

January 20, 1997

Superintendent Anne C. Fox
Superintendent of Public Instruction
Department of Education
STATEHOUSE MAIL

Honorable William T. Sali
House of Representatives
STATEHOUSE MAIL

**THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE**

Dear Superintendent Fox and Representative Sali:

Per request for opinion from Representative Sali dated December 13, 1996, and Superintendent of Public Instruction, Anne C. Fox, Ph.D., dated December 13, 1996.

QUESTIONS PRESENTED

1. What is the definition of "public funds" under Idaho Law?
2. Are mandated student fees such as those imposed upon students attending Idaho state supported colleges and universities public funds?
3. What are the restrictions on the use of public funds to advocate for or against a candidate or ballot issue?
4. Does the First Amendment to the United States Constitution restrict the manner in which public funds may be spent, or impose any special obligations upon governmental entities which spend public funds to advocate in favor or against an election issue? Would an analysis under the First Amendment distinguish between tax generated public funds and non-tax generated public funds such as mandated student fees?
5. If a public entity spends funds in support or in opposition to an election issue, is it required to file a report or to otherwise comply with the Idaho Sunshine Law?
6. What remedies are available against public entities, officers, or employees which spend or who authorize spending of public funds in favor or against election or ballot issues? Please consider all remedies, civil, criminal and injunctive relief.

7. What is the potential liability on the part of a public officer or employee who uses or who authorizes the use of public funds to advocate for or against a candidate or ballot issue?

CONCLUSION

1. Public funds are defined as “moneys belonging to government, or any department of it, in hands of a public official.” Black’s Law Dictionary (6th ed. 1990).
2. Student activity and other mandated fees are considered public funds.
3. Public funds should not be expended to support or oppose candidates or election issues. However, in the case of mandated student fees, the expenditure of funds in support of certain political activities is not strictly prohibited, provided that safeguards are built in for students who oppose the stance being taken by student government or by any organization funded by student government.
4. If public resources or public funds are used in any way related to a ballot issue, there must be equal access to the funds or resources on the part of both opponents and proponents of a ballot measure.
5. The Idaho Sunshine Law does not apply to expenditures by public entities on ballot issues.
6. Idaho law does not provide specific remedies against public entities, officers, or employees who violate the prohibition against expenditure of public funds in support of or in opposition to a ballot measure. There is no Idaho case law on this point. Criminal statutes may apply, but more likely any remedy would be civil in nature.
7. Just as remedies are unclear under Idaho law, the liability of public officials who authorize the expenditure of public funds is likewise unclear. Public officers who authorize such expenditures conceivably could be subject to criminal liability. Civil liability making the public officer personally responsible for the expenditure or injunctive relief against the public officer is also possible.

ANALYSIS

Factual Background

During the 1996 election campaign, school districts and other public entities spent public funds in opposition to the most recent version of the one percent initiative. Public

moneys were used to print campaign flyers, political tracts, fact sheets, position papers and notices to patrons of school districts. Other state entities also made expenditures of funds in open opposition to the one percent initiative as well as against the bear baiting initiative. In addition, it has been alleged that the student governments at Idaho's universities authorized the expenditure of moneys in opposition to the one percent initiative. In prior elections, it has been alleged that student governments authorized expenditure of funds in opposition to other ballot measures. Annually, legislators and other public officials receive complaints of expenditures by school districts and municipalities to campaign for passage of bonds.

It is a common practice in Idaho and in other states for school boards, boards of county commissioners, city councils, individual legislators, the governor, the attorney general, and other public officers to take stands for or against various initiatives. Actions taken in support or opposition to ballot initiatives might include the passage of resolutions, statements of position, speeches or participation in debates. It appears well settled that this latter type of activity does not violate the public purpose doctrine or any rules regulating the expenditure of public funds. However, this opinion will examine the status of existing law concerning the expenditure of public funds to actively campaign for or against ballot measures or the expenditure of public funds to purchase advertising space, to produce television or radio ads or to print tracts which argue for or against a particular ballot measure.

