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18-007

STATE OF NEBRASKA
OFFICIAL

OCT 11 2018

DEPT. OF JUSTICE

SUBJECT: Whether the fees charged to participants in the Nebraska Educational Savings Plan Trust are public funds and whether the Legislature may transfer an excess of those fees into the General Fund.

REQUESTED BY: Senator John P. Stinner, Nebraska State Legislature
Don Stenberg, Nebraska State Treasurer

WRITTEN BY: Douglas J. Peterson, Attorney General
Natalee J. Hart, Assistant Attorney General

INTRODUCTION

You have each requested our opinion on questions which have followed the issuance of Op. Att'y Gen. 18-003 (July 18, 2018) relating to an account which was maintained by the State Treasurer for the purpose of paying administrative costs associated with the Nebraska Educational Savings Plan Trust. In our prior opinion, we determined that the monies held in that account by the State Treasurer (designated the "Fee Account" therein) must be deposited in an account set up for that purpose by the Legislature, the "Expense Fund." However, we declined to opine on the question of whether the funds in that account were "public funds," as such a determination was unnecessary at that time. You have both now asked us to issue an opinion on this issue. Senator Stinner has posed the following question:

- (1) Were the "Fee Account" funds, as reported under the Auditor's August 14, 2018, attestation report, "money of the state" (or "public money" or "public funds") for purposes of Neb. Rev. Stat. § 84-602 (Cum. Supp. 2016)?

Senator Stinner has indicated that he intends to bring legislation concerning this issue; accordingly, it is now appropriate for us to opine on the nature of the funds in the Expense Fund.¹ Treasurer Stenberg has also asked us to opine on this same question. Additionally, Treasurer Stenberg has posed two other questions to this office:

- (2) Whether the portion of Neb. Rev. Stat. § 85-1807(4), which authorizes the Legislature to transfer funds from the Expense Fund of the Nebraska Educational Savings Trust to the General Fund, is constitutional?
- (3) If the Legislature were to transfer funds from the College Savings Plan Expense Fund to the General Fund, would that be a violation of federal securities law?

BACKGROUND

In Op. Att'y Gen. No. 18-003 we were asked by the State Treasurer and the State Auditor to opine as to whether the Treasurer was permitted to maintain a bank account outside of the state accounting system, which served to pay expenses related to the Nebraska Educational Savings Plan Trust ("NESPT") fund. The funds in that outside account originated with fees charged to investors. We determined that because Neb. Rev. Stat. § 85-1807 specifically provided for the deposit of such fees in the "Expense Fund," the Treasurer was required to utilize that fund and not an outside account. In Op. Att'y Gen. No. 18-003 we were concerned primarily with whether the Treasurer could maintain a bank account outside of the state accounting system in which to deposit and store these fees; we were not concerned with the nature of the funds, as the character of the funds was inapplicable to the question of where the funds were statutorily required to be deposited. Consequently, we declined to opine as to whether the funds in the Expense Fund were public funds. This opinion will now examine that question and related questions posed by the Treasurer.

The State Treasurer has been granted duties and responsibilities to implement and administer NESPT, a public trust established for investment by individuals for future educational use. Neb. Rev. Stat. §§ 85-1801 through 85-1814 (2014). The Legislature has established three separate funds for the State Treasurer to administer in relation to NESPT: (1) The College Savings Plan Program Fund ("Program Fund"), (2) the College Savings Plan Expense Fund ("Expense Fund"), and (3) the College Savings Plan Administrative Fund ("Administrative Fund"). Neb. Rev. Stat. § 85-1807(1). The State Treasurer is required to deposit money received by the trust into the appropriate fund

¹ In Op. Att'y Gen. No. 18-003, that account was referred to as the "Fee Account." As that account has now been closed and the funds moved to the Expense Fund, we will only refer to the Expense Fund in this opinion. See Nebraska State Auditor of Public Accounts, Attestation Report of the Nebraska State Treasurer, p. 5 (August 14, 2018), found at http://www.auditors.nebraska.gov/APA_Reports/2018/SA12-08142018-July_1_2016_through_December_31_2017_Attestation_Report.pdf.

and the funds "shall be separately administered." *Id.* Money in each of the funds is to be invested by the State Investment Officer when such funds are available. Neb. Rev. Stat. § 85-1807(2)-(4). The Program Fund consists of all deposits and investment income from investors in NESPT. Neb. Rev. Stat. § 85-1807(2).

