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The Honorable Gino White  
Idaho House of Representatives  
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THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE  
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE

Re: Use of student activity fees at Idaho's colleges and  
universities

Dear Representative White:

This is in response to your questions concerning the use of  
student activity fees at Idaho's public colleges and  
universities.

1. May the student government funds of Idaho's  
colleges and universities, that are collected  
through student-approved activity fees, be used by  
Idaho students to retain an attorney for  
litigation against a college or university  
concerning the proper collection or use of student  
fees by the college or university?

In answering your first question, it is important to analyze  
and define the nature of the activity fees which are collected  
and allocated to the student governments of the respective  
institutions. The board's policies and procedures define  
"activity fee" as follows:

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Activity fee is defined as the fee charged for such activities as intercollegiate athletics, student health center, student union operations, the associated student body, financial aid, intramural and recreation and other activities which directly benefit and involve students. The activity fee shall not be charged for educational costs nor major capital improvement nor building projects. Each institution shall develop a detailed definition and allocation proposal for each activity for internal management purposes.

State Board of Education Governing Policies and Procedures, Section V,R(2).

While the activity fee is ultimately allocated to various activities, it is assessed only under authority of the Idaho State Board of Education (see e.g. Idaho Code § 33-3717) and allocated pursuant to the "allocation proposal" developed by each institution. Under Idaho Code § 33-107(2)-(3), the state board is given power to "hold and dispose of" real and personal property as well as general supervisory authority for "all entities of public education supported in whole or in part by state funds." Article 9, § 10, of the Idaho Constitution states in pertinent part: "The regents shall have the general supervision of the university, and the control and direction of all the funds of, and appropriations to, the university, under such regulations as may be prescribed by law."

We are unable to find any Idaho judicial decision discussing this specific issue in the university context. However, a Washington Supreme Court decision provides persuasive authority for this point of view. In Good v. Associated Students of the University of Washington, 542 P.2d 762 (1975), the court held that the ASUW funds were "public in nature" and "subject to the ultimate control by the Regents." Id. at 765. See also, Student Government Association v. Board of Trustees of the University of Massachusetts, 868 F.2.1 473, 478 (1st Cir. 1989) (discussed infra). The court made this finding in spite of the fact that ASUW was a separate non-profit corporation with its own articles of incorporation. The student associations here in Idaho are not currently incorporated, according to the secretary of state's office. This would actually make the argument stronger that the student associations are under the board's ultimate authority, since they are not separate legal entities. Additionally, existing state board policy indicates that "[e]xpenditures by or on behalf of . . . student organizations are subject to rules, policies, and procedures of the institution and the board," State Board of Education Governing Policies and Procedures, Section III, P.14. See also, id., Section III, P.8 (student

government constitutions "must be consistent with Board Governing Policies and Procedures").

In summary, student activity fees collected at the institutions are public funds, subject to the control of the state board of education and the board of regents.

The related question then is; given a request to expend student activity funds for litigation against the board and/or the institutions under its governance, whether the board may deny or otherwise prohibit the use of student activity funds for litigation by student groups. While, again, there appears to be no Idaho case on point, a recent decision from the First Circuit Federal Court of Appeals answers this question in the affirmative. In Student Government Association v. Board of Trustees of the University of Massachusetts, 868 F.2d 473 (1st Cir. 1989), the court held that the university board of trustees' termination of a legal services office did not violate the students' first amendment rights, even if the termination was solely in response to suits against the university and its officers.

In 1974, the board established the Legal Services Office (LSO) within the university system. The board later authorized the LSO to assist students in various capacities, including representing students in litigation against the university. The LSO was almost exclusively funded by mandatory student activity fees. It also received indirect support from university funds by the provision of electricity, heat and office space on campus. Several years later the board rescinded authorization of the LSO to represent students against the university and its employees and later, as noted above, terminated the LSO, replacing it with the Legal Services Center, "which was prohibited from engaging in any litigation, and whose sole purpose was to provide primary legal advice to individual students and to educate students as to their legal rights." The student government filed an action against the board, claiming its order was motivated by the LSO's success in suits against the university and its officials and was intended to deter the students' ability to bring such lawsuits in the future.

