section 54F(d)(1) and any issuance authority allocated

pursuant to 26 U.S.C. Section 54F(d)(2) to school districts of the State and not used by them shall be allocated by the State Superintendent of Education to one or more of the school districts, or county boards of education on behalf of one or more school districts of the State. In that regard, the State Superintendent of Education shall allocate sixty percent of the state's QSCB issuance authority to or on behalf of school districts having the lowest capital financing resources, measured in terms of assessed value per pupil, not to exceed twenty million dollars per school district and forty percent of the state's QSCB issuance authority to or on behalf of school districts having an ability to expeditiously issue bonds demonstrated through a high credit rating and timely start and completion of a project, not to exceed ten million dollars per school district. Any remaining QSCB allocations shall be awarded on a pro rata basis to school districts that originally requested more than the maximum amount in a QSCB allocation. School districts allocated issuance authority under 26 U.S.C. Section 54F(d)(2)(E)(i) are not eligible for allocation of issuance authority under this paragraph (A). When two or more school districts are proposing a joint construction rehabilitation of a qualified project, the priority level for the project must be based on the priority level of the joint partner having the lowest assessed value per pupil.

S.C. Code Ann. § 59-3-100 (emphasis added).

You specifically ask us to opine as to what is meant by the use of the phrase "pro rata basis" as used above. We understand that the SCDE has come up with four possible interpretations of this phrase.

- pro rata basis as determined by the amount of money each of the school districts (that have unfunded amounts) requested;
- pro rata basis as determined by the amount of the unfunded amount, in those same districts;
- pro rata basis as calculated by the student population in those same districts; or
- pro rata basis as calculated by the number of districts, that have unfunded amounts, divided into the amount of funds remaining.

To interpret the phrase "pro rata basis" as used in section 59-3-100, we must employ the rules of statutory interpretation.

The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. State v. Pittman, 373 S.C. 527, 561, 647 S.E.2d 144, 161 (2007). Thus, in interpreting statutes, we look to the plain meaning of the statute and the intent of the legislature. State v. Gaines, 380 S.C. 23, 32, 667 S.E.2d 728, 733 (2008). A statute's language must be construed in light of the intended purpose of the statute. Id. at 33, 667 S.E.2d at 733. Whenever possible, legislative intent should be found in the plain language of the statute itself. Id.

Michael P. v. Greenville County Dept. of Social Services, 385 S.C. 407, 414, 684 S.E.2d 211, 215 (Ct. App. 2009).

The Act includes the following findings by the Legislature:

(1) Owing to a devastating upheaval in world financial markets, the United States is experiencing restricted access to credit, closures of numerous business concerns, and high levels of unemployment across the nation. In response, the United States Congress has made provisions for a variety of strategies intended to stimulate economic activity in The American Recovery and Reinvestment Act of 2009 (ARRA). Among the strategies implemented by ARRA are various innovative financing programs for local governments.

(2) Traditionally, most financing undertaken by local governments is exempt from federal income tax. In order to stimulate local building activity and, further, to ameliorate the impact of a significant present weakness in the market for tax-exempt securities, ARRA, through a change in federal tax law, provides for the issuance by local school districts of a new type of obligation, the Qualified School Construction Bond (QSCB). It is the intent of Congress that QSCB obligations will be issued with an interest rate at or near to zero. In exchange for forgoing interest, the holder of a QSCB obligation will receive a credit against federal income tax intended to provide tax benefits equivalent to the forgone interest payments. The proceeds of QSCB obligations only may be used to defray the cost of the construction, rehabilitation, or repair of a public school facility or for the acquisition of land on which a facility is to be constructed.

(3) ARRA authorizes the issuance of eleven billion dollars of QSCB obligations in each of calendar years 2009 and 2010. Allocations will be made to the states in proportion to the respective numbers of

children in each state who have attained age five but not age eighteen for the most recent fiscal year ending before the calendar year. South Carolina has been allotted one hundred and thirty one million dollars under ARRA in 2009 plus special allocations for large districts. Forty percent of the total national allocation amount is being allocated to one hundred large school districts and up to twenty-five additional school districts selected by the Secretary of the United States Department of Education. School districts of Charleston County and Greenville County are receiving direct allocations from the Secretary of the United States Department of Education.

(4) ARRA does not specify any method or criteria by which a state must allocate its share of QSCB issuance authority to its school districts. Accordingly, it is necessary for the General Assembly to direct the allocation of this issuance authority. The General Assembly has determined in this act to provide for the allocation of sixty percent of the State's QSCB issuance authority, not including the amount allocated to school districts of Greenville and Charleston Counties, to school districts having the lowest capital financing resources, measured in terms of assessed value per pupil, not to exceed a maximum of twenty million dollars per school district, and forty percent of the State's QSCB issuance authority to school districts having an ability to expeditiously issue bonds demonstrated through a high credit rating and timely start and completion of a project, not to exceed ten million dollars per school district. Any remaining QSCB allocations shall be awarded on a pro rata basis to school districts that originally requested more than the maximum amount in a QSCB allocation. By allocating QSCB issuance authority to such school districts, a portion of the critical facilities needs of these districts may be addressed, subject to Article X, Section 15 of the South Carolina Constitution, 1895.

(5) Because the public market for tax-credit obligations is presently underdeveloped and may require several years or more to become a robust substitute for the tax-exempt market of prior years, it is also necessary to make appropriate provisions for the marketing of QSCB obligations.

2009 S.C. Acts No. 68.

According to the stated purposes set forth in the Act, we gather that the Legislature intended to provide a method by which QSCB funds can be allocated among the State's school districts. By

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placing a cap on the amount each school district could receive, we believe the Legislature sought to make sure that all eligible school districts could receive at least some portion of the QSCB funds. However, we believe the Legislature included the provision in question to ensure that all of the QSCB funds available will be used by those districts with a need, even if that need exceeds the maximum amount.

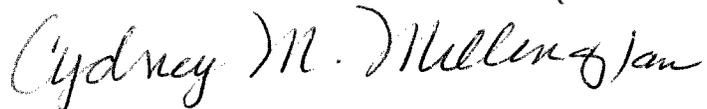
The statute is far from clear as method of computation that shall be used to allocate this amount among school districts. Each one of the methods suggested by the SCDE appear reasonable. Nonetheless, we believe the best reading is to compute the pro rata amount based on the amount each district requested. We believe this reading best effectuates the Legislature's intent to spread QSCB funds among the various qualifying districts, while at the same time ensuring that funds are allocated based on each district's need. Nonetheless, because the statute appears vague with regard to the specific method to be used, we also recommend that either judicial or legislative clarification be sought to ensure the appropriate method of computing the allocation be used.

Conclusion

Although we find section 59-3-100 to be unclear as to the appropriate method of allocating excess QSCB funds, based on our understanding of the Legislature's intent with regard to this provision, we find it best to allocate remaining QSCB funds pro rata based on the amount each district requested.

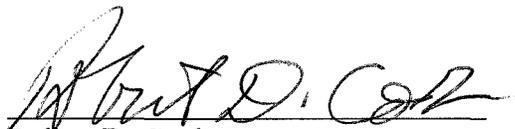
Very truly yours,

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