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October 14, 2016

**TRANSMITTED VIA U.S. MAIL
AND ELECTRONIC MAIL**

The Honorable Andrew Beavers
Chair, Lutsen Town Board
P. O. Box 151
Lutsen, Minnesota 55612

Dear Chair Beavers,

The Office of the State Auditor (OSA) received concerns about several donations made by the Town of Lutsen (Town), including donations made to the Birch Grove Community School, a charter school, and W.E. Connect (formerly the Birch Grove Foundation), a community center. In response to these concerns, the OSA reviewed relevant documents requested and received from the Town.

Based on the OSA's review, it appears that the Town lacked the authority to make donations to the charter school. This letter will provide the Town with recommendations to comply with Minnesota law in the future.

General Background

The OSA reviewed specific donations made by the Town, which are summarized in Table 1 below.¹

TABLE 1

Town of Lutsen Donations by Recipient and Year		
	Birch Grove Community School	W.E. Connect
2012	\$ -	\$ 3,500
2013	-	3,500
2014	5,000	3,500
2015	8,000	3,500
2016	10,000	- ²
	\$ 23,000	\$ 14,000

¹ The Town also reported proposed 2017 donations of \$20,000 to Birch Grove Community School and \$5,000 to W.E. Connect.

² Residents voted to approve an \$11,000 donation to W.E. Connect (then called Birch Grove Foundation) at the continuation of the 2015 annual meeting held on August 18, 2015. The Town had not, however, made any 2016 payments to W.E. Connect as of October 6, 2016.

The money used for Town donations comes from the Town's revenue, which, in turn, comes from various sources including but not limited to property taxes, federal grants, Taconite Aid, Town Aid, other state grants and aids, Iron Range Resources & Rehabilitation Board Grants, charges for services, investment earnings, and other financing sources. These revenues, no matter their source or origin, are considered public funds.

Expenditure of public funds requires that there be both authority and a public purpose.³ Authority may be specifically stated in a statute or implied as necessary to do something that is expressly authorized.⁴ A public purpose has been defined by the Minnesota Supreme Court as “[s]uch an activity as will serve as a benefit to the community as a body and which, at the same time, *is directly related to the functions of government.*”⁵

Donations to Birch Grove Community School

Birch Grove Community School (BGCS) is a nonprofit, charter elementary school in Tofte, Minnesota.⁶ Its enrollment during the 2015-2016 school year was approximately 26 students, coming, in part, from the towns of Tofte, Lutsen, and Schroeder (collectively referred to as the “West End” of Cook County).⁷

BGCS is both a public school and a nonprofit organization governed by Minnesota Statutes chapters 124E and 317A.⁸ State funding for schools generally, and BGCS specifically, is calculated on a per pupil basis. Fluctuating enrollment can result in a decrease in state funding, which BGCS has experienced.

³ See, e.g., Op. Att’y Gen. 59a-22 (Dec. 4, 1934); 59a-22 (Nov. 23, 1966).

⁴ See, e.g., *Mangold Midwest Co. v. Village of Richfield*, 143 N.W. 2d 813, 820 (1966).

⁵ See *Visina v. Freeman*, 89 N.W. 2d 635 (1958) (emphasis added).

⁶ According to the Minnesota Secretary of State’s website, BGCS first filed as a domestic nonprofit corporation in 2004.

⁷ These towns are located in the Cook County School District, Independent School District No. 166 (ISD 166). The nearest elementary school to BGCS is Sawtooth Mountain Elementary School in Grand Marais, Minnesota, approximately 30 miles away.

⁸ Minn. Stat. § 120A20, subd. 1; Minn. Stat. § 124E.03, subd. 1. Charter schools are distinguishable from other public schools and school districts. Minn. Stat. § 124E.03, subd. 1, states “[a] charter school is exempt from all statutes and rules applicable to a school, school board, or school district unless a statute or rule is made specifically applicable to a charter school or is included in this chapter.” Under Minn. Stat. § 123A55, charter schools are identified as “charter districts” for purposes of receiving state funds but are distinguishable from school districts, including “common districts,” “independent districts,” and “special districts,” which are designated “public corporations.” In 2014, the Minnesota Court of Appeals in *Minnesota Transitions Charter Sch. V. Commissioner of the Dep’t of Educ.*, 844 N.W.2d 223 (Minn. Ct. App. 2014) held that “under a plain reading of Minn. Stat. § 120A05, subd. 8, a charter school is not a ‘school district’ and is therefore not a ‘district’ as defined in that section.”