The students contended that the university had created a "limited public forum," and that a trial should be held on whether the board's motive was to suppress a particular point of view, thus violating the first amendment. However, the court rejected the students' contention, stating:

The problem with the plaintiffs' syllogism is its premise. Forum analysis is inappropriate in this case because the LSO is not a forum for purposes of the

first amendment. Although fora have traditionally had a physical situs, (citations omitted), the supreme court has recently extended the concept of a forum to include intangible channels of communication (citations omitted). But even under this expanded view, we fail to see how the LSO is a forum. Since fora are channels of communications, we begin our analysis by identifying the two groups of people with whom the students are communicating: first, the persons with whom they have legal disagreements; second, the LSO's attorneys.

As regards the communication between the students and those against whom they have filed lawsuits, the channel of communication is the court system. The LSO attorneys helped the students to participate in this forum . . . The LSO merely represents an in-kind speech subsidy granted by UMass to students who use the court system.

Id., 868 F.2d at 476. The court went on to analyze the relationship between the attorneys and student clients and concluded that the U.S. Supreme Court's "subsidy" cases were controlling. As the court stated, "[T]he university has not tried to restrict first amendment rights of the students; all it has sought to do is to stop subsidizing the exercise of those rights." Id. at 477 (emphasis added). The students argued, in part, that the "subsidy cases" were not controlling because student fees were involved, not "state monies." The court rejected this argument, stating that:

Student activity fees do not "belong" to students. They are collected by UMass under authority of state law. (Citation omitted.) Payment of fees is voluntary only in the sense that one may choose not to enroll; apart from that, payment is a contractual condition of enrollment as a resident student. (Citation omitted.) Those fees are placed in the student activity trust fund. (Citation omitted.) That fund is administered by UMass officers, see id., subject to the direction of the board of trustees, who are authorized by statute to determine how the fees are to be spent.

Id. at 478 (emphasis added).

In summary, the court stated:

The basic lesson to be drawn from the Court's subsidy cases is that although the government may not place obstacles in the path of the exercise of constitutionally protected activity, it need not remove

obstacles not of its own creation. (Citation omitted.) Consequently, the state does not violate an individual's first amendment rights if it refuses to subsidize those activities of that individual that are protected by the first amendment.

\* \* \*

We now apply these principles to this case. First, UMass has refused to pay for the litigation expenses of its students, but there is no indication that UMass is penalizing any student for engaging in litigation. "A refusal to fund protected activity, without more, cannot be equated with the imposition of a penalty." McCrae, 448 U.S. at 317 n. 19, 100 S.Ct. at 2688 n. 19. Students who engage in litigation -- even those who are engaged in litigation against the university -- are not precluded from taking advantage of the LSC's services, nor are such students denied any independent benefit on account of their litigation activity. . . . We note . . . that the withdrawal of the subsidy is not framed in an invidiously discriminatory manner that is designed to suppress dangerous ideas. The 1987 order applies to all litigation (although litigation initiated at the time of the 1986 order was grandfathered) not just litigation advocating liberal or conservative causes.

Id. at 479 (emphasis in original). The court concluded its opinion in the following terms:

The plaintiffs here are "simply being required to pay for [their litigation expenses] entirely out of their own pockets." (Citation omitted.) Even if the 1987 order withdrawing UMass in-kind subsidy of student litigation was entered solely in response to LSO's suits against UMass and its officers, we hold that it does not violate the first amendment because it is non-selective, does not penalize students who engage in litigation, and will not result in the suppression of student litigation.

Id. at 482 (emphasis added). See also, Lyng v. International Union, 485 U.S. 360 (1988); Cammarano v. United States, 358 U.S. 498 (1959). Applying a similar rationale here, if the board chooses to respond in a non-selective manner, i.e., denying the use of board controlled funds for litigation by all student groups, and does not penalize students who do engage in litigation, then such action would not violate the first amendment.