Public Funds Doctrine

a. Prior Analysis of Public Funds and Public Purpose Doctrine by the Office of Attorney General

Questions relating to the expenditure of public funds for or against ballot issues have come up repeatedly for at least the past 20 years. In 1975, the Office of Attorney General issued Attorney General Opinion 6-75 concerning the expenditure of public funds on a bond election for an auditorium district. The opinion concluded that a taxing district may utilize public funds to advertise a bond election provided the funds used equally present the pro and con positions of the ballot question. Further, funds are not to be used for promotional advertising urging voters to pass the bond. Expenditures for informational advertising are permissible so long as that information is limited to information about the election, such as the location of polling places, the hours that polling places would be open, the bond authorization being sought and information regarding the cost of the bond to property owners.

In 1995, the Office of Attorney General issued Opinion 95-07 regarding the practice of Idaho state government agencies loaning state employees to the United Way for the United Way's annual fund raising campaign. That opinion concluded that the

loaning of employees violated the Public Purpose Doctrine and, further, that Idaho employees or facilities may not be shared or loaned to private charitable foundations unless the action serves a public purpose and is directly related to a function of government. Between these two opinions, a number of informal letters have been issued by the Attorney General's Office concerning public expenditures in support of school bonds, municipal bonds, and expenditures in opposition to ballot initiatives. All of these opinions have concluded that the expenditure of public money in opposition or in favor of a ballot measure violates the Public Purpose Doctrine and is an improper expenditure of public funds.

b. Basis of the Public Purpose Doctrine as it Relates to the Expenditure of Public Funds

Governments have available to them powers not available to private individuals or corporations. Governments at all levels have the ability to raise money through taxation. All citizens are subject to taxation whether or not they agree with the purposes to which the government intends to put the money. Generally, citizens may not challenge in court these expenditures so long as the government spends the money for a public purpose related to the function of government.

The First Amendment to the United States Constitution provides some basis for restricting public expenditures on ballot campaigns. One court has noted:

An interpretation of the pertinent language of the Campaign Reform Act as a grant of express authority for a partisan use of public funds in an election of this type would violate the First Amendment to United States Constitution, made applicable to the states by the due process clause of the Fourteenth Amendment. It is the duty of this Court to protect the political freedom of the people of Colorado. The freedom of speech and the right of the people to petition the government for a redress of grievances, are fundamental components of guaranteed liberty in the United States.

Mountain States Legal Foundation v. Denver School District, 459 F. Supp. 357, 360 (1978) (citations omitted).

Most courts have avoided an analysis under the First Amendment, with the exception of those courts addressing the issue of the expenditure of mandatory student fees.

The prohibition on the use of public funds in political campaigns is primarily based upon the public funds doctrine. This doctrine prohibits the expenditure of public

moneys for purposes unrelated to the function of government. As noted by the New York Supreme Court in Stern v. Kramarsky, 375 N.Y.S. 2d 235 (1975):

Public funds are trust funds, and as such are sacred and are to be used only for the operation of government. For government agencies to attempt to influence public opinion on such matters inhibits the democratic process through the misuse of government funds and prestige. Improper expenditure of funds, whether directly through promotional and advertising activities or indirectly through the use of government employees or facilities cannot be countenanced.

Id. at 239.

The prohibition on using public funds on political campaigns recognizes the vast amount of money available as well as the power and prestige of the state. Unchecked, governments or incumbents could use the resources available to them to control the outcome of elections.

The principles behind the Public Purpose Doctrine are as old as the Republic. A fundamental premise of American government is the principle that the people control the government. The government should never be allowed to control the people. Structural safeguards designed to protect the people from an overreaching government have long been part of American democracy. Among these safeguards is that public monies should only be used for public purposes. Indeed, Thomas Jefferson wrote:

To compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors is sinful and tyrannical.

Boyd, Papers of Thomas Jefferson, 545-47 (1950).

c. Definition of Public Funds

There are two Idaho statutes which define public moneys. Idaho Code § 57-105 defines public moneys:

“Public moneys” are all moneys coming into the hands of any treasurer of a depositing unit, and in the case of any county shall also include all moneys coming into the hands of its tax collector or public administrator.

Similarly, Idaho Code § 18-5703 defines public moneys:

The phrase “public moneys” as used in the two preceding sections includes all bonds and evidences of indebtedness, and all moneys belonging to any state, or any city, county, town or district therein, and all moneys, bonds and evidences of indebtedness received or held by state, county, district, city or town officers in their official capacity.

The definition used in these Idaho statutes is in accord with the general understanding of the terms “public funds” and “public moneys.” The generally accepted definition of public funds is:

Moneys belonging to government, or any department of it, in hands of public official.