In implementing NESPT, the Treasurer is permitted to "establish, impose, and collect administrative fees and charges in connection with transactions of the trust, and provide for reasonable service charges, including penalties for cancellations and late payments with respect to participation agreements." Neb. Rev. Stat. § 85-1804(10) (2014). The administrative fees authorized by this statute are to be deposited into the Expense Fund.

The expense fund shall be used to pay costs associated with the Nebraska educational savings plan trust and shall be funded with fees assessed to the program fund. . . . Transfers may be made from the expense fund to the General Fund at the direction of the Legislature. Any money in the expense fund available for investment shall be invested by the state investment officer pursuant to the Nebraska Capital Expansion Act and the Nebraska State Funds Investment Act.

Neb. Rev. Stat. § 85-1807(4).

The Legislature appropriates funds from the Expense Fund into the Administrative Fund in order to pay the costs of "administering, operating, and maintaining" the NESPT trust. Neb. Rev. Stat. § 85-1807(3). No General Fund appropriations are to be used to operate NESPT. Neb. Rev. Stat. § 85-1807(1). Neb. Rev. Stat. § 85-1813 provides that the assets of the Program Fund are to be held in trust for the participants and beneficiaries and no property rights exist in the State to this fund, but expressly excludes the Administrative Fund and the Expense Fund from these stipulations:

The assets of the Nebraska educational savings plan trust, including the program fund and excluding the administrative fund and the expense fund, shall at all times be preserved, invested, and expended solely and only for the purposes of the trust and shall be held in trust for the participants and beneficiaries. No property rights in the trust shall exist in favor of the state. Such assets of the trust shall not be transferred or used by the state for any purposes other than the purposes of the trust.

Your questions concern whether the monies found in the Expense Fund are "public funds" and whether those funds may be lawfully transferred from the Expense Fund to the General Fund as authorized by Neb. Rev. Stat. § 85-1807(4). Our responses to your questions are set out below.

ANALYSIS

Whether the funds in the Expense Fund are “public funds.”

Your first question as posed to us is whether the “Fee Account” funds, as reported under the Auditor’s August 14, 2018, attestation report, are “money of the state” (or “public money” or “public funds”) for purposes of Neb. Rev. Stat. § 84-602 (Cum. Supp. 2016). As the funds which were maintained in the “Fee Account” as referenced in Op. Att’y Gen. No. 18-003 were transferred to the Expense Fund in August 2018, we will rephrase your question to be whether the funds in the Expense Fund, derived directly from fees charged of NESPT participants, are public funds or monies of the state.

Neb. Rev. Stat. § 84-602 provides, in pertinent part, that “[i]t shall be the duty of the State Treasurer: (1) [t]o receive and keep all money of the state not expressly required to be received and kept by some other person” The phrase “money of the state” is not defined for purposes of § 84-602(1). “Money of the state” is also often referred to as “public funds.” “Public funds” is defined only once in Nebraska statute, in relation to the budgets of cities, counties, and other political subdivisions. While not directly germane to the question before us, Neb. Rev. Stat. § 13-503(7) (Cum. Supp. 2016) may provide some insight as to what “public funds” means in Nebraska: “[p]ublic funds means all money, including nontax money, used in the operation and functions of governing bodies.”

