



**Office of the Attorney General
State of Texas**

DAN MORALES
ATTORNEY GENERAL

September 14, 1993

Honorable Mike Driscoll
Harris County Attorney
1001 Preston, Suite 634
Houston, Texas 77002-1891

Letter Opinion No. 93-83

Re: Whether a county must be reimbursed for the cost of audit services performed for a county department of education under V.T.C.S. article 2929g-1 (ID# 20116)

Dear Mr. Driscoll:

You ask whether Harris County should be reimbursed for the audit services performed by the Harris County Auditor for the Harris County Department of Education pursuant to V.T.C.S. article 2919g-1.¹ You say, and we assume for purposes of this opinion, that the Harris County Department of Education (hereinafter "the department") is a "board of county school trustees" or "county board of education" within the provisions of chapter 17 of the Education Code. Section 17.21 of that code provides that county school trustees or a county board of education constitutes "a body corporate," which may acquire and hold property, sue and be sued, accept donations, etc. Thus, although geographically coextensive, the department is a political entity distinct from Harris County.

Article 2919g-1, the subject of your request, provides for the rendition of audit services by a county auditor to a county department of education as follows:

Section 1. In any counties having a population of two million (2,000,000) or more according to the last preceding Federal Census, the county auditor is hereby authorized and required to audit all books, accounts, reports, vouchers, and other records relating to all funds handled by the county department of education. The results of such audit shall be made public by the county auditor.

Sec. 2. The county auditor of any county to which this Act applies shall, as soon as practicable, audit all such books, accounts, reports, vouchers and other records of the county department of

¹See Tex. Educ. Code Aux. Laws entry for article 2919g-1. These provisions were adopted in 1963 to apply to counties of 1,200,000 population or more, and amended in 1971 and 1981 so as to apply to counties of 1,500,000 or more and 2,000,000 or more, respectively. Acts 1963, 58th Leg., ch. 87; Acts 1971, 62d Leg., ch. 542, § 113; Acts 1981, 67th Leg., ch. 237, § 82.

preceding audit made of such books, accounts, reports, vouchers, and other records by a county auditor of said county. *The county auditor shall be reimbursed from the funds of the county department of education for all expenses incurred in performing the first audit.* Thereafter, the county auditor shall audit such books, accounts, reports, vouchers and other records of the county department of education as often as is necessary to keep himself informed of the condition thereof, but in no case shall the interval between such audits exceed one (1) year.

Sec. 3. The county auditor of any county to which this Act applies shall set up such methods and procedures as are necessary to conduct audits effectively. The county department of education shall comply with such methods and procedures for facilitating audits as determined by the county auditor.

Sec. 4. This Act shall not be construed as precluding other government agencies or independent auditors from auditing certain funds handled by county departments of education, in counties to which this Act applies, in addition to the audit by county auditors as provided for herein.

Sec. 5. [Severability]

Sec. 6. All laws and parts of laws in conflict with the provisions of this Act are repealed to the extent of such conflict only.

Sec. 7. [Emergency clause]

Acts 1981, 67th Leg., ch. 237, § 82 at 580-81 (emphasis added).

That article 2919g-1 expressly provides that the expenses of the first audit of the education department, which the county auditor is directed thereunder to make, are to be reimbursed by the department, suggests that subsequent audits thereunder, for which no provision for reimbursement is made, require no such reimbursement. You argue however that the provision in article III, section 52 of the state constitution, that "the Legislature shall have no power to authorize any county, city, town or other political corporation or subdivision of the State to . . . grant public money or thing of value in aid of, or to any . . . corporation,"² would preclude the services of the county auditor under article 2919g-1 from being rendered without adequate compensation. You note that the term "corporation" in article 3, section 52, has consistently been held to include public

²Article III, section 52 provides for various exceptions to the quoted prohibition, none of which, however, are applicable here.

corporations. *See, e.g., Harris County Flood Control Dist. v. Mann*, 140 S.W.2d 1098 (Tex. 1940).

A brief submitted on behalf of the department here focuses as well on the article III, section 52 issue, pointing out that its prohibition on gratuitous transfers does not apply where the transfer serves a legitimate public purpose of the transferring entity. *See* Attorney General Opinion JM-1229 (1990) (and authorities cited there). It acknowledges that, with regard to the provision of audit services at issue here, "there is no definitive articulation of the public purpose that is sought to be achieved." The brief suggests, however, that the county purpose accomplished is the "independent oversight of the fiscal integrity of the county department of education" by the county "as representative of the local taxpayers." We are not persuaded that such oversight on behalf of local taxpayers constitutes a legitimate county purpose such as to overcome the article III, section 52 prohibition on gratuitous transfers.

Except to the extent it might be inferred from article 2919g-1 itself, we find no indication in the constitutional or statutory provisions governing counties that the fact that the territory of a distinct taxing unit falls within county territory makes the affairs of the former the business of the latter. Although various statutes provide for the county auditor's performing services for special districts with territory overlapping the county's, those provisions generally call for such districts' compensating the auditor for the services rendered. *See, e.g.,* Water Code § 61.174 (accounting services for certain navigation districts) and other provisions cited in 35 D. BROOKS, COUNTY AND SPECIAL DISTRICT LAW § 19.16 (Texas Practice 1989).

It might be argued that article 2919g-1, in directing the county auditor to perform the services in question without providing for compensation, itself extends the scope of county purposes to include the provision of such services, thereby avoiding the article III, section 52 problem. Indeed, counties have been described as "agents of the state" and "creatures of the legislature" to which, subject to constitutional limitation, the legislature may assign authority and duties as it sees fit. *See City of Galveston v. Posnainsky*, 62 Tex. 118 (1884); *Reeves v. Pecos County*, 7 S.W. 54 (Tex. 1887). However, if the legislature simply by providing in a legislative act for a donation by a county, could thereby bring such a donation within the county purpose exception to the article III, section 52 prohibition on donations, section 52 would be a nullity, with respect to counties at least, and despite its language that "the legislature shall have no power" In *Mann*, 140 S.W.2d 1098, the supreme court ruled invalid under article III, section 52, acts of the legislature which authorized Harris County to "supplement from its general fund" funds of a distinct entity, the Harris County Flood Control District. We think that article 2929g-1, if construed to require the county auditor to donate services to the department here, would operate in a manner indistinguishable for purposes of article III, section 52 from the legislation *Mann* held invalid. Accordingly we conclude that in order to pass muster under

article III, section 52, a requirement of reasonable reimbursement by the department for the county auditor's services must be read into article 2929g-1.

We caution that we limit our response here to whether the expenses of the county auditor's services required under article 2929g-1 must be reimbursed by the department in order to be constitutional, and do not address any other aspects of article 2929g-1 or the department's operations. Also, as you do not ask about it, we do not here attempt to advise whether the county should in the future continue to provide audit services, with reimbursement, or simply stop providing the services. We think that, in any case, the county is entitled to reasonable reimbursement for the expenses of audits already performed.

S U M M A R Y

The provisions of V.T.C.S. article 2929g-1 [Texas Education Code. Auxiliary Laws] that certain county auditors render auditing services to certain county departments of education would be unconstitutional if the expenses of the auditor's services were not reimbursed by the county department of education receiving the services.

Yours very truly,



William Walker
Assistant Attorney General
Opinion Committee