Black’s Law Dictionary (6th ed. 1990).

d. Mandated Student Fees

Idaho state universities and colleges are not specifically authorized by the constitution or by statute to collect student activity fees. However, it has been generally accepted that such fees are generally authorized by the constitutional provision granting “general supervision of the state educational institutions” to the State Board of Education (Board). Idaho Constitution, art. 9, section 2. The Board’s governing policies and procedures identify activity fees as “local fees” which are deposited into local institutional accounts and are to be expended for the purposes for which they are collected. The activity fee funds are not deposited into the state treasury, but are instead administered on campus by university officials. The governing policies and procedures of the Board define activity fee:

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 or major capital improvement or 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, Subsection R, Page V-42.

Clearly, public funds are not limited to those funds derived from taxes. In Denver Area Labor Federation v. Buckley, 924 P.2d 524 (Colo. 1996), the Colorado Supreme

Court held that money in the funds administered by the Colorado worker's compensation fund constituted public moneys. The court then concluded that money in the fund could not be used to urge voters to vote for or against a ballot measure.

Although student activity fees are not state funds inasmuch as they are not controlled directly by the state treasurer, they appear to fit the definition of public funds. The use of such fees for political causes has restrictions as will be discussed more fully below.

e. Expenditure of Tax Generated Public Funds in Favor of or Against Ballot Issues

The question here is whether public entities may use money raised by taxes to influence the outcome of an election. Most courts that have addressed this issue have found the use of public funds to support or oppose a ballot issue improper, either on grounds that such use was not legislatively authorized (*ultra vires*), Mines v. Del Valle, 257 P.2d 530 (1927); Citizens to Protect Public Funds v. Board of Education of Parsippany—Troy Hills Tp., 98 A.2d 673 (N. J. 1953); Porter v. Tiffany, 502 P.2d 1385 (Or. Ct. App. 1972); Stanson v. Mott, 551 P.2d 1 (Cal. 1976); Palm Beach County Hospital v. Hudspeth, 540 So.2d 147 (Fla. Ct. App. 1989); and Smith v. Dorsey, 599 So.2d 529 (Miss. 1992), or on broader constitutional grounds, Mountain States Legal Foundation v. Denver School District No. 1, 459 F.2d 357 (D. Colo. 1978); Schultz v. State of New York, 654 N.E.2d 1226 (N.Y. 1995).

In Citizens to Protect Public Funds, *supra*, Justice (now former United States Supreme Court Justice) Brennan, writing for the New Jersey Supreme Court, determined that a school board had implied powers to use public funds to give voters some information about a school bond issue. However, the court held:

That a fair presentation of the facts will necessarily include all consequences, good and bad, of the proposal, not only the anticipated improvement in educational opportunities, but also the increased tax rate and such other less desirable consequences may be foreseen. . . .

The public funds entrusted to the Board belong equally to the proponents and opponents of the proposition, and the use of the funds to finance not the presentation of facts merely, but also arguments to persuade the voters that only one side has merit, gives the dissenters just cause for complaint. The expenditure is then not within the implied power and is not lawful in the absence of express authority from the Legislature.

Id. at 677.

Public expenditures in other elections are even more limited. There are strong policy reasons for precluding public expenditures in elections for office or initiative or referendum elections.

In Idaho, the right of the initiative is recognized in the state constitution at article 3, section 1. That section states in relevant part:

The people reserve to themselves the power to propose laws, and enact the same at polls independent of the Legislature. This power is known as the initiative, and legal voters may, under such conditions and in such manner as may be provided by acts of the Legislature, initiate any desired legislation and cause the same to be submitted to the vote of the people at a general election for their approval or rejection.

Some courts reviewing expenditures by public entities in initiative elections have specifically cited the constitutional recognition of the right of the initiative. In Mountain States Legal Foundation v. Denver School District No. 1, *supra*, the court, early in its opinion, hinted at the significance of the initiatives, stating:

That proposal was placed on the ballot by a voter's petition in the exercise of the power of the initiative, expressly reserved to the people in Article V, Section 1 of the Constitution of Colorado.