Absent a statutory definition, “money of the state” or “public funds” should be given its plain and ordinary meaning. See *In re Interest of Jeremy T.*, 257 Neb. 736, 600 N.W.2d 747 (1999). Where the words of a statute are plain, direct, and unambiguous, no interpretation is necessary to ascertain their meaning. *Governors of Knights of Ak-Sar-Ben v. Dep’t of Revenue*, 217 Neb. 518, 349 N.W.2d 385 (1984); *Garreans v. City of Omaha*, 216 Neb. 487, 345 N.W.2d 309 (1984). A court will not read meaning into a statute that is not warranted by the legislative language, and it will not read anything plain, direct, and unambiguous out of a statute. *State ex rel. Douglas v. Herrington*, 206 Neb. 516, 294 N.W.2d 330 (1980). “Public funds” are commonly defined as “[t]he revenue or money of a governmental body” while “general fund” is defined as “[a] government’s primary operating fund A general fund is distinguished from assets of a special character such as trust, escrow, and special purpose funds.” Black’s Law Dictionary 682 (7th ed. 1999).

We have indicated previously that “state funds” involve monies which are generated by the operation of general state law such as state fees and state taxes. “[T]he Nebraska Supreme Court and other authorities define public funds as those funds belonging to the state or a political subdivision that the state has collected in accordance with general law.” Op. Att’y Gen. No. 07016, p. 2 (September 24, 2007). Funds are not public funds when they have been segregated for a specific use and cannot lawfully be used for any other purpose. *Id.* “Special purpose funds in the

custody of the State that are earmarked for particular purposes are not public funds." *Id.* In distinguishing between state and nonstate funds, we have maintained that "[s]tate funds are those monies which are generated by state fees or state taxes. Nonstate funds are those which the state receives from outside sources." Op. Att'y Gen. No. 87114, p. 1 (December 9, 1987). "[N]onstate funds must be appropriated for purposes defined by the sources of the funds." *Id.* at 2. Custodial funds held for a specific purpose are not state monies. Merely depositing funds within a state treasury does not in itself make them state funds;² "only monies raised by operation of some general state law become state funds." Op. Att'y Gen. No. 87001, p. 1 (January 6, 1987).³

Neb. Rev. Stat. § 85-1807(4) provides that the Expense Fund "shall be used to pay costs associated with the [NESPT] trust." Neb. Rev. Stat. § 85-1807(3) provides that the Administrative Fund is to be funded by appropriation from the Expense Fund and "shall be utilized to pay for the costs of administering, operating, and maintaining the trust. . ." However, Neb. Rev. Stat. § 85-1807(4) further provides that "transfers may be made from the expense fund to the General Fund at the direction of the Legislature." We must also be cognizant of the express exclusion of the Expense Fund from the trust created from the Program Fund and the requirement that the funds invested by participants be "preserved, invested, and expended solely and only for the purposes of the trust and shall be held in trust for the participants and beneficiaries." Neb. Rev. Stat. § 85-1813. Further, while as to the Program Fund the state has no property rights and may not transfer or use those assets for any purpose other than the trust, the same prohibition is not made as to the Expense Fund or the Administrative Fund. *Id.*

² The State Treasurer asks, rhetorically, in his request letter, whether child support payments handled by that office become state funds merely by being deposited in a state bank account. We believe it is clear that these types of monies never become "state funds." See also, Op. Att'y Gen. No. 0002, p. 1 (January 4, 2000) ("[child support funds] represent child support payments due individual litigants rather than public funds.")

³ We have also looked for guidance in how other states' courts have defined "public funds" absent a statutory definition. In Virginia, "[p]ublic funds are those moneys belonging to the State or to any city, county or political subdivision of the State, — or more specifically, taxes, customs and moneys raised by the operation of law for the support of the government or for the discharge of its obligations. . . . The character of the money is determined by its ownership rather than by the manner and means of its collection." *Beckner v. Com.*, 174 Va. 454, 459, 5 S.E.2d 525, 527 (1939)(citations omitted). "Public funds are moneys belonging to the United States or a corporate agency of the Federal government, a state or subdivision thereof, or a municipal corporation. They represent moneys raised by the operation of law for the support of the government or for the discharge of its obligations. In other words, they constitute 'revenue', which, in turn, is defined as 'the income of the government arising from taxation, duties, and the like.'" *Wood Bros. Const. Co. v. Bagley*, 232 Iowa 902, 908-09, 6 N.W.2d 397, 400 (1942)(internal quotations omitted)(citations omitted). These cases are consistent with the prior opinions of this office.

