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OFFICE OF THE
ATTORNEY GENERAL
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Opinion No. 11-20

Use of Net Lottery Proceeds

QUESTION

Has the General Assembly appropriated net lottery proceeds for the purposes authorized by Article XI, Section 5, of the Tennessee Constitution?

OPINION

The following principles apply to any expenditure of net lottery proceeds. The expenditure must supplement, rather than supplant, available non-lottery funds. Net lottery proceeds must first be used to fund financial assistance programs for students of post-secondary educational institutions. Remaining net lottery proceeds may be used for the other purposes listed in Article XI, Section 5.

Based on the information provided with this request, net lottery proceeds have been appropriated for a variety of purposes as follows:

1. THEC and TSAC Expenditures Related to Scholarship Programs

a. i. Clearly, scholarships awarded under Tenn. Code Ann. §§ 49-4-901, et seq., ~~"p~~rovide financial assistance to citizens of this state to enable such citizens to attend post-secondary educational institutions located within this state," within the meaning of Article XI, Section 5, of the Tennessee Constitution. It is the opinion of this Office, therefore, that net lottery proceeds may be expended directly for these scholarships.

ii. Research indicates the General Assembly has also appropriated earnings from the lottery-for-education account in the State Treasury to supplement the Tennessee Student Assistance Award Program under Tenn. Code Ann. §§ 49-4-301, et seq. It is not clear that these earnings are ~~"n~~et proceeds of the lottery's revenues" subject to the limitations in Article XI, Section 5, of the Tennessee Constitution. In any case, these awards also ~~"p~~rovide financial assistance to citizens of this state to enable such citizens to attend post-secondary educational institutions located within this state," within the meaning of Article XI, Section 5. It is the opinion of this Office, therefore, that earnings from the lottery-for-education account may be expended directly for awards under this program.

b. Money spent to purchase laptops for students eligible for dual enrollment grants "provide[s] financial assistance to citizens of this state to enable such citizens to attend post-secondary educational institutions located within this state," within the meaning of Article XI, Section 5, of the Tennessee Constitution. It is the opinion of this Office, therefore, that net lottery proceeds may be expended for this purpose.

c. It is the opinion of this Office that net lottery proceeds may be used to pay administrative expenses incurred by TSAC and THEC that are reasonably necessary for those agencies effectively to manage the lottery scholarship program.

d. Contract with XAP Corporation

Based on the information supplied, some of the services provided under a contract between THEC and XAP Corporation appear to be reasonably necessary to manage the lottery scholarship program. It is the opinion of this Office, therefore, that net lottery proceeds may be used for the costs of the following components described under Section A.3 of the contract:

A. College Planning Tools (A.3.c.) to the extent they are used to provide information about Tennessee higher education institutions to students and to enable students to apply for admission to these institutions;

B. Financial Aid Planning Tools (A.3.d.);

C. Services through the Adult Student Module (A.3.f.) that enable students to apply to Tennessee higher education institutions and to obtain lottery scholarships and other financial aid to attend these institutions; and

D. Services provided through the Professional Center (A.3.g.) that enable educators to send student transcripts to Tennessee higher education institutions and to TSAC for lottery scholarship GPA verification.

But the costs of the Career Planning Tools (A.3.a.), High School Planning Tools (A.3.b.), Life-long Portfolio (A.3.e.), Adult Student Module (A.3.f.) (to the extent not providing college and financial aid planning), Professional Center (A.3.g.) (for services besides the transcript transmission services noted above), and Middle School Module (A.3.h.) do not appear to be reasonably necessary to manage the lottery scholarship program. For this reason, it is the opinion of this Office that they may not be funded from net lottery proceeds. Further, these expenses are not for the purpose of capital outlay projects, early learning programs, or after school programs within the meaning of Article XI, Section 5, of the Tennessee Constitution and as currently authorized by statute through Tenn. Code Ann. §§ 49-6-701, *et seq.* (after school programs); Tenn. Code Ann. §§ 49-6-101, *et seq.* (pre-kindergarten programs); and Tenn. Code Ann. § 49-4-940(c) (energy efficient schools fund).

e. Reasonable expenses related to administering lottery scholarship day are part of the costs to "provide financial assistance to citizens of this state to enable such citizens to attend

post-secondary educational institutions located within this state," within the meaning of Article XI, Section 5, of the Tennessee Constitution. It is the opinion of this Office, therefore, that net lottery proceeds may be used for this purpose.

