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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

May 31, 1995

The Honorable Joe Wilson
Senator, District No. 23
606 Gressette Building
Columbia, South Carolina 29202

Re: Informal Opinion

Dear Senator Wilson:

By your letter of April 26, 1995, you have raised several questions concerning the legality of certain activities that were recently orchestrated by various school district administrators in an effort to arouse opposition to the education portion of the Annual Appropriations Bill that was being considered by the South Carolina House of Representatives. Each of your questions will be addressed separately, as follows.

Question 1

> Does the South Carolina Code sanction the use of (a) public employees, (b) public buildings, (c) public facilities (telephones, photocopiers, postage meters, stationery, printing machines), and (d) school children in the custody of school officials to organize and execute political protests?

This Office has previously issued advisory opinions that address questions similar to your own. By an opinion dated May 29, 1979, this Office determined that the St. Andrews Public Service District Commission would not be authorized to expend District funds to oppose formally the proposed incorporation of a portion of the District's service area.

The basis of the opinion was, first, that the South Carolina Constitution requires every expenditure of public funds to be for a public purpose. Art. X, § 5. Moreover, the legal authorities at that time were in apparent agreement that the expenditure of public funds to obtain or oppose legislation would not be authorized in the absence of express statutory language to the contrary. Since the District lacked statutory authorization to expend public funds to oppose the incorporation, the opinion concluded that the District's funds could not be used for that purpose.

More recently, this Office examined the same issue in an opinion dated November 2, 1990. (Copy enclosed; see response to question 3.) Therein, we recognized the difficulty in articulating a per se rule because the law continues to evolve in this area. The courts now seem to be recognizing a difference between educating and informing the public on a particular issue, on the one hand and advocating a specific outcome, on the other. As was observed in that opinion:

> [W]e advise that the resolution of the question may ultimately be up to the courts. The law is still evolving in this area, and courts are becoming less reluctant to prohibit all aspects of government speech. On the other hand, a court must be assured that where public funds are expended, such activities possess a valid public purpose. The activities of an individual official, employee, or political subdivision (through its governing body) will require examination to determine whether such activities are educational, informative, or advocatory in nature .... (emphasis added).

The courts have defined public purpose as one which has as its objective "the promotion of the public health, morals, general welfare, security, prosperity, and contentment of all the inhabitants or residents within a given political division." Carll v. South Carolina Jobs-Economic Development Authority, 284 S.C. 438, 327 S.E.2d 331 (1988). In determining what constitutes a public purpose, courts resort to a factual analysis on a case by case basis. Generally, a balancing test is utilized, whereby the benefit to the public is weighed against the benefit to private individual(s) or corporation(s). Moreover, to be a public purpose, the advantage to the public must be direct, not merely indirect or remote. Caldwell v. McMillan, 224 S.C. 150, 77 S.E.2d 798 (1953). However, "the mere fact that benefits will accrue to private individuals or entities does not destroy public purpose." Bauer v. South Carolina State Housing Authority, 271 S.C. 219, 246 S.E.2d 869 (1978). Finally, as the court stated in Anderson v. Baehr, 265 S.C. 153,

217 S.E.2d 43 (1975), each case must be determined on its own merits, considering each situation.

Accordingly, the answer to your question appears dependent upon the nature of the activities undertaken by the school district administrators and employees. If such activities are merely educational or informative in nature, the courts are more likely to consider such an expenditure of public funds to be for a public purpose. However, if such activities are advocatory in nature, the courts may more readily reach the opposite conclusion. Of course, the foregoing addresses only the issue of the use of public funds for lobbying purposes. No attempt has been made to address whether anyone associated with such an effort would be required to register as a lobbyist or a lobbyist's principal pursuant to the Ethics, Government Accountability, and Campaign Reform Act of 1991 (Section 2-17-5 et seq. and Section 8-13-100 et seq., S.C. Code Ann., 1976, as amended). By statute, the South Carolina State Ethics Commission is responsible for issuing opinions concerning the requirements of the Ethics Reform Act.

Question 2

> Would children who were provided scripts or who were coached ahead of time what to say at press conferences be required to have written permission from their parents or guardians to participate in such an event?

Although state law does not appear to require parental consent under these circumstances, some districts may have a policy requiring such consent.

Question 3

> Would these children who were utilized as background properties for this political theater (on school property during the hours they were required by law to be in school) need written permission from their parents or guardians, many of whom could well have supported the actions of the House of Representatives.

Again, state law does not appear to require parental consent under these circumstances, but certain school districts, by policy, may require such consent.

This letter is an informal opinion only. It has been written by a designated Deputy Attorney General and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

Sincerely,

Zeb Williams

Zeb C. Williams, III
Deputy Attorney General

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Enclosure