These statutes provide conflicting indications of the nature of the Expense Fund as public or nonpublic and we must attempt to reconcile their meaning. We are guided by the following principles in that undertaking. Effect must be given to every word of a statute, since the Legislature is presumed to have intended every provision of a statute to have a meaning. *Iske v. Papio Nat. Resources Dist.*, 218 Neb. 39, 352 N.W.2d 172 (1984). Different provisions of a statute must be reconciled to make them logical, harmonious, and sensible. *Ledwith v. Bankers Life Ins. Co.*, 156 Neb. 107, 54 N.W.2d 409 (1952). In determining legislative intent, it is necessary to examine the statute as a whole, in light of its objects and purposes. See *Sorensen v. Meyer*, 220 Neb. 457, 370 N.W.2d 173 (1985); *Adkisson v. City of Columbus*, 214 Neb. 129, 333 N.W.2d 661 (1983).

The State Treasurer's position is that the funds in the Expense Fund are not public funds. In support of this, the Treasurer points us to *Allen v. City of Omaha*, 136 Neb. 620, 286 N.W. 916 (1939) and *Sherard v. State of Nebraska*, 244 Neb. 743, 509 N.W.2d 194 (1993).⁴ In *Allen*, the court considered whether a city pension fund for police officers was a "public fund" for purposes of awarding attorney's fees to the prevailing party. The court discussed only the fund which contained participant contributions and investment income, and discussed other similar trust funds, each of which are akin to the Program Fund of NESPT, in holding that the pension fund was not a public fund. The court stated:

"The term 'public funds' means funds belonging to the state or to any county or political subdivision of the state; more specifically taxes, customs, moneys, etc., raised by the operation of some general law, and appropriated by the government to the discharge of its obligations, or for some public or governmental purpose; and in this sense it applies to the funds of every political division of the state wherein taxes are levied for public purposes. The term does not apply to special funds, which are collected or voluntarily contributed, for the sole benefit of the contributors, and of which the state is merely the custodian." In conformity therewith it has been held that a state hail insurance fund raised from hail insurance premiums was not a public fund. A state bonding fund raised from the

⁴ The State Treasurer also cites to an informal opinion of this office issued in 2013 concerning the University of Nebraska Group Health Trust Fund. The question raised in that opinion was whether those funds, which were to be used to pay University employee health care obligations, funded by employee and employer health plan contributions, must be deposited with the State Treasurer. We determined that the University Trust Fund did not contain money of the state once that money was paid into the trust; the money belonged to the health plan for the sole purpose of paying employee health claims. However, that opinion is inapplicable to the questions at issue. First, there was no express statutory provision requiring the University to deposit the funds with the State Treasurer. In the present instance, the Nebraska Legislature has chosen a specific statutory scheme that requires the fees paid by NESPT participants to be deposited in the Expense Fund. Second, the primary analysis related to whether the University had a legal obligation to make the health plan payments and whether the employees who participated in the plan had a legal right to the payments. Our analysis depended on the Nebraska Wage Payment and Collection Act, which has no application to the questions herein.

collection of bond premiums was not a public fund. A state compensation fund maintained by contributions of employers is a special and not a public fund. Funds paid to the state forester for fire protection by those whose property was benefited are not state funds.