Id. at 358. The court then went on to condemn the practice of spending by public entities for or against ballot initiatives:

A use of the power of publicly owned resources to propagandize against a proposal made and supported by a significant number of those who are being taxed to pay for such resources is an abridgment of those fundamental freedoms. Specifically, where the proposal in question—placed before voters in the exercise of the initiative power—seeks fundamentally to alter the authority of representative government, opposition to the proposal which is financed by publicly collected funds has the effect of shifting the ultimate source of power away from the people. Do not the people themselves, as the grantors of the power of government, have the right to freely petition for what they believe is an improvement in the exercise of that power? Publicly financed opposition to the exercise of that right contravenes the meaning of both the First Amendment to the United States Constitution and Article V, Section 1 of the Constitution of Colorado.

Id. at 360, 361. The practice of using tax generated public funds to oppose a citizen initiative was likewise found to be an unlawful practice in Campbell v. Arapahoe County School District No. 6, 90 F.R.D. 189 (D. Colorado 1981).

Article 1, section 2 of Idaho's Constitution states: "[a]ll political power is inherent in the people." The initiative was established as a means of exercising this power. Idaho Constitution article 3, section 1. Because of the central importance of the initiative process in protecting the political power vested in the people, interference with the right of initiative by the use of government resources in opposition should be regarded with suspicion.

The use of public funds to support or oppose a statewide initiative could be considered a violation of the provision of the Idaho Constitution prohibiting the use of public funds for a private benefit. In Schulz v. State of New York, *supra*, the court considered whether public funds used in support of a local referendum violated a New York constitutional provision similar to Idaho's constitutional provisions prohibiting the granting or loaning of the state's money or credit to private individuals. The New York court recited the history of New York's provision, which is substantially the same as Idaho's. Both prohibitions arose out of a fear of government subsidization of the railroad industry. The New York court held:

We think it is unassailable that the use of public funds out of a state agency's appropriation to pay for the production and distribution of campaign materials for a political party or a political candidate or partisan cause in any election would fall squarely within the prohibition of Article VII, Section 8, Subsection 1 of the Constitution. Manifestly, using public moneys for those purposes would constitute a subsidization of a non-governmental entity—a political party, candidate or political cause advanced by some non-governmental group. Contrastingly, a governmental agency does not violate Article VII, Section 8, Subsection 1, merely by using taxpayers' funds for the valid governmental purpose of encouraging the public to participate in a democratic process by voting in an election. Nor would that constitutional provision prevent the use of public funds to inform and educate the public in a reasonably neutral fashion on the issues in an election so that voters will more knowledgeably exercise their franchise.

Id. at 1230. In Schulz, the plaintiffs were challenging a local board of education's use of public funds for the preparation and distribution of promotional materials advocating an affirmative vote on a bond proposition scheduled for public referendum.

f. First Amendment Implications

You have raised the issue of whether the First Amendment to the United States Constitution imposes restrictions on the use of public funds to advocate in favor or in opposition to ballot measures. The First Amendment as a potential source of restriction on such use as is noted in Mountain States Legal Foundation v. Denver School District No. 1, *supra*. However, most courts appear to have avoided First Amendment issues. They have construed these cases as issues of government power to expend funds on ballot issues rather than examining the issue of whether the expenditure is an infringement upon a citizen's First Amendment rights. Some courts have noted that the right of free speech involves also the right not to speak and that necessarily involves the right not to have one's money spent in support of an issue with which one disagrees. Most often, the First Amendment issue is not reached because these cases do not involve First Amendment questions, but, rather, involve issues of the power or authority of government to legally spend money to influence the outcome of elections.

In Anderson v. City of Boston, 380 N.E.2d 628 (Mass. 1978), the court noted:

We are offered little assistance from prior decisions. Although for more than 50 years the due process clause of the fourteenth amendment has protected the liberty of speech from invasion by state action, there has been no judicial consideration of the impact of the rights of freedom of speech on the right of state or local governments to use public funds to advocate a position on a question being submitted to voters.

Id. at 635 (citations omitted).

In State v. Kramarsky, 375 N.Y.S.2d 235 (N.Y. Sup. Ct. 1975). The plaintiffs were challenging expenditures by the New York Human Rights Commission in support of a constitutional amendment to be submitted to the voters. The court held that the issue to be examined was not free speech, but, rather, the power and authority of government to use public funds in a political campaign:

Thus the issue raised by the instant application is not one concerning freedom of speech or association, but whether it is a proper function of a state agency to actively support a proposed amendment to the state constitution which is about to be presented to the electorate in a statewide referendum.

Id. at 237. It must be noted that the issue in the New York case was not the free speech rights of those challenging the expenditure, but, rather, the First Amendment rights of the Human Rights Commission and its director to use state funds to campaign against the constitutional amendment.