As noted above, the Town donated a total of \$23,000 to BGCS from 2014-2016. These donations do not appear to be legally authorized. In May 2016, the Town executed a “contract” for services with BGCS, but the Town Board motion approving the 2016 payment to BGCS was as a motion to “donate \$10,000 to Birch Grove School from available surplus funds as soon as possible.”⁹

First, the OSA knows of no specific authority given to the Town to expend public funds to support schools. Minnesota law expressly assigns such authority to some public bodies, such as school districts and school boards, but it does not assign similar authority to towns.¹⁰

Second, although there is general statutory authority for a town to transfer personal property (including money) to another *public corporation* under certain circumstances,¹¹ Minnesota courts have made it clear that charter schools are not public corporations.¹² Therefore, Minn. Stat. § 471.85 cannot be used as a basis for conveying funds from the Town to BGCS, because BGCS is not a public corporation.¹³

Finally, to make a donation to a private institution, a town generally needs statutory or constitutional authority: “Donations cannot be made to a mere private institution not under the control of the municipality, such as a private school or a public school in the absence of constitutional or statutory authority. Appropriations to charitable or nonprofit associations, without consideration, cannot be made.”¹⁴ Similarly, the Minnesota Attorney General has long held that absent statutory authorization, public entities cannot donate public funds to private organizations.¹⁵ The OSA is not aware of any statutory or constitutional authority under which the Town could donate to BGCS.

⁹ See February 16, 2016, Town Board meeting minutes.

¹⁰ *Contrast* Minn. Stat. Chs. 365, 366, 367, 368, and 471 (Various provisions describe powers of towns) *with* Minn. Stat. §§ 123B.02, subd. 2 (Independent school district duty and function “to furnish school facilities to every child of school age residing in any part of the district.”), and 123B.09, subd. 8 (School board “must superintend and manage the schools of the district...”).

¹¹ Minn. Stat. § 471.85 (“[a]ny city, county, town, or school district may transfer its personal property for a nominal or without consideration *to another public corporation* for public use when duly authorized by its governing body.”). Emphasis added. The term “personal property” includes funds or money, according to Op. Att’y Gen. 1011 (Dec. 27, 1968).

¹² *Tipka v Lincoln Int’l Charter Sch.*, 864 N.W. 2d 371 (Minn. Ct. App. 2015).

¹³ Even prior to the Court’s clarification in 2015 that charter schools are not public corporations, Minn. Stat. § 471.85 would not appear on its own to provide authority for a town’s donation of funds to a charter school. The Attorney General has noted that Minn. Stat. § 471.85 “is not a license to transfer moneys between public bodies at will without regard for the purposes for which the particular moneys were originally obtained and without regard to other limitations of law on the transferor and transferee governing bodies. Further, the ‘public use’ to which the property is to be put must be one which is *directly related to the public purposes of the transferring governing body.*” Op. Att’y Gen. 1011 (Dec. 27, 1968) (emphasis added). Since, as previously discussed, there does not appear to be anything assigning the Town the purpose of supporting or providing schools, it seems unlikely that a town’s donation to a charter school is directly related to a town’s public purposes.

¹⁴ McQuillan, *The Law of Municipal Corporations*, § 39.31(3rd).

¹⁵ See e.g., Ops. Att’y Gen. 422a-17 (January 17, 1938) (Red Cross), 59-A-3 (May 21, 1948) and (Sept. 28, 1933) (Boy Scouts). See also the OSA Statement of Position on Public Expenditures: Donations and Dues.

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Donations to Birch Grove Foundation/W.E. Connect

The Birch Grove Foundation was established in 1985 but recently became known as W.E. Connect, Inc. W.E. Connect offers fitness facilities, senior programs, senior lunches, and space for health and senior services.

On April 21, 2015, the Town signed a Contract for “Birch Grove Foundation Services, included to [sic] but not limited to Community Center Senior Programs” with the Birch Grove Foundation.¹⁶

These activities and expenditures appear consistent with Minnesota law. There is specific statutory authority under Minn. Stat. § 471.935 for the Town to appropriate money to support the facilities, programs, and services of a public or private, not-for-profit senior citizen center or youth center. In addition, under Minn. Stat. § 365.10, subd.14, electors may approve the Town expending not more than \$10,000 per year on health, social, and recreation services that are in the public interest and good for the Town.

Recommendation

Having found no authority for Town donations to a charter school, the OSA recommends that the Town not make donations in the future to BGCS.

If you have any questions about the issues raised in this letter, please feel free to contact me at (651) 297-3673.

Sincerely,

/s/ Ramona I. Advani

Ramona I. Advani
General Counsel & Deputy State Auditor

cc: The Honorable Lynn Rose, Town Board Supervisor
The Honorable Rae Piepho, Town Board Supervisor
The Honorable Sharon Hexum-Platzer, Town Clerk
The Honorable John Groth, Town Treasurer

¹⁶ The contract states that it is authorized under Minn. Stat. § 365.10, subd. 14.