

May 3, 2000

OPINION NO. 2000-028

The Honorable Jim Petro
Auditor of State
88 East Broad Street
P.O. Box 1140
Columbus, Ohio 43216-1140

Dear Auditor Petro:

We have received your request for an opinion regarding the applicability of R.C. 5705.412 to a school district that is in fiscal emergency. Your specific questions are as follows:

1. How can a school district that is in fiscal emergency certify a contract under R.C. 5705.412 if the school district has projected budget deficits?
2. Who is the appropriate authority to provide the certification, if certification is required?

Your questions have arisen from an apparent conflict regarding the powers and duties of a school district that is in fiscal emergency. Under the provisions of R.C. 5705.412, a school district cannot enter into a contract without a certification that it has sufficient funds to provide an adequate educational program for the current year and one or more subsequent years. However, the existence of a fiscal emergency indicates that adequate funding cannot be guaranteed. Therefore, it is not clear how a district that is in fiscal emergency can proceed with contracts that are necessary for its operation.

Further, when a school district is in fiscal emergency, it is subject to supervision by a financial planning and supervision commission, which has authority to take over various responsibilities of the district. It is not clear what relationship exists between the commission and district officials on the matter of certification under R.C. 5705.412, and you have asked for clarification on that matter as well.

Let us begin our analysis of your questions with an examination of the certification requirements of R.C. 5705.412. That statute provides that no school district "shall adopt any appropriation measure, make any contract, give any order involving the expenditure of money, or increase during any school year any wage or salary schedule" unless there is a certificate stating

that the school district has resources (including the authority to levy taxes) “sufficient to provide the operating revenues necessary to enable the district to maintain all personnel, programs, and services essential to the provision of an adequate educational program” for the current fiscal year and the following fiscal year. R.C. 5705.412. In the case of a contract, the prescribed time period for the certification consists of the current fiscal year and two succeeding fiscal years or the term of the contract, whichever is greater. The certificate must be signed by the treasurer and president of the board of education and the superintendent of the school district. By the express terms of the statute, a contract, order, or schedule that does not have such a certificate is void. *Id.*

The statute provides for the Department of Education and the Auditor of State to jointly develop rules “governing the methods by which treasurers, presidents of boards of education, and superintendents shall estimate revenue and determine whether such revenue is sufficient to provide necessary operating revenue for the purpose of making certifications” required by R.C. 5705.412. *Id.* Provisions addressing this subject appear in 5 Ohio Admin. Code 3301-92-05. They provide, in part, that certification under R.C. 5705.412 is based on the current five-year projection, which is governed by R.C. 5705.391 and 5 Ohio Admin. Code 3301-92-04. 5 Ohio Admin. Code 3301-92-05(F); *see also* R.C. 5705.391; 5 Ohio Admin. Code 3301-92-04. They also provide that the events for which a school district must certify the availability of revenue under R.C. 5705.412 include, but are not limited to, negotiated agreements, appropriation measures, contracts for benefits, increased salary or wage schedules, and construction contracts. 5 Ohio Admin. Code 3301-92-05(A).

The Auditor of State is responsible for determining whether school districts are in compliance with R.C. 5705.412. R.C. 5705.412. If noncompliance is determined, action may be taken to recover public money as provided by law. *Id.*; *see* R.C. 117.28. Individuals who knowingly violate the certification requirements are liable for amounts paid from the school district’s funds, but there is no liability for mistaken estimates of available resources made in good faith and based upon reasonable grounds or for estimates and determinations made as provided by rule. R.C. 5705.412; *see also* 1998 Op. Att’y Gen. No. 98-002.

Exceptions to the certification requirements of R.C. 5705.412 are provided for contracts, orders, or increases in wage or salary schedules necessary to meet the minimum salary schedule for teachers set forth in R.C. 3317.13 and for certain temporary appropriation measures. *Id.* Exceptions are also provided for purchase orders and current payrolls of, or contracts of employment with, regular employees or officers, which are subject to the certification requirements of R.C. 5705.41. *Id.*; *see also* 1987 Op. Att’y Gen. No. 87-069; 1980 Op. Att’y Gen. No. 80-060.