In Campbell v. Arapahoe County School District No. 6, 90 F.R.D. 189 (1981), the court was urged by the defendants to interpret Colorado's Campaign Reform Act in such a way as to permit expenditures of public moneys in favor of ballot issues. Regarding this argument, the court stated that such an interpretation might violate the First Amendment:

Reading Section 1-45-116 in the manner urged by the defendants would also infringe upon those individual freedoms which are protected by the First Amendment to the United States Constitution, applicable to the States under the Fourteenth Amendment.

Id. at 194.

One place where the courts have applied First Amendment principles to the area of public funds is the expenditure of mandatory student fees. In light of the First Amendment, courts have considered a number of cases involving the use of mandatory fees to fund controversial or objectionable activities. Smith v. Board of Regents, 844 P.2d 500 (Cal. 1993), dealt with the expenditure of mandated student fees. The Smith court held:

To summarize, *Keller* and *Abood* teach that the state may compel a person to support an organization if there is a sufficiently compelling reason to do so, and that the organization's use of mandatory contributions must be germane to the purpose that justified the requirement of support.

Id. at 508.

Perhaps the most recent of these cases is Southworth v. Grebe, et al. (Eastern District Wis. 96-C-0292-S) (slip opinion). In that case, three students at the University of Wisconsin - Madison sued the university's board of regents claiming that the student activity fees were used to support student organizations engaged in political or ideological activities. At least part of the objection of the students was that their beliefs were very different from the activities they were being compelled to support. The district court granted summary judgment to the plaintiffs primarily because their First Amendment right to free speech had been violated.

In analyzing the case, the court identified First Amendment concerns, framing the issue:

In this case, plaintiffs contend that the use of mandatory segregated fees to subsidize student organizations that are engaged in political and

ideological activities violates their First Amendment rights not to be compelled to speak and associate. Defendants argue that the mandatory segregation fee does not compel speech on behalf of plaintiffs, but rather funds the expression of different views at the University of Wisconsin. To the extent that the segregated fee infringes plaintiff's First Amendment rights, defendants claim that such infringement is justified by the university's compelling interest in providing opportunities for free and wide ranging discussion of competing viewpoints. Accordingly, the parties' arguments in this case require the court to strike a balance between two very significant competing interests: the plaintiffs' constitutional right not to be compelled to financially subsidize political or ideological activities, balanced against the board of regents authority to promote the university's educational mission by providing opportunities for the free expression of diverse viewpoints on difficult and challenging issues.

Slip op. at 11. Since the issue involved fundamental rights, strict scrutiny was applied:

Because the imposition of mandatory fees implicates both freedom of speech and freedom of association, the court must consider plaintiffs' claims using a strict scrutiny analysis. Strict scrutiny provides that a state may infringe upon one's First Amendment rights to freedom of speech or freedom of association if it serves a compelling state interest, unrelated to suppression of ideas, and cannot be achieved through less restrictive means. *Chicago Teacher's Union, Local No. 1 AFT. AFL-CIO v. Hudson*, 475 U.S. 292, 303 Note 5 (1986).

Id. The court in Southworth held that distribution of mandatory student fees to subsidize political or ideological student organizations might be permissible, but any program providing for distribution of such funds must be carefully tailored:

Accordingly, just as the *Smith* court found that the students at U.C. Berkley were forced to support groups whose primary function was to promote political and ideological activities, plaintiffs are being compelled to subsidize student organizations at UW-Madison whose educational benefits to the UW-Madison are incidental to some student organizations' political and ideological activities. This court need not determine if each and every of the eighteen groups that plaintiff specifically challenged offer educational benefits that justify the infringement of plaintiffs' speech and associational rights. As long as more than a de minimus number of student organizations are using their funding from the segregated fee to engage in primarily political and ideological activity, defendant's

infringement of plaintiffs' First Amendment rights cannot be legally justified. . . .

. . . The university's compelling interest in promoting the free exchange of ideas by subsidizing the political and ideological student organizations does not justify such infringement because the university hasn't carefully tailored the implementation of its interest so as to avoid the unnecessary infringement of the First Amendment Rights of those students who disagree with the political and ideological messages being advocated by certain student organizations. This is not to say that these political and ideological student organizations cannot be funded by segregated fees of those students who do not object. These political and ideological student organizations contribute in a limited manner to the education function of state universities and can be funded by mandatory student fees such as the segregated fee, however, the university must provide some sort of opt out provision or refund system for those students who object to subsidizing political and ideological student organizations with which they disagree. Because the parties have agreed to fashion their own remedy in the event violation of plaintiffs' constitutional rights exists, this court will not address at this time that which it believes may be the appropriate remedy.