2. a. Early Learning Programs

i. It is the opinion of this Office that funds spent on early learning programs in accordance with Tenn. Code Ann. §§ 49-6-101, *et seq.*, comply with the restrictions on net proceeds of the lottery's revenues under Article XI, Section 5, of the Tennessee Constitution.

ii. Expenses to conduct the pre-K longitudinal study are administrative expenses that are reasonably necessary to administer the pre-kindergarten programs authorized by law. It is the opinion of this Office, therefore, that net lottery proceeds may be used to pay these expenses.

b. After School Programs

It is the opinion of this Office that funds spent on after school programs in accordance with Tenn. Code Ann. §§ 49-6-701, *et seq.*, comply with the restrictions on net proceeds of the lottery's revenues under Article XI, Section 5, of the Tennessee Constitution.

3. It is the opinion of this Office that the General Assembly may appropriate net lottery proceeds available after allocations for lottery scholarships to fund projects under the Energy Efficient Schools Initiative of 2008, Tenn. Code Ann. §§ 49-17-101, *et seq.* These proceeds may also fund administrative expenses reasonably necessary to administer this program.

ANALYSIS

Article XI, Section 5, of the Tennessee Constitution, provides in relevant part:

> The legislature shall have no power to authorize lotteries for any purpose, and shall pass laws to prohibit the sale of lottery tickets in this state, except that the legislature may authorize a state lottery *if the net proceeds of the lottery's revenues are allocated to provide financial assistance to citizens of this state to enable such citizens to attend post-secondary educational institutions located within this state.* The excess after such allocations from such net proceeds from the lottery would be appropriated to:
>
> (1) Capital outlay projects for K-12 educational facilities; and
>
> (2) Early learning programs and after school programs.
>
> Such appropriation of funds to support improvements and enhancements for educational programs and purposes and such net proceeds shall be used to supplement, not supplant, non-lottery educational resources for educational programs and purposes.

(emphasis added). This language creates a clear priority in favor of the financial assistance program for post-secondary education students. Op. Tenn. Att'y Gen. 03-015 (February 10, 2003). Thus, the term "excess" as used in Article XI, Section 5, refers to any net proceeds of the state lottery remaining after funding the financial assistance program established by the General Assembly for Tennessee citizens to attend post-secondary institutions. *Id.* The Constitution, therefore, provides that net lottery proceeds must be used for one of three different purposes: first, "to provide financial assistance to citizens of this state to enable such citizens to attend post-secondary educational institutions located within this state[;]" second, for "[c]apital outlay projects for K-12 educational facilities;" and third, for "[e]arly learning programs and after school programs." Further, net lottery proceeds must be used to supplement, not supplant, non-lottery educational resources for education programs and purposes.

Disposition of lottery revenue is governed by Tenn. Code Ann. § 4-51-111. Under subsection (a)(2) of this statute, the Tennessee Education Lottery Corporation must pay its operating expenses from its lottery proceeds. Under Tenn. Code Ann. § 4-51-111(b), the Corporation must transfer net lottery proceeds to a lottery-for-education account within the State Treasury. The same statute establishes several reserve and subaccounts to be maintained within the lottery-for-education account.

This opinion relies on documents accompanying the request. These documents include extensive information about education programs and expenses funded with net lottery proceeds. The following is a summary of each document:

1. A spreadsheet comparing appropriation requirements and state revenues for fiscal years 2003-2004 through 2013-2014. The document provides details about "Appropriation Requirements" that include the following:

Higher Education Scholarships Base
TSAA Need-Based Scholarships
Pre-Kindergarten Program
Tennessee Higher Education Commission
Tennessee Student Assistance Corporation
Education: E-Transcripts for Tennessee Higher Education Commission
Education: Lottery Scholarship Day
Comptroller: Pre-K Longitudinal Study

2. A 2009-2010 summary report for the Tennessee Education Lottery Scholarship Program. This document details amounts awarded under the following: Hope Foster Care Grant; Dual Enrollment Grant; Math and Science Teachers Program; Helping Heroes Grant; and Rural Health Loan Forgiveness. The same document reflects awards by educational institution.

3. The Tennessee Education Lottery Scholarship Program Annual Report, (the "Annual Report"), reflecting outcomes through Fall 2009. This document provides extensive narrative information about the program.

4. A list of lottery expenditures by the Tennessee Higher Education Commission (–THEC") for fiscal year 2009. Items on this list are the following: Salaries and Benefits; Operational Expenses; and –Laptop Project," required by 2008 Tenn. Pub. Acts ch. 1142.