R.C. 5705.412 states plainly that a contract, order, or schedule that does not have the required certificate “shall be void.” R.C. 5705.412. That language has been construed strictly to provide that a contract is void if it does not have a certificate bearing the three signatures required by statute, even when the result is harsh. *See Empire Gas Corp. v. Westerville Bd. of Educ.*, 102 Ohio App. 3d 613, 617, 657 N.E.2d 790, 793 (Franklin County 1995) (“Ohio courts

have consistently enforced the requirements of R.C. 5705.412, despite hardships the requirements may impose on one of the parties”), *discretionary appeal not allowed*, 73 Ohio St. 3d 1453, 654 N.E.2d 988 (1995); *CADO Bus. Sys. v. Board of Educ.*, 8 Ohio App. 3d 385, 389, 457 N.E.2d 939, 944 (Ct. App. Cuyahoga County 1983) (“[i]t is the responsibility of the judiciary to place a strict construction on specific statutory provisions designed by the legislature to safeguard public funds”). R.C. 5705.412 is a form of the Burns Law, which was enacted in Ohio to ensure that governmental entities did not expend money unless they could certify that it was available. Such laws historically “have served a useful and salutary purpose in curtailing the unwise and reckless expenditure of public funds when such funds were not on hand or in sight.” *Village of Mayfield Heights v. Irish*, 128 Ohio St. 329, 332, 191 N.E. 129, 130 (1934); *see also Tri-County N. Local Sch. Bd. of Educ. v. McGuire & Shook Corp.*, 748 F. Supp. 541, 546 (S.D. Ohio 1989).

Let us now review the provisions governing the fiscal emergency of a school district. Those provisions appear in R.C. Chapter 3316, and the General Assembly has declared that they were enacted to serve the public purpose of requiring fiscal integrity of school districts “so that they can educate children, pay when due principal and interest on their debt obligations, meet financial obligations to their employees, vendors, and suppliers, and provide for proper financial accounting procedures, budgeting, and taxing practices.” R.C. 3316.02(A). The intent behind R.C. Chapter 3316 “is to enact procedures, provide powers, and impose restrictions to assure fiscal integrity of school districts” to enable them to carry out their statutory functions. R.C. 3316.02(B).

Pursuant to statute, the provisions of R.C. Chapter 3316 are supplemental to other provisions of law, including public securities law (R.C. Chapter 133) and tax levy law (R.C. Chapter 5705), and to resolutions of the school district board of education. R.C. 3316.02(C). However, provisions of R.C. Chapter 3316 prevail over provisions of R.C. Chapters 133 and 5705 and resolutions of the school district “to the extent of any conflict or inconsistency” between R.C. Chapter 3316 and the other chapters or resolutions. *Id.*

Under R.C. Chapter 3316, the Auditor of State, after consulting with the Superintendent of Public Instruction, declares a school district to be in a state of fiscal emergency if the district meets specified criteria. R.C. 3316.03(B). In general, a declaration of fiscal emergency indicates that the school district is suffering a financial deficit. We are informed that it is very common for a school district in a state of fiscal emergency to have an operating deficit that exceeds fifteen percent of the school district’s general fund revenue for the preceding fiscal year. *See R.C. 3316.03(B)(1)(b).*

When a school district is declared to be in fiscal emergency, the law provides for the creation of a financial planning and supervision commission for the school district. The financial

planning and supervision commission is an agency of the state and its functions are essential governmental functions of the state. R.C. 3316.05.¹

A basic responsibility of a school district financial planning and supervision commission is to adopt a financial recovery plan for the school district. R.C. 3316.06. The plan must provide for the elimination of fiscal emergency conditions, the satisfaction of judgments and past-due accounts, the elimination of deficits, and the balancing of the budget. R.C. 3316.06(A). The plan specifies the level of fiscal and management control that the commission exercises within the school district and enumerates the respective powers and duties of the commission and the school board. The commission is empowered “to assume any of the powers and duties of the school board it considers necessary, including all powers related to personnel, curriculum, and legal issues.” R.C. 3316.06(A)(2). The commission is authorized to remove the superintendent or treasurer of a school district “for failing to comply with the commission’s orders concerning the preparation or implementation of the financial recovery plan.” R.C. 3316.17.