Allen, 136 Neb. at 625, 286 N.W. at 919 (internal citations omitted). The characteristics of the pension fund contributed to this holding: the pension fund was not raised by taxation but by employee and employer contributions, the pension fund was statutorily segregated for a specific use and could not be used for any other purpose, and the money in the pension fund was held in trust by the city treasurer for the benefit of claimants. *Id.* "In no event do such moneys become the funds of the city. They can be paid out only as provided in the statute creating the fund." *Id.*

In *Sherard*, the court dealt with the Second Injury Fund, which provided compensation in certain workers' compensation cases, and whether a writ of execution could issue against the fund. Because state property is not subject to execution, the issue was whether the money held in the fund was state money. The statutes which established the fund made the State Treasurer the custodian of the fund and specifically provided that the funds were to be held in trust and were not "money or property of the state." *Sherard*, 244 Neb. at 749, 509 N.W. 2d 194, 199.

As we indicated in Op. Att'y Gen. No. 18-003, neither *Allen* nor *Sherard* is directly applicable to the Expense Fund. The funds at issue in each of these opinions are similar to those found in the Program Fund – the funds deposited by the investors, rather than the Expense Fund – the fees charged of the investors. These cases make no mention of fees or administrative charges to participants and whether those fees are public funds. Additionally, the statute establishing the fund in *Sherard* specifically provided that the Second Injury Fund was not money of the state, in contrast to Neb. Rev. Stat. § 85-1813 which excludes the Expense Fund from a similar provision related to NESPT. However, as in each of these cases, the funds in the Expense Fund have been set aside for a particular purpose.

Also relevant to our analysis are the program disclosure statements and participation agreements available to program participants and members of the public. These documents create an expectation on the part of the program participants who invest in one or more of the plans as to what fees will be charged of the fund(s) in which they invest and the intended expenditure of those fees. The plan disclosure documents inform plan participants of a "state Administration Fee to cover administrative costs of overseeing, distributing and marketing the Plan." NEST Direct College Savings Plan Program Disclosure Statement and Participation Agreement, p. 5 (July 23, 2018);⁵ TD Ameritrade 529 College Savings Plan Program Disclosure Statement and Participation Agreement, p. 5 (July 23, 2018).⁶

⁵ Found at <http://cdn.unite529.com/jcdn/files/NED/pdfs/programdescription.pdf>.

⁶ Found at <http://cdn.unite529.com/jcdn/files/PDF/pdfs/tdameritrade/programDescription.pdf>

Additionally, plan participants are also advised that their investment plan will be assessed various fees including:

An administration fee equal to 0.02% of the average daily net assets in each Investment Option will be allocated to the state's cost to administer, market, and distribute the Plan. This fee accrues daily as a percentage of average daily net assets and is deducted from each Investment Option. This fee will reduce the value of an account.

NEST Direct College Savings Plan Program Disclosure Statement and Participation Agreement, p. 43; NEST Advisor College Savings Plan Program Disclosure Statement and Participation Agreement, p. 48 (July 23, 2018);⁷ TD Ameritrade 529 College Savings Plan Program Disclosure Statement and Participation Agreement, p. 43; State Farm 529 Savings Plan Program Disclosure Statement and Participation Agreement, p. 41 (August 6, 2018).⁸ From the language in these plan documents, it seems to us that it would be the reasonable expectation of the plan participants that their fees are utilized only in relation to NESPT.

The Expense Fund is unlike any other fund. These funds originate with fees charged to investors, are collected by the Treasurer, and held in a state fund to be invested by the State Investment Council. In Op. Att'y Gen. No. 18-003 we stated that a court could well determine that these are public funds. However, it is also possible that a court could find these to be nonpublic funds. The unique nature of the fees paid into the Expense Fund leaves us with little precedent to guide our examination of this question. However, we believe that the more persuasive case controlling the nature of the fees to be *Allen v. City of Omaha*. In that case, the court provided direction for what are to be considered "public funds" in Nebraska: "taxes, customs, moneys, etc., raised by the operation of some general law, and appropriated by the government to the discharge of its obligations, or for some public or governmental purpose." *Allen* also provides us with a three-part test for establishing whether funds are public funds: (1) the funds are raised by taxation, (2) are statutorily segregated for a specific use, and (3) are held in trust by an official. *Allen v. City of Omaha*, 136 Neb. 620, 286 N.W.2d 916, 919; See also *Sherard v. State of Nebraska*, 244 Neb. at 750, 509 N.W. 2d 194, 199.