5. A more detailed list of THEC administrative expenses, broken down into salaries and employee benefits; travel expenses; and printing, copying, communication, and shipping expenses. The document also lists data processing, office supplies, rental, and billing services.

6. A narrative description of activities of THEC lottery-related personnel.

7. and 8. Details of administrative expenditures from lottery funds by the Tennessee Student Assistance Corporation (–TSAC"). These include salaries, employee benefits, travel, rental, communication, copying, and printing charges.

The fundamental purpose in construing a constitutional provision is to ascertain and give effect to the intent and purpose of the people who adopted it. *Cleveland Surgery Center, L.P. v. Bradley County Memorial Hospital,* 30 S.W.3d 278, 281 (Tenn. 2000). Thus, when construing a constitutional provision, courts must give its terms their ordinary and inherent meaning. *Barrett v. Tennessee Occupational Safety and Review Commission,* 284 S.W.3d 784, 787 (Tenn. 2009).

Many of the expenditures listed in the material are explicitly authorized by state statutes. The Tennessee Supreme Court recently acknowledged that a construction of the Constitution adopted by the legislative department and long accepted and acquiesced in by the people is entitled to great weight, and in the absence of some showing of palpable error, is to be accepted as a correct interpretation. *American Civil Liberties Union of Tennessee v. Darnell,* 195 S.W.3d 612, 627, n. 12 (Tenn. 2006) (quoting *LaFever v. Ware,* 211 Tenn. 393, 365 S.W.2d 44, 47 (1963)).

1. HOPE SCHOLARSHIP AND OTHER SCHOLARSHIP PROGRAM EXPENDITURES

Most of the net lottery proceeds have been expended to support the HOPE Scholarship Program and other scholarship programs. These programs operate under Tenn. Code Ann. §§ 49-4-901, *et seq.* They are administered by TSAC, and THEC is charged with evaluating them. Tenn. Code Ann. § 49-4-903. The following discussion will consider the different expenditures listed in the materials provided to determine whether they fall within the first purpose for which net lottery proceeds may be used, which is –to provide financial assistance to citizens of this state to enable such citizens to attend post-secondary educational institutions located within this state."

a. Grant Awards

i. Scholarship Programs under Tenn. Code Ann. §§ 49-4-101, *et seq.*

The Annual Report summarizes the Tennessee Education Lottery Scholarship Program as follows:

> The Tennessee Education Lottery began operations on January 20, 2004. Lottery proceeds fund scholarships for Tennessee students attending eligible public or private colleges and universities across the state. Initial qualification and renewal criteria for the program were set in 2003. The legislature adjusted the qualification criteria in 2005 and the renewal criteria in 2008. Additionally, the legislature added a Non-traditional Student Grant and Dual Enrollment Grant in 2005 and several smaller provisions in 2006 and 2008.
>
> Pursuant to Public Chapter 1142, which was signed into law in July 2008, the most significant policy changes to the program since inception were implemented in Fall 2008. One of the reforms was a provisional method for maintaining the award after the student attempted 72 credit hours. Additionally, the law approved an expansion of the Non-traditional Student Grant. If a student is age 25 or over, has an adjusted gross income of $36,000 or less, and has never attended or has been away from college for two years, he or she can become eligible for a Non-traditional Student Grant by completing 12 hours of collegiate coursework with a minimum 2.75 cumulative GPA.
>
> In addition to changes in the scholarship programs, the state has also made lottery-funded grants available to veterans of the Global War on Terror, students pursuing degrees in math and science education, and students who pursue medical education with the intention of serving a rural health shortage area. Also in 2008-09, the state used a combination of lottery reserve earnings and other non-recurring revenues to provide $10 million so that 5,000 additional students could receive Tennessee Student Assistance Awards (TSAA), which provide grants to financially needy undergraduate students who are residents of Tennessee.

Annual Report at 1-2.