The school district financial planning and supervision commission is empowered to review or assume responsibility for the development of all tax budgets, tax levy and bond resolutions, appropriation measures, and certificates of estimated resources to ensure that they are consistent with the financial recovery plan and a balanced appropriation budget. R.C. 3316.07(A)(1). Among the commission’s powers is the authority to make reductions in force to bring the budget into balance, notwithstanding any provision of a collective bargaining agreement. R.C. 3316.07(A)(11).

During a period of fiscal emergency, the school district financial planning and supervision commission is required to review the appropriation measure for the current fiscal year or the next fiscal year and determine the adequacy of revenues to meet expenditures. R.C. 3316.07(B)(1). The commission also must either require the school district board to establish

¹ A financial planning and supervision commission appointed after July 1, 1999, consists of five voting members: (1) the Director of Budget and Management or a designee; (2) the Superintendent of Public Instruction or a designee; (3) a member with knowledge and experience in financial matters or business appointed by the Governor; (4) a parent appointed by the Superintendent of Public Instruction; and (5) a member with knowledge and experience in financial matters or business appointed by the mayor of the municipal corporation with the most residents in the school district or by the county auditor. R.C. 3316.05(B). Commissions appointed prior to that date also include the superintendent of the school district and the mayor or county auditor. *See* Am. Sub. H.B. 282, 123rd Gen. A. (1999) (eff. June 29, 1999) (amending, *inter alia*, R.C. 3316.05). The Superintendent of Public Instruction serves as chairperson of the financial planning and supervision commission. R.C. 3316.05(D). The Auditor of State acts as financial supervisor for the school district or contracts for that service. R.C. 3316.05(G). At the request of the commission, the Auditor of State provides employees to assist the commission and coordinate the work of the Auditor of State. *Id.* The affirmative vote of three members of the commission is necessary for the commission to act. R.C. 3316.05(F).

monthly levels of expenditures and encumbrances consistent with the financial recovery plan or establish such levels itself. “If the commission permits the district board to make expenditures,” the commission must monitor the monthly levels of those expenditures. R.C. 3316.07(B)(2). A district board must obtain the written approval of the commission in order to make any expenditure apart from the approved level. *Id.*

Certifications, notifications, orders, and requests of the commission are binding upon school districts and their officials and employees. R.C. 3316.13. It is provided generally that “[n]o appropriation measure may be adopted nor any expenditure made contrary to the financial recovery plan adopted by a school district financial planning and supervision commission.” R.C. 3316.12(A). Certificates of estimated resources and tax budgets must be consistent with the financial recovery plan, and revenue estimates may not include revenues conditioned upon action by the electorate, the General Assembly, or the Congress, except appropriations at current levels. R.C. 3316.12. Various prohibitions are imposed upon school districts and their board members, officers, and employees, including a prohibition against making contracts or expenditures in excess of the amount permitted by the school district financial planning and supervision commission. R.C. 3316.19(A)(1).

During the period of a fiscal emergency, the Auditor of State determines whether the school district will incur an operating deficit, and if it will, a tax levy issue must be put on the ballot. R.C. 3316.08. Advancements of funds may be secured from the school district solvency assistance fund, as provided by law. The statute states that they must be repaid within the following two years. R.C. 3316.20.

Let us now consider the interaction between the certification requirements of R.C. 5705.412 and the fiscal emergency provisions. As discussed above, certification under R.C. 5705.412 requires a finding of sufficient revenues for an adequate educational program for a period of years. The financial recovery plan establishes limits on expenditures and provides a program that leads to fiscal stability, but it does not provide an immediate guarantee that sufficient revenues will be available to provide an adequate educational program during the period covered by R.C. 5705.412.

By law, the Auditor of State is responsible for determining whether school districts are in compliance with the certification requirements of R.C. 5705.412. R.C. 5705.412. A rule enacted pursuant to that provision states that certification under R.C. 5705.412 “shall be based on the current five-year projection.” 5 Ohio Admin. Code 3301-92-05(F); *see* R.C. 5705.391. Under this rule, if the five-year projection for a particular school district shows a deficit for a given year, it is impossible for that district to obtain certification under R.C. 5705.412 that it has adequate resources available for that year. The result is that the district is restricted from certifying adequate revenues for any actions that come under R.C. 5705.412.