2. May student government funds of Idaho's colleges and universities, that are collected through student-approved activity fees, be used to retain professional lobbyists?

The reasoning of the University of Massachusetts case discussed above will also have some applicability to this question. That is, while it is clear that the board may not, consistent with the first amendment to the United States Constitution, restrict the right of students to associate, even if the association takes the form of formal lobbying, nothing in the Constitution would appear to require subsidization by the board or the state of such an activity.

The United States Supreme Court has never dealt with this specific issue in the university setting. The bulk of the litigation in the lower courts in this area has centered around objections by dissenting students against the expenditure of mandatory student fees for such things as student newspapers, the editorial views of which dissenting students found objectionable. Kania v. Fordham, 702 F.2d 475 (4th Cir. 1983); Arrington v. Taylor, 380 F.Supp. 1348 (M.D.N.C. 1974); Veed v. Schwartzkopf, 353 F.Supp. 149 (D. Neb. 1973); Larson v. Board of Regents of University of Nebraska, 204 N.W.2d 568 (1973). Other objections have related to student association funded activities such as speaker series, films, and other miscellaneous student government expenses. See, e.g., Lace v. University of Vermont, 303 A.2d 475 (Vt. 1973); Good v. Associated Students of University of Washington, 542 P.2d 762 (1975). It should be noted that none of the cases cited have found mandatory student fees unconstitutional per se, and dissenting students' lawsuits have largely failed. The courts have generally exhibited a deferential approach to governing boards and institutions when it comes to student fees. The commentators who have dealt with the issue also appear to be in accord. See, e.g., E. Wells, Mandatory Student Fees: First Amendment Concerns and University Discretion, 55 U.Chi.L.Rev. 363 (1988); C. Steele, Mandatory Student Fees at Public Universities: Bringing the First Amendment Within the Campus Gate, 13 J.C.U.L. 353 (1987); Note, "Fee Speech": First Amendment Limitations on Student Fee Expenditures, 20 Cal.West.L.Rev. 279 (1984).

Two cases do deal specifically with certain aspects of the use of university collected student fees for lobbying purposes. In Smith v. Regents of the University of California, 248 Cal.Rptr. 263 (Cal.App. 1 Dist. 1988), dissenting students challenged the mandatory student fee collected by the University of California at Berkeley to fund certain activities of the student body organization, the Associated Students of the

University California (ASUC). Among the activities challenged were certain lobbying activities. The court described the lobbying activities as follows:

The ASUC also funds certain student lobbying organizations: the UC Student Lobby works in concert with representatives of other UC campuses on student-related issues before the state legislature and state administrative agencies. By way of illustration of its lobbying activities, the UC Student Lobby opposed legislation prohibiting the use of registration fees to fund abortions, supported legislation prohibiting rent discrimination against students, opposed legislation prohibiting mandatory student fees for student activities, and supported legislation reducing budget cuts for the university. The Berkeley Annex of the UC Lobby acts on campus to publicize the positions taken by the UC Student Lobby and to encourage students to write their legislators.

\* \* \*

The ASUC National Student Lobby lobbies Congress on student issues and encourages students to write their representatives. The issues of concern at the national level have centered on student financial aid.

Under university regulations and ASUC guidelines, off-campus advocacy activities are permitted only when related to student affairs or business. In that context, the university has consistently viewed ASUC operations as being university related.

248 Cal.Rptr. at 267-68.

In upholding the use of the student fees for various student activities, including lobbying, the court focused upon the regents' determination that such activities were consistent with the "university's educational mission." Id., at 272. As the court stated:

The Regents have obviously decided that the educational process extends beyond the classroom and includes extracurricular opportunities for students to be exposed to widely divergent opinions on various topics. The Regents have implicitly concluded that the use of student fees to finance student activities, including student groups that advocate positions on political and ideological matters, is necessary and related to the university's educational purposes. The broad powers

granted the university for the governance of its affairs gives the Regents wide discretion to determine the best course for the university's educational mission. We must defer to that decision. (San Francisco Labor Council v. Regents of the University of California, supra, 26 Cal.3d at p.788, 163 Cal.Rptr. 460, 608 P.2d 277).