Statutes governing eligibility for financial aid under various programs funded with net lottery proceeds appear at Tenn. Code Ann. §§ 49-4-901, *et seq.* Clearly, scholarships under the program "provide financial assistance to citizens of this state to enable such citizens to attend post-secondary educational institutions located within this state," within the meaning of Article XI, Section 5, of the Tennessee Constitution. Thus, net lottery proceeds may be expended directly for these scholarships.

ii. Tennessee Student Assistance Awards under Tenn. Code Ann. §§ 49-4-301, *et seq.*

The Annual Report indicates that the State used a "combination of lottery reserve earnings and other non-recurring revenues" to help fund Tennessee Student Assistance Awards. *Id.* at 2. This award program is governed by Tenn. Code Ann. §§ 49-4-301, *et seq.* The 2008 Appropriations Act reflects that the General Assembly appropriated $6,800,000 from "interest earnings attributable to the Lottery for Education Account" to supplement these awards. 2008 Tenn. Pub. Acts ch. 1203, Item 3, at 109. This appropriation appears to refer to interest earned on net lottery proceeds after the Tennessee Lottery Corporation transferred those proceeds to the lottery-for-education account under Tenn. Code Ann. § 4-51-111. This money does not appear to fall within the term "net proceeds of the lottery's revenues" as used in Article XI, Section 5, of the Tennessee Constitution. Op. Tenn. Att'y Gen. 03-066 (May 22, 2003) (the term "net proceeds of the lottery's revenues" means the funds remaining from the gross proceeds from the state lottery after all expenses and losses incurred in realizing them are deducted). In any case, awards under this program also "provide financial assistance to citizens of this state to enable such citizens to attend post-secondary educational institutions located within this state," within the meaning of Article XI, Section 5, of the Tennessee Constitution. Thus, earnings from the lottery-for-education account may be expended directly for these Tennessee Student Assistance Awards under Tenn. Code Ann. §§ 49-4-301, *et seq.*

b. Purchase of Laptops

The materials indicate that THEC spent $156,600 in net lottery proceeds in Fiscal Year 2009 to purchase laptops. This purchase was authorized by 2008 Tenn. Pub. Acts ch. 1142, § 26, now codified at Tenn. Code Ann. § 49-4-930(f). This section creates a pilot program to assist high school juniors and seniors eligible for dual enrollment grants to enroll in dual enrollment courses that require a computer to facilitate the offering of such course or as necessary equipment for such course. Tenn. Code Ann. § 49-4-930(f)(1). The term "dual enrollment grant"

> means a grant for study at an eligible postsecondary institution that is funded from net proceeds of the state lottery and awarded to students who are attending high school and who are also enrolled in college courses at eligible postsecondary institutions for which they will receive college credit.

Tenn. Code Ann. § 49-4-902(9). The pilot program was to provide laptop computers for one hundred students in each grand division of the state, the cost not to exceed five hundred dollars each. Tenn. Code Ann. § 49-4-930(f)(2) and (3). Money spent for this purpose "provide[s] financial assistance to citizens of this state to enable such citizens to attend post-secondary educational institutions located within this state," within the meaning of Article XI, Section 5, of the Tennessee Constitution. For this reason, expenditures to purchase laptops under this program are authorized under Article XI, Section 5, of the Tennessee Constitution, as long as they supplement rather than supplant other funds.

c. General Administrative Expenditures by THEC and TSAC

The materials provided indicate that net lottery proceeds are used to cover administrative expenses of TSAC and THEC related to administering the lottery scholarship programs. These expenses include salaries and employee benefits, travel expenses, and printing, copying, communication, and shipping expenses, as well as data processing, office supplies, rental, and billing services.

TSAC is responsible for administering lottery scholarship and grant programs. Its duties include determining eligibility of students and distributing funds appropriated by the General Assembly for scholarships and grants awarded under the program. Tenn. Code Ann. § 49-4-903(a). THEC is required to provide assistance to the legislature and TSAC by researching and analyzing data concerning these programs, including, but not limited to, student success and scholarship retention rates. Tenn. Code Ann. § 49-4-903(b). The statute was recently amended to require further information in THEC's annual report under this statute. 2010 Tenn. Pub. Acts ch. 839.

Statutes governing the lottery scholarship programs explicitly authorize administrative expenses to be paid from the lottery-for-education account:

> Costs incurred by TSAC and THEC *in administering the educational programs created under this part* that provide *financial assistance* to enable citizens of this state to attend postsecondary educational institutions shall be funded from the lottery for education account *as part of the programs.*

Tenn. Code Ann. § 49-4-924(e) (emphasis added). Thus, the General Assembly has determined that TSAC and THEC costs to administer programs funded with net lottery proceeds are properly ~~"a~~llocated to provide financial assistance to citizens of this state to enable such citizens to attend post-secondary educational institutions located within this state," as required under Article XI, Section 5, of the Tennessee Constitution. As discussed above, this determination is entitled to judicial deference. Further, the Constitution requires that net lottery proceeds be allocated to ~~"p~~rovide" financial assistance. Logically, the cost of administering the financial assistance programs is part of the cost of providing this assistance. The Oregon Attorney General reached a similar conclusion in 1991. Op. Or. Att'y Gen. OP-6373, 1991 WL 543950 (April 9, 1991). The Oregon constitutional provision construed in that opinion provided in relevant part that, ~~"[~~a]ll proceeds from the State Lottery . . . shall be used for the purpose of creating jobs and furthering economic development in Oregon." Or. Const. Art. XV, Section 4(3). The Attorney General concluded that this provision permitted lottery funds to be used for administrative expenses of a lottery-funded program, so long as the program itself was a permissible use of lottery funds. The opinion notes:

> As a practical matter, any program to create jobs and promote economic development needs administrative support in order to operate. For instance, such a program requires staff, which in turn needs office space and supplies. Costs for such administrative support are an integral part of the program expenses. We

> conclude, therefore, that lottery funds may be used to pay administrative expenses which are reasonably necessary for a state agency effectively to manage a program that creates jobs and promotes economic development.

Op. Or. Att'y Gen. OP-6373, 1991 WL 543950 at *3 (April 9, 1991). Similarly, any program to provide financial assistance to Tennessee citizens to enable them to attend Tennessee post-secondary educational institutions needs administrative support in order to operate. Thus, net lottery proceeds may be used to pay administrative expenses incurred by TSAC and THEC that are reasonably necessary for those agencies effectively to manage lottery scholarship programs. The funds must supplement and not supplant available non-lottery funds.

d. "Electronic Transcripts" — Contract between THEC and XAP Corporation

Material received with the request reflects an appropriation entitled "E-Transcripts for THEC." The spreadsheet anticipates appropriations of $808,100 each year through fiscal year 2013-2014. This item refers to a contract between THEC and XAP Corporation. This Office previously reviewed an amendment to a contract between the same parties to determine whether lottery funds could legally be spent to pay for services provided under the amendment. Op. Tenn. Att'y Gen. 06-111 (July 13, 2006). A memorandum from THEC to the Fiscal Review Committee dated April 1, 2010, summarizes the contract with XAP as follows:

> Tennessee procured a solution from XAP Corporation to provide a broad avenue of access to Tennessee education opportunities beyond high school. The resulting website www.CollegeforTN.org is designed especially for use in Tennessee and allows the user, which includes students in grades K – 12, to plan their future careers, begin to understand the need for higher education, know which courses to take in middle and high school to be academically prepared for college, prepare for tests, including ACT, SAT, and GRE, and learn how to apply for financial aid. Additionally, postsecondary students, parents, guidance counselors, and college access professionals will have access to a comprehensive suite of career, college, and financial aid planning services in a web-based environment using a single log-on and password.

The same paragraph appears in Section A.2., page 1, of the contract beginning May 1, 2010. Services provided under the contract are described in greater detail under Section A.3., a.-g. on pages 2 and 3 of the contract:

> a. Career planning and test preparations tools which will provide a comprehensive career exploration and standardized test preparation experience for all Tennessee citizens. Career assessments will include an Interest Profile, Career Cluster Survey, Basic Skills Survey, Transferable Skill checklist, Career Key and Work Values Sorter. Career exploration resources will also include career search and matching functionality organized around the career clusters as determined by the U.S. Department of Labor and will be tailored to reflect Tennessee's Department of Education career cluster customizations. Elementary School

students will have access to age appropriate career exploration tools in the module Paws in Jobland. The career exploration resources found on the web portal will change in content and form dependent on the age of the user ensuring that all users have a career exploration experience customized to their needs and age level. The web portal will also provide standardized test preparation tools for the ACT, SAT and GRE.

b. High School planning tools which include a planning timeline and a personalized plan of study, outlining what students and parents should be doing throughout a student's high school career to effectively plan for college. The personalized plan of study will allow students to make high school course plans. The plans of study will be populated with all courses listed as approved by the Tennessee Department of Education and will be organized in accordance with Tennessee course and graduation standards. Local districts and schools will have the ability to customize course offerings, course sequences, and options for the personalized plan of study of students that attend their particular school or district.

c. College planning tools which offer resources allowing students to explore postsecondary education options. Web portal users will be able to browse higher education institutions, view program and major profiles and access college preparation content. The State will have the capability to customize and add college planning content as it sees fit. The web portal will provide online applications for admissions to all Tennessee higher education institutions. Additionally, the web portal will provide electronic transcript services for high school, high school equivalent and college transcripts.