During a period of fiscal emergency, the school district does not have authority to increase its expenditures beyond those permitted by the financial planning and supervision commission, even if additional expenditures are desired for the sake of providing an adequate

educational program. *See, e.g.*, R.C. 3316.07(B)(2). Thus, apart from the standards of R.C. 5705.412, the standards established by the commission control the contracting and spending authority of the school district.

It is clear that, even when a school district is in fiscal emergency, that district has a duty to continue to function, to operate schools, and to provide students with educational programs. *See* R.C. 3313.483(C) (“[n]o board of education may delay the opening of its schools or close its schools for financial reasons”);² R.C. 3316.02 (declaring it to be the public policy and a public purpose of the state “to require fiscal integrity of school districts so that they can educate children”); R.C. 3316.06-.07; R.C. 3316.12-.13. To carry out those functions, the district may find it necessary to take actions that come within R.C. 5705.412—that is, for example, to adopt appropriation measures, make contracts, or give orders involving the expenditure of money. As discussed above, however, the inability to obtain certification of adequate revenues may prevent the district from taking such actions.

R.C. 3316.02 states that the fiscal emergency provisions are supplemental to R.C. Chapter 5705. Hence, provisions of the two chapters should be read together and harmonized when possible. *See also* R.C. 1.51; *Empire Gas Corp. v. Westerville Bd. of Educ.* Only if a conflict or inconsistency exists are the provisions of R.C. Chapter 3316 to prevail over the provisions of R.C. Chapter 5705. R.C. 3316.02(C).

In considering your questions, we have endeavored to interpret the provisions of R.C. Chapter 3316 in a manner that supplements R.C. 5705.412, but we have been unable to do so. For R.C. 5705.412 to have meaning, the treasurer and president of the board of education and the superintendent of the school district must have authority to determine whether the district has sufficient revenue to maintain all personnel, programs, and services essential to the provision of an adequate educational program and to decline to provide certificates for appropriation

² In litigation involving the constitutionality of school funding, the Ohio Supreme Court found the emergency school assistance loan provisions of R.C. 3313.483 unconstitutional. *DeRolph v. State*, 78 Ohio St. 3d 193, 677 N.E.2d 733 (1997) (syllabus, division (b)), *clarified by* 78 Ohio St. 3d 419, 678 N.E.2d 886 (1997), *clarified by* 83 Ohio St. 3d 1212, 699 N.E.2d 518 (1998), *on remand*, 98 Ohio Misc. 2d 1, 712 N.E.2d 125 (C.P. Perry County 1999). However, the court did not declare R.C. 3313.483 unconstitutional in other applications. In particular, the finding of unconstitutionality was not addressed to the provision of the statute that prohibits the closing of schools for financial reasons, and that provision remains valid. *See* R.C. 1.50 (“[i]f any provisions of a section of the Revised Code or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the section or related sections which can be given effect without the invalid provision or application, and to this end the provisions are severable”); *see also* Ohio Const. art. VI, § 2 (“[t]he general assembly shall make such provisions ... as ... will secure a thorough and efficient system of common schools throughout the state”); R.C. 3316.18.

measures, contracts, orders, or salary schedules when there is not sufficient revenue. However, if those officials determine that there is not sufficient revenue and decline to provide certificates under R.C. 5705.412 when the district is in fiscal emergency, then their compliance with R.C. 5705.412 prevents the school district from entering into such appropriation measures, contracts, orders, or salary schedules and may thereby interfere with the functions of the financial planning and supervision commission, thwart the implementation of the financial recovery plan, and prevent the district from continuing its operation as required by law.³

It is clear that the General Assembly has given the financial planning and supervision commission supervisory power over a school district that is in fiscal emergency and that the General Assembly intends that the financial recovery plan be implemented. It is clear also that the provisions of R.C. 5705.412 place restrictions on the ability of the school district to comply with the orders of the commission and the provisions of the plan. Hence, there is a conflict or inconsistency between the provisions of R.C. Chapter 3316 governing school districts in fiscal emergency and the provisions of R.C. 5705.412 governing certification of adequate revenues. The General Assembly has decreed that, in the event of such conflict or inconsistency, the provisions of R.C. Chapter 3316 prevail. R.C. 3316.02(C). Therefore, a school district must be permitted to follow the instructions of the commission and carry out the plan prepared pursuant to R.C. Chapter 3316, even if it cannot comply with the certification requirements of R.C. 5705.412.