Id. (emphasis added). Relative to the plaintiff's specific challenge to lobbying activities, the court stated:

Plaintiff's focus on ASUC lobbying organization's engagement in political as well as educational activities misses the mark. The test is not whether the activity is political but whether it is germane to the organization's purposes.

The Aboud Court [Aboud v. Detroit Board of Education, 431 U.S. 209 (1977)] expressly rejected the notion that attaching the adjective "political" to an activity is determinative. The Court recognized that by its very nature a public employees' union is involved in political activities to secure approval of public authorities and to obtain necessary budgetary appropriations decisions. (Citation omitted.) While declining to draw a line between permissible and impermissible political activities, the Court held that contributions may be compelled as long as the ideological activities are related to the organization's duties.

\* \* \*

Here, the lobbying activities -- confined to student and university issues -- are obviously related to ASUC's function.

In conclusion, we reject plaintiff's claim that the use of student fees to fund various student groups violates plaintiff's right of free speech.

Id., at 272-73. It should be noted that this decision has been appealed to the California Supreme Court and is still pending. As to the lobbying aspect of mandatory student fees, it does appear that the courts, if the Smith rationale is followed, are willing to pay a great deal of deference to the determination of the board of regents as to the educational merit, or lack thereof, of student lobbying activities.

The other case which dealt in part with student lobbying is Galda v. Rutgers, 772 F.2d 1060 (3rd Cir. 1985). In that case, a group of students asserted that their first amendment rights were violated by the university's imposition of a mandatory, refundable fee for the specific purpose of supporting a group called the New Jersey Public Interest Research Group (PIRG). PIRG was a group that participated in state legislative matters and actively engaged in research, lobbying and advocacy for social change. Because PIRG was independent of the university, it was ineligible, under the university's rules, to receive money from general student activity fees. Accordingly, through a separate procedure, PIRG received a fee of \$3.50 from each student, which PIRG was required to refund on request. As the court stated it, the specific issue in the case was "limited to whether a state university may compel students to pay a specified sum, albeit refundable, to an independent outside organization that espouses and actively promotes political an ideological philosophy which they oppose and do not wish to support." 772 F.2d at 1064. The court answered the question in the negative. As to the educational merit question discussed in Smith, supra, the Galda court stated that:

The university has presented no evidence, nor do we believe it could, that the educational experience which it cites as justification could not be gained by other means which do not trench on the plaintiff's constitutional rights.

Id., at 1067. The "constitutional rights" with which the court was concerned were the first amendment rights of dissenting students not to associate nor to be compelled to support political views and activities with which they disagree. The court, of course, made it clear that it was making "no judgment as to a voluntary contribution program." Id. at 1068.

Reading Galda and Smith together, it would appear that the Idaho State Board of Education would have the discretion to permit student activity fees to be expended for student lobbying activities if the board determines that lobbying would be consistent with, or an integral part of, the educational mission of the institutions of higher education within the state, and if the particular form of lobbying activity does not "trench on the [dissenting students'] constitutional rights." On the other hand, if the board were to decide not to fund such activity, as long as the board's decision is "content neutral," and does not amount to "viewpoint discrimination," such a decision would not be in violation of the first amendment. Gay and Lesbian Students Association v. Gohn, 850 F.2d 361 (8th Cir. 1981); Regan v. Taxation with Representation of Washington, 461 U.S. 540 (1982). Courts have found an encroachment upon first amendment rights

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when the governmental entity involved discriminates by withholding funding or a benefit otherwise available based upon a dislike or abhorrence of the content of the views espoused by a particular group.

In you have further questions, please do not hesitate to contact me.

Very truly yours,

BRADLEY H. HALL  
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State Board of Education  
and Deputy Attorney General