d. Financial Aid planning tools which include a set of comprehensive financial aid resources including financial aid calculators, an Expect Family Contribution (EFC) calculator, user-personalized financial planning tool and scholarship search tools. The State will have the ability to customize and supplement the financial aid and financial literacy information provided. The portal will also provide the ability of users to transfer information found in user profiles directly to the Free Application for Federal Student Aid (FAFSA) form.

e. Life-long Portfolio which provide[s] users with a personal web-based portfolio that will house all career, high school, college, and financial aid planning activity outcomes. Users will be able to manage items such as careers, postsecondary institutions, and academic programs of interest. The portfolio provides resources including email, calendar, and the capability of communicating with school personnel.

f. Adult Student Module which provides career planning, college planning, financial aid planning, life-long portfolio and professional center tools tailored to the adult student. Workforce development and career centers will have access to the Professional Center to better aid in facilitating resources to adults. The adult

portions of the website will be customizable both in appearance and content to better reflect the needs of Tennessee.

g. Professional Center which gives designated school, university, and workforce center personnel access to the accounts of all individuals associated with their respective programs. Professional center users will have the ability to segment individuals in a variety of ways (i.e. grade level, last name, career interests, etc.) to maximize use. Professional center users will be able to track web portal user's progress in completing site activities including assessment, college applications, and high school plans. Messages and event notices can be sent to individual portal user accounts. School personnel can upload and send transcripts through the Professional Center. User-friendly reports are available in the Professional Center to track, engage and keep portal users accountable. Sample reports include a list of students who are interested in majoring in Biology, which users have applied to college, or a list of students who have not yet completed a personalized plan of study. The Professional Center provides tools to more efficiently manage portal user's career, high school, college and financial aid planning. Additionally, school district and state level educators will have the capability of obtaining aggregate and disaggregate data regarding student usage and outcomes.

h. Middle School Module which provides career planning, college planning, financial aid planning, life-long portfolio and professional center tools tailored to the middle school student. All Tennessee middle schools will have access to the Professional Center to better aid in facilitating resources to middle school students. The student portions of the website will be customizable in appearance and content to better reflect the needs of Tennessee.

None of these services can be interpreted as direct financial assistance to enable Tennessee citizens to attend post-secondary educational institutions located in Tennessee within the meaning of Article XI, Section 5, of the Tennessee Constitution.

The cost of some of the services described under this contract is, arguably, an administrative expense that is reasonably necessary to manage the lottery scholarship programs. The College Planning Tools (A.3.c.) provide information to students about Tennessee higher education institutions and enable students to apply for admission. Since lottery scholarships are available to attend only these institutions, it can be argued that expenditures for these services are reasonably necessary to manage the lottery scholarship programs. For this reason, expenditures for the College Planning Tools component may be funded from net lottery proceeds to the extent they are used to provide information about Tennessee higher education institutions to students and to enable students to apply for admission to these institutions.

Further, we think it can be argued that Financial Aid Planning Tools (A.3.d.) represent an expense that is reasonably necessary to manage the lottery scholarship programs. Services under this component will enable students effectively to use lottery scholarship funds to attend Tennessee higher education institutions. Expenditures for the Financial Aid Planning Tools

component, therefore, may be funded from net lottery proceeds. The same argument can be made concerning the Adult Student Module (A.3.f.), but only to the extent the module provides college planning and financial aid planning.

The Professional Center described at A.3.g. of the contract provides a means to assemble data regarding students whose information is on the program. Staff members at THEC indicate that educators use this service to send official high school transcripts to TSAC for lottery scholarship GPA verification. Verification of student GPAs for lottery scholarship eligibility requires three steps. First, educators upload grade data from their own student information system to the Professional Center. Second, the Professional Center service automatically organizes this data into individual student transcripts. Third, educators use the Professional Center to send student transcripts to higher education institutions for admissions purposes and to TSAC for lottery scholarship GPA verification. For this reason, expenditures for the Professional Center that enable educators to send student transcripts to Tennessee higher education institutions and to TSAC for lottery scholarship GPA verification may be funded from net lottery proceeds.

Expenditures for the following services, however, are not closely enough linked to administering the lottery scholarship program to allow them to be funded from net lottery proceeds under Article XI, Section 5, of the Tennessee Constitution:

Career Planning Tools (A.3.a.);

High School Planning Tools (A.3.b.);

Life-long Portfolio (A.3.e.);

Adult Student Module (A.3.f.) (to the extent not providing college and financial aid planning);

Professional Center (A.3.g.) (expenditures for services besides the electronic transmission services enabling educators to send student transcripts to Tennessee higher education institutions and to TSAC for lottery scholarship GPA verification); and

Middle School Module (A.3.h.).