The fact that a school district in fiscal emergency is supervised by the financial planning and supervision commission assures that the state's interest in fiscal responsibility is protected. In situations of fiscal emergency, the provisions of R.C. Chapter 3316 allow the determinations of the commission and the provisions of the financial recovery plan to supersede the provisions of R.C. 5705.412. Hence, periods in which the requirements of R.C. 5705.412 are not met may be permitted during a fiscal emergency in order to provide for the long-term fiscal integrity of the school district. *See City of Youngstown v. First Nat'l Bank*, 106 Ohio St. 563, 571-72, 140 N.E. 176, 179 (1922) (Burns Law, distant predecessor to R.C. 5705.421, was designed to require certification of available funds for usual, ordinary, and everyday transactions, but did not apply to emergency situation); *see also Tri-County N. Local Sch. Bd. of Educ. v. McGuire & Shook Corp.* (certification under R.C. 5705.412 is not required when construction project is to be funded through proceeds from a bond issue combined with state building assistance funds and contract will not affect general source of funds that is available to operate the ordinary services of government); *Village of Mayfield Heights v. Irish* (applying rule of reason to exclude from

³ As mentioned above, the school district financial planning and supervision commission has authority to remove the superintendent or treasurer of a school district for failing to comply with the commission's orders concerning preparation or implementation of the financial recovery plan. R.C. 3316.17. However, if such removal occurred, any persons serving in place of the removed officials would be restricted by the same provisions governing the certification of adequate revenues and would be unable to issue certificates pursuant to R.C. 5705.412 absent compliance with the standards established by law.

Burns Law compensation paid to engineer under contract fixing compensation at a percentage of the estimated cost of improvements when it was impossible to gauge compensation with certainty at time of employment in order to provide certificate of available funds); *City of Cincinnati v. Holmes*, 56 Ohio St. 104, 113, 46 N.E. 514, 516 (1897) (“the Burns law cannot apply to this statute as it would render the statute nugatory”).

The evil that R.C. 5705.412 seeks to prevent—that school districts may expend or commit themselves to expend amounts in excess of available revenues—is not at risk when a school district operates under the supervision of a financial planning and supervision commission and the terms of a financial recovery plan. Although there may be some instances in which certification under R.C. 5705.412 cannot be provided, there is a long-term program for securing the solvency and fiscal integrity of the school district. Relieving a school district that is in fiscal emergency from compliance with R.C. 5705.412 does not compromise the fiscal integrity of the district, for the provisions of R.C. Chapter 3316 operate to ensure that integrity. *See, e.g.*, R.C. 3316.07(B); R.C. 3316.12(A); R.C. 3316.19.

We conclude, therefore, that pursuant to R.C. 3316.02(C), which states that provisions of R.C. Chapter 3316 prevail over provisions of R.C. Chapter 5705 to the extent of any conflict or inconsistency, a school district that is in fiscal emergency pursuant to R.C. Chapter 3316 is not required to obtain a certificate of adequate revenues pursuant to R.C. 5705.412 when taking action that otherwise would be subject to that certification requirement. Accordingly, it is not necessary to consider which officials have authority to provide a certificate of adequate revenues for a school district that is in fiscal emergency.

For the reasons discussed above, it is my opinion, and you are advised, that pursuant to R.C. 3316.02(C), which states that provisions of R.C. Chapter 3316 prevail over provisions of

The Honorable Jim Petro

-9-

R.C. Chapter 5705 to the extent of any conflict or inconsistency, a school district that is in fiscal emergency pursuant to R.C. Chapter 3316 is not required to obtain a certificate of adequate revenues pursuant to R.C. 5705.412 when taking action that otherwise would be subject to that certification requirement.

Sincerely,

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May 3, 2000

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SYLLABUS:

2000-028

Pursuant to R.C. 3316.02(C), which states that provisions of R.C. Chapter 3316 prevail over provisions of R.C. Chapter 5705 to the extent of any conflict or inconsistency, a school district that is in fiscal emergency pursuant to R.C. Chapter 3316 is not required to obtain a certificate of adequate revenues pursuant to R.C. 5705.412 when taking action that otherwise would be subject to that certification requirement.