Slip op. at 8, 9.

The court recognized some legitimate university interest in funding activities or organizations which are political or ideological. However, it appears that the court also had in mind a remedy which would provide a refund to students of that portion of their student fee which would otherwise go to subsidizing such an activity. The court felt that given the unique circumstances of the university community such a balance was necessary to provide for the free flow and exchange of ideas.

It appears that a university may support student organizations through mandatory student fees because the free exchange of ideas is germane to the university's mission. However, safeguards must be built in to any such system. Such safeguards might include provisions for refunding money to students who disagree with political or ideological activities which do not directly relate to the university's primary mission.

g. Applicability of Sunshine Law to Governmental Entities

Whether or not the state's Sunshine Law, Idaho Code § § 67-6601 through 6628, applies to state agencies is primarily a matter of statutory interpretation. The Sunshine Law's definition of "person" includes "an individual, corporation, association, firm,

partnership, committee, political party, club, or other organization or group of persons.” Idaho Code § 67-6602(l). In addition, public agencies generally do not receive contributions, one of the triggering elements to be considered a “political committee.” Since public agencies do not fall within the definitions of the Sunshine Law, they are not subject to its provisions.

The primary purpose of the state’s Sunshine Law is one of disclosure. Both the Public Records Act and the Open Meeting Law apply to state agencies. These laws probably provide the appropriate disclosure as well as assuring that the public entities’ business is conducted in a public forum.

Construing the state’s Sunshine Law in such a fashion as to apply it to governmental entities might imply that the governmental entities have the right to make political contributions. In other words, state agencies and branches of government need not be subject to the state’s Sunshine Law unless it is felt that they possess the power or should be granted the power to make political contributions or to attempt to influence the outcome of elections.

The lack of mention of governmental entities in a state Sunshine Law was cited by the Massachusetts court in Anderson v. City of Boston, *supra*, in support of the proposition that the state agencies lacked the authority to spend funds in opposition to a state referendum. The Massachusetts’ Sunshine Law is found in the General Laws of Massachusetts, Chapter 55. In relying upon the Massachusetts Sunshine Law in support of its conclusion, the court held:

We interpret G.L.c. 55 as intended to reach all political fund raising and expenditures within the commonwealth. The absence of any reference to municipal corporations is significant, not as an indication that municipal action to influence election results was intended to be exempt from regulation, but rather as an indication that the Legislature did not even contemplate such municipal action could occur. We notice judicially that traditionally municipalities have not appropriated funds to influence election results. If the Legislature had expected municipalities would engage in such activities or intended that they could, G.L.c. 55 would have regulated those activities as well. We thus construe G.L.c. 55 as preempting any right which a municipality might otherwise have to appropriate funds for the purpose of influencing the result on a referendum question to be submitted to the people at a state election.

Id. at 634.

h. Remedies/Penalties

The absence of Idaho case law in this area makes it difficult to determine what is the most appropriate remedy to be pursued in cases where governmental entities or officers misuse public funds to influence the outcome of elections. At the outset, it appears that civil remedies are probably the most appropriate. The appropriateness of a particular remedy will depend upon the facts of each case.

The primary criminal provision that could apply to a public agency or officer is Idaho Code § 18-5701—Misuse of Public Money by Officers, which provides:

Each officer of this state, or of any county, city, town, or district of this state, and every person charged with the receipt, safekeeping, transfer or disbursement of public moneys, who . . . [w]ithout authority of law, appropriates the same or any portion thereof to his own use, or to the use of another . . . [i]s punishable by imprisonment in the state prison for not less than one (1) no more than ten (10) years, and is disqualified from holding any office in this state.

The severe penalties imposed by this code section are a strong deterrent. As a criminal statute, it is to be enforced by a county prosecutor. An aggrieved citizen cannot pursue enforcement on his own and therefore must rely upon government to remedy the shortcomings of government. More importantly, however, the annotations to § 18-5701 concern more traditional embezzlement and theft situations. There are no reported cases where this statute has been used to pursue a public agency or officer for spending money to influence the outcome of an election.