It can certainly be argued that each of these programs is intended to help students plan their careers and meet the general academic qualifications necessary to receive a lottery scholarship. But they are not administrative expenses directly related to "provid[ing] financial assistance to citizens of this state to enable such citizens to attend post-secondary educational institutions located within this state" within the meaning of Article XI, Section 5, of the Tennessee Constitution. These services do not directly assist students to participate in the lottery scholarship programs, and they do not assist any state agency to administer these programs. Further, these expenses do not appear to be for the purpose of capital outlay projects, early learning programs, or after school programs within the meaning of Article XI, Section 5, of the

Tennessee Constitution and as currently authorized by statute through Tenn. Code Ann. §§ 49-6-701, *et seq.* (after school programs); Tenn. Code Ann. §§ 49-6-101, *et seq.* (pre-kindergarten programs); and Tenn. Code Ann. § 49-4-940(c) (energy efficient schools fund).

e. Lottery Scholarship Day

Under Tenn. Code Ann. § 49-4-932, TSAC is authorized to conduct a lottery scholarship day each school year to inform high school students and their parents of financial assistance available from net lottery proceeds for attendance at eligible postsecondary institutions. THEC and the state university systems are to provide assistance to TSAC in planning and conducting the event. TSAC is required to enlist the assistance of the Tennessee Department of Education, local education agencies, and local schools in informing students on its lottery scholarship day of scholarship eligibility requirements. Tenn. Code Ann. § 49-4-932(b). Subsection (j) of the statute provides:

> The administrative costs incurred by the department of education and TSAC in administering the programs established by this section, which provides information to students about lottery scholarships consistent with Tenn. Const. art. XI, § 5 shall be funded from the lottery for education account created by § 4-51-111.

Tenn. Code Ann. § 49-4-932(j). Thus, the General Assembly has explicitly authorized net lottery proceeds to be used to pay administrative costs of TSAC and the Department of Education in advertising and administering lottery scholarship day. This legislative determination that these expenses are properly allocated to provide financial assistance to Tennessee citizens to attend Tennessee post-secondary institutions is entitled to judicial deference. The purpose of lottery scholarship day is to inform Tennessee high school students of the availability of financial assistance under the lottery scholarship programs. This represents a reasonably necessary administrative expense of operating these programs. For this reason, reasonable expenses related to administering lottery scholarship day are part of the costs to ~~"p~~rovide financial assistance to citizens of this state to enable such citizens to attend post-secondary educational institutions located within this state," within the meaning of Article XI, Section 5, of the Tennessee Constitution.

2. PRE-KINDERGARTEN AND AFTER SCHOOL PROGRAMS

a. Pre-Kindergarten Program

i. The General Assembly has also authorized lottery funds to be used for preschool programs, Tenn. Code Ann. §§ 49-6-101, *et seq.* Appropriations for programs authorized under this statutory scheme from excess net lottery proceeds may not exceed twenty-five million dollars in any fiscal year. Tenn. Code Ann. § 49-6-110. Under Tenn. Code Ann. § 49-4-901, net lottery proceeds in excess of those allocated to provide financial assistance to Tennessee citizens to enable them to attend postsecondary institutions must be allocated first to early learning programs. Under Tenn. Code Ann. § 49-6-105, local educational authorities may apply to the

Department of Education for funding and approval of one or more pre-kindergarten programs. Programs operated under these statutes are to serve at-risk children four years of age or less, but any child may enroll in a program when an insufficient number of at-risk children are enrolled to fill a specific classroom. Tenn. Code Ann. § 49-6-104(a). Section (b) of Tenn. Code Ann. § 49-6-104 lists further requirements that these programs must meet. Funds for the program may not supplant any other state or local funds for pre-kindergarten programs. Tenn. Code Ann. § 49-6-107(e). Thus, funds spent on early learning programs in accordance with Tenn. Code Ann. §§ 49-6-101, *et seq*., comply with the restrictions on net proceeds of the lottery's revenues under Article XI, Section 5, of the Tennessee Constitution.

ii. Pre-K Longitudinal Study Reports

Materials provided with the request include a separate expenditure for pre-K longitudinal study reports. This term appears to refer to the study authorized under Tenn. Code Ann. § 49-6-109. Under this statute, the Office of Education Accountability must coordinate a study of the effectiveness of the authorized pre-kindergarten programs. Expenses to conduct this study are administrative expenses that are reasonably necessary to administer the pre-kindergarten programs authorized by law. For this reason, net lottery proceeds may be used to pay these expenses.