As in *Allen*, the funds in the Expense Fund were not raised by taxation or through a general law, and are segregated by § 85-1807(3)-(4) for a specific use. The Expense Fund is comprised of funds raised from private individuals for a specific purpose: to pay the costs associated with NESPT by program participants, in order that no general funds be used to support NESPT. The Expense Fund is not used for the general

⁷ Found at <https://cdn.unite529.com/jcdn/files/NEA/pdfs/programdescription.pdf>.

⁸ Found at <http://cdn.unite529.com/jcdn/files/PDF/pdfs/sfadvisor/programdescription.pdf>.

operation and function of the Treasurer's Office;⁹ it is utilized to pay NESPT expenses and is held by the State Treasurer for this sole purpose.

We recognize the dichotomy created by the language in Neb. Rev. Stat. § 85-1807(3)-(4) versus that in Neb. Rev. Stat. § 85-1813 which specifically excludes the Expense Fund from the prohibition against the assets of the NESPT trust fund being transferred or used by the state for any purposes other than the trust. We resolve that conflict by recognizing that the Expense Fund is intended to be spent by the State Treasurer, after proper appropriation by the Legislature into the Administrative Fund, in order to pay the costs associated with NESPT. Were the Expense Fund part of the assets of the NESPT Trust, and were there a prohibition against transferring the fees, the Legislature would be unable to properly appropriate the funds for expenditure by the Treasurer or examine the expenses related to the NESPT program for propriety. While the State has no custody or control over the assets of the NESPT Trust, which are those monies invested by plan participants, the State must have control over the fees deposited into the Expense Fund in order for the Treasurer to expend them. The State's interest in the Expense Fund is in its proper administration and the payment of appropriate expenses, not in the corpus of the fund. Mere custody of the fees in the Expense Fund and authority of the State Treasurer to spend them does not make monies in the Expense Fund public funds. In our reading of Neb. Rev. Stat. §§ 85-1801 through 85-1814, we believe that the most sensible construction of the act as a whole is that the fees paid by investors are not meant to be public funds made available for the general use of the State of Nebraska.

The funds at issue no longer belong to the individuals paying the fees once they are collected. But neither do we believe that these fees belong to the state. The court in *Allen* held that those funds "were not, strictly speaking, public funds" and did not belong to the City, but were held by the city treasurer for the benefit of claimants. Consequently, we believe the better answer here to be that the Expense Fund is not clearly a public fund and should not be treated as a public fund by the Legislature. We believe these funds, which are earmarked and held by the State Treasurer for the specific purpose of paying expenses of NESPT, must be utilized only for that purpose.

Whether the portion of Neb. Rev. Stat. § 85-1807(4), which authorizes the Legislature to transfer funds from the Expense Fund of the Nebraska Educational Savings Trust to the General Fund, is constitutional?

There is currently no imminent Legislative action calling for a transfer of funds from the Expense Fund to the General Fund. As a result, it is unnecessary to opine as

⁹ We understand the Expense Fund is utilized to pay for expenses of the Treasurer's Office related to the administration of NESPT. This is in keeping with the prohibition against using any General Fund monies to operate NESPT. See Neb. Rev. Stat. § 85-1807(1); See also Op. Att'y Gen. No. 93094 (November 10, 1993) ("It is a longstanding principle of constitutional law in Nebraska that public funds cannot be expended for private purposes." (citations omitted)). No Expense Fund monies are used for the general operation of the Treasurer's Office, or its other programs.

to whether this provision is unconstitutional.¹⁰ However, we believe your question can be posed another way: whether the Legislature has the authority to transfer funds from the Expense Fund to the General Fund, when those funds are earmarked for purposes related solely to NESPT and are not clearly public funds. We do not believe it has such authority.