The Administrative Procedure Act (APA) may also provide remedies to citizens who object to the action of a public agency which is subject to the APA. This remedy would be pursued through the judicial review provisions of the APA. Under Idaho Code § 67-5273(3), an aggrieved party may file a petition for judicial review of a “final agency action other than a rule or order . . . within twenty-eight (28) days of the agency action, . . .” Not all public entities are subject to the APA. The APA does not cover the actions of local government entities.

A third remedy would be for an aggrieved citizen to seek injunctive relief against the public entity. The standards for either granting or denying a preliminary injunction are set out in Idaho Rule of Civil Procedure 65(e). Injunctive relief is prospective in nature and may not provide satisfaction in cases where the action complained of has been completed. In addition, in Harris v. Cassia County, 106 Idaho 513, 681 P.2d 988 (1984), the Idaho Supreme Court held that a preliminary injunction is granted only in extreme cases where the right is very clear and it appears that irreparable injury will flow from its refusal.

A board or public official who authorizes the expenditure of public funds which is later found to be illegal might be personally liable for the money spent. In other words, the board or officer who authorizes spending to advocate for or against a ballot issue might be called upon to refund to the public agency the amount of the expenditure.

As noted above, there are numerous cases around the United States where citizens have filed suit against public entities when those entities have spent money to attempt to influence the outcome of an election. Few of these cases have discussed standing. This seems remarkable given the reluctance of courts to grant standing to individual taxpayers who feel aggrieved by government action. Those cases which have addressed standing have done so in only a cursory fashion. The court in Stern v. Kramarsky, *supra*, simply ruled that the plaintiff had standing to bring the action and did not provide any further explanation:

Moreover, as a taxpayer and as president of an organization campaigning against the Human Rights Amendment, the plaintiff Annette Stern has requisite standing to maintain this action.

Id. at 240 (citations omitted). The New York court did not discuss the particularized injury of the plaintiff, although perhaps it is noteworthy that the court specifically mentioned that the plaintiff was president of an organization campaigning against the human rights amendment. Members of organizations who are sponsoring ballot measures which are opposed by governmental entities might have the particularized injury required to maintain standing.

Injunctive relief was seen as an appropriate remedy in Anderson v. City of Boston, *supra*. However, Chief Justice Hennessey writing for the Massachusetts Supreme Court, hinted that relief beyond injunction might be appropriate:

We come finally to the relief to which the plaintiffs are entitled. They seek an injunction against the city and its employees from taking certain action for the purpose or effect of influencing the outcome of the vote on the classification amendment.

The order which was entered on July 19, 1978 (see note 5 above), dealt with the expenditure of funds. Such an order is appropriate in an action brought under G.L.c. 40, Section 53 where a municipality is about to raise or expend money for purposes not authorized by law.

That order enjoins the city from using any funds specifically appropriated to be used to influence a vote on the classification

amendment. Of course, the city has no authority to use other appropriated funds, including services of any employees paid from funds appropriated for other purposes, for the purpose of influencing that vote. In our discretion, however, we decline to issue an order concerning municipal funds of any greater breadth than that already entered. We anticipate that the city will adhere to the requirements of the law which are stated in this opinion. No claim has been made concerning the recovery of funds already expended. Normally, G.L.c. 40, Section 53, “does not authorize the undoing of completed transactions.” We decline to express any view concerning whatever obligation there may be to restore, or to seek to recover, these amounts which were paid not only after this action was commenced, but also after the defendants had knowledge of the action. . . .

Our Order made no explicit reference to the use of city facilities, equipment, and supplies to advocate adoption of the classification amendment. The city intends to use office space and telephones for this purpose and to make them available to volunteers. It also intends to provide printed materials for distribution to the voters. From what we have said, it is apparent that the city’s use of telephones and printed materials provided by public funds, and its use of facilities paid for by public funds, would be improper, at least unless each side were given equal representation and access.

Id. at 640-41.

In Independent School District No. 5 v. Collins, 15 Idaho 535, 98 P.2d 857 (1908), two taxpayers brought legal action against a school board trustee to recover from the trustee the money paid to his business pursuant to a contract which was said to violate provisions of Idaho law. The district had paid the bill to the trustee’s business and the school board refused the demands of the plaintiffs to seek restitution from the defendant trustee. Regarding the remedy the Idaho Supreme Court held:

If money is illegally paid on such void contract, the district may recover it back and in case the district refuses to do so, any taxpayer of the district may, for and on behalf of the district, maintain an action for the recovery of the money so illegally paid.