b. After School Programs

Under Article XI, Section 5, the General Assembly may also allocate net lottery proceeds for early learning programs and after school programs. These programs must be funded from excess net lottery proceeds remaining after the lottery scholarship programs have been funded. Op. Tenn. Att'y Gen. 03-015 (February 10, 2003). The General Assembly has authorized lottery funds to be used for after school programs. Tenn. Code Ann. §§ 49-6-701, *et seq.* Under this statutory scheme, the Department of Education is authorized to establish, administer, and monitor a system of competitive grants and technical assistance for eligible organizations providing after school educational programs consistent with Article XI, Section 5, of the Tennessee Constitution. Tenn. Code Ann. § 49-6-701(a). Grants under the program must supplement and not supplant non-lottery educational resources for after school educational programs and purposes. *Id.*

Funding for this grant program comes from the lottery-for-education after school programs grant fund, referred to as the "LEAP" grant fund, in the State Treasury. Tenn. Code Ann. § 49-6-701(b)--(d). Costs incurred by the Department of Education in administering the grant program are also funded from the LEAP fund. Tenn. Code Ann. § 49-6-706. The General Assembly is authorized to appropriate moneys to the LEAP fund from the after school account established under Tenn. Code Ann. § 4-51-111(f). Moneys may be transferred to the LEAP fund in any fiscal year in which the scholarship programs have been funded. Tenn. Code Ann. § 49-6-701(c). The after school account is a special account in the State Treasury that also contains unclaimed lottery prize money deposited at the end of each fiscal year. Tenn. Code Ann. § 4-51-111(f); Tenn. Code Ann. § 4-51-123(h). Under subsection (h) of Tenn. Code Ann. § 4-51-123, unclaimed prize money does not constitute "net lottery proceeds" and is not to be distributed as

lottery proceeds for the purposes of Tenn. Code Ann. § 4-51-111(a). This money, however, is still ~~"n~~et proceeds of the lottery's revenues" subject to the spending limitations of Article XI, Section 5. Op. Tenn. Att'y Gen. 03-066 (May 22, 2003). Grants and technical assistance under Tenn. Code Ann. §§ 49-6-701, *et seq.*, must supplement and not supplant non-lottery educational resources for after school educational programs and purposes. Tenn. Code Ann. § 49-6-701(a).

The statutes creating the after school grant program comply with the spending limitations under Article XI, Section 5, of the Tennessee Constitution. Funds may be transferred to the LEAP account only when the scholarship programs have been funded. The funds must supplement, not supplant, non-lottery educational resources for after school educational programs and purposes. Thus, funds spent on after school programs in accordance with Tenn. Code Ann. §§ 49-6-701, *et seq.,* comply with the restrictions on net proceeds of the lottery's revenues under Article XI, Section 5, of the Tennessee Constitution.

3. Energy Efficient Schools Program

Tenn. Code Ann. § 49-4-940(c) provides:

> If for fiscal year 2008-2009 the board determines that earnings on the lottery for education account will be sufficient to meet the funding requirements for scholarships that fiscal year, the board is authorized to transfer an amount not to exceed ten million dollars ($10,000,000) from the lottery for education account to the energy efficient schools fund, if the fund is created by law.

The Energy Efficient Schools Initiative was created under Tenn. Code Ann. §§ 49-17-101, *et seq.* The General Assembly recently deleted Tenn. Code Ann. § 49-17-107, which provided that the Energy Efficient Schools Council created under the act would terminate on June 30, 2010. 2010 Tenn. Pub. Acts ch. 1066. The Council is authorized to award grants or loans to kindergarten through grade twelve school systems for qualifying capital outlay projects. Projects funded under the act must satisfy the Council's guidelines for improving energy efficiency and must also comply with the requirements of Article XI, Section 5, of the Tennessee Constitution. Tenn. Code Ann. § 49-17-102(5). Article XI, Section 5, of the Tennessee Constitution expressly provides that excess net proceeds of the lottery after allocations to the scholarship programs may be appropriated for capital outlay projects for K-12 educational facilities. The General Assembly, therefore, may appropriate net lottery proceeds available after allocations for lottery scholarships to fund projects under the Energy Efficient Schools Initiative of 2003, Tenn. Code Ann. §§ 49-17-101, *et seq.* These proceeds may also fund administrative expenses reasonably necessary to administer this program.

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