We have previously opined that in order for any state agency to utilize funds, state or nonstate, the Legislature must first make an appropriation. Op. Att'y Gen. No. 87001. "The Legislature must appropriate all funds (both state and non-state) before actual payment can be disbursed from the state. . . . However, nonstate funds must be appropriated for purposes defined by the sources of the funds." Op. Att'y Gen. No. 87114, p. 1-2. Consequently, while the Legislature must appropriate the funds before the Treasurer may expend them, for the reasons already found herein, we do not believe the Legislature may appropriate funds in the Expense Fund to any fund other than the Administrative Fund or for any other purpose than to pay the costs of administering, operating, or maintaining the trust.

If the Legislature were to transfer funds from the College Savings Plan Expense Fund to the General Fund, would that be a violation of federal securities law?

We do not believe that the Legislature may transfer funds from the Expense Fund into the General Fund. However, the Treasurer and the legal counsel for the NESPT plans have raised concerns that any transfer of funds from the Expense Fund for purposes other than to pay expenses related to the NESPT funds would run afoul of federal securities law, specifically the anti-fraud provision of the federal Securities Act and the rules of the Securities Exchange Commission. See 17 C.F.R. § 240.10b-5; 15 U.S.C. § 77q. These rules prohibit fraud in the marketing and description of a federal security, such as an interest in the Nebraska college savings plan. 17 C.F.R. § 240.10b-5 provides:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

- (a) To employ any device, scheme, or artifice to defraud,
- (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

¹⁰ This office generally declines to opine as to whether a current statute is unconstitutional, absent a pressing need to do so. Should the Legislature instruct the Treasurer to transfer funds from the Expense Fund to the General Fund, the issue of whether such transfer would be constitutional would then be ripe for our opinion. See Neb. Rev. Stat. §§ 84-215, 84-216.

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

Additionally, 15 U.S.C. § 77q (a) contains very similar language prohibiting fraudulent statements in the sale of securities. Neb. Rev. Stat. § 85-1807 and the plan documents provide that the fees charged of participants are to be used to pay expenses related to the plan. We agree with the State Treasurer that these federal provisions give rise to concerns that the transfer of funds out of the Expense Fund for a use other than to pay expenses related to NESPT may be in violation of federal rules related to these college savings plans.

CONCLUSION

For the reasons set forth above, we believe that the funds in the Expense Fund are not clearly public funds; these are funds held in the custody of the State Treasurer which are earmarked for a particular purpose: to pay expenses related to NESPT. General Funds are explicitly prohibited from being utilized to support NESPT, requiring fees to be charged of participants in order to sustain the program. That they are held by the State Treasurer in a state bank account does not define whether the funds are public funds: the nature of the funds is defined by their origin and intended use. In this case, we believe the better answer to be that these funds are not public funds, must be used only to pay expenses of NESPT, and cannot be transferred by the Legislature for general state purposes.

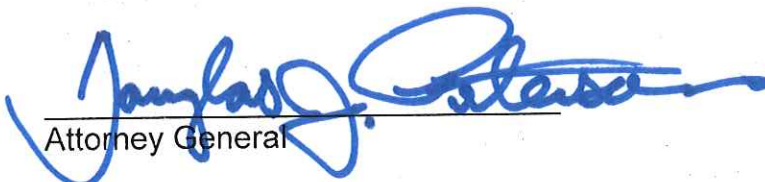
Sincerely,

DOUGLAS J. PETERSON
Attorney General



Natalee J. Hart
Assistant Attorney General

Approved by:


Attorney General

pc Patrick J. O'Donnell
Clerk of the Nebraska Legislature