15 Idaho at 541.

It is not clear whether Idaho courts would so easily find that taxpayers have standing to bring these actions today.

In the area of student fees, it appears from the Southworth case that students who may disagree with the use of student funds for political or ideological purposes must be given the opportunity of receiving a refund on that portion of their mandated student fees which went to support the political or ideological activity. This result, rather than a strict prohibition on expenditures, appears to be a recognition that universities are to foster the free flow of information as well as to encourage public debate.

CONCLUSIONS

Public agencies may not spend money to influence the outcome of elections. While public funds may be spent to encourage voter participation or to represent fairly both sides of an issue, funds may not be spent simply to support or to defeat a particular ballot issue. Government may sponsor candidate debates, debates on ballot issues and, in the case of bond elections, certain basic information such as the amount of the bond sought, what it is to be used for and its effect upon property owners.

Certainly, elected officials may state their position on issues of the day, as well as their opinion on ballot measures. School boards may pass resolutions indicating their position on a ballot measure, but the expenditure of public funds to defeat a measure or to support a measure is prohibited.

The courts have used strong language in condemning the practice of spending public funds to influence the outcome of elections. The Massachusetts court in Anderson v. City of Boston, *supra*, stated:

Fairness and the appearance of fairness are assured by a prohibition against using public tax revenues to advocate a position which certain taxpayers oppose. The commonwealth's interest in fairness and in the appearance of fairness is particularly significant in the face of the defendant's argument that no limit may be imposed on the city's expenditure of tax revenue for vigorous advocacy on a referendum question. On this view, the commonwealth is apparently powerless against political entities of its own creation.

Assuming that the commonwealth has no right to restrict such advocacy where there is no opposition from any affected citizen, the commonwealth has a compelling interest in restricting such advocacy where the affected citizenry are not in unanimity. The commonwealth has an interest in assuring that a dissenting minority of taxpayers is not compelled to finance the expression on an election issue of views with which they disagree. Unlike the shareholders of a private corporation, real

estate taxpayers such as plaintiffs cannot avoid the financial consequences of the city's appropriation of funds.

380 N.E. 2d at 639 (citations omitted).

Similarly, the court in Mountain States Legal Foundation v. Denver School District No. 1, *supra*, stated:

Indeed, every court which has addressed the issue to date has found the use of public funds for partisan campaign purposes improper either on the ground that such use was not explicitly authorized or on the broader ground that such expenditures are never appropriate. As in the instant case, the majority of these decisions related to expenditures in connection with bond elections.

Underlying this uniform judicial reluctance to sanction the use of public funds for election campaigns rests an implicit recognition that such expenditures raise potentially serious constitutional questions. A fundamental precept of this nation's democratic electoral process is that the government may not "take sides" in election contests, or bestow an unfair advantage on one of several competing factions. A principal danger feared by our country's founders lay in the possibility that the holders of government authority would use official power improperly to perpetuate themselves or their allies in office. The selective use of public funds in election campaigns, of course, raises a spectre of just such an improper distortion of the democratic electoral process.

459 F. Supp. at 360 (citations omitted). Perhaps the strongest language used in condemning expenditures of public funds to influence the outcome of elections came from the New York Supreme Court in Stern v. Kramarsky, *supra*. In that case, after ruling that the New York Human Rights Commission could not spend money to advocate in favor of passage of a human rights amendment, the court went on to conclude:

The spectacle of state agencies campaigning for or against propositions or proposed constitutional amendments to be voted on by the public, albeit perhaps well motivated, can only demean the democratic process. As a state agency supported by public funds, they cannot advocate their favorite position on any issue or for any candidates, as such. So long as they are an arm of the state government, they must maintain a position of neutrality and impartiality.

It would be establishing a dangerous and untenable precedent to permit the government or any agency thereof, to use public funds to disseminate propaganda in favor of or against any issue or candidate. This may be done by totalitarian, dictatorial, or autocratic governments, but cannot be tolerated, directly or indirectly, in these democratic United States of America. This is true even if the position advocated is believed to be in the best interest of our country.

Id. at 239.

There is nothing contained in the Idaho Statutes or in Idaho case law to indicate that an Idaho court would reach a different conclusion.

Very truly yours,

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