

VOLUME NO. 35

Opinion No. 74

FEES — University system, mandatory student; STATE BOARD OF REGENTS — Mandatory student fees, control of; determining expenditure of; UNIVERSITY OF MONTANA — Mandatory student fees, expenditure of; public funds. Article VIII, Section I and Article X, Section 9, Constitution of Montana; sections 75-8501, 75-8504, 75-8507 and 75-8601, R.C.M. 1947.

- HELD:**
- 1. Mandatory university system student fees are public funds.**
 - 2. Mandatory university system student fees must be expended for a public purpose determined in the first instance by the Montana board of regents.**

March 20, 1974

Mr. Lawrence K. Pettit
Commissioner of Higher Education
Montana University System
1231 Eleventh Avenue
Helena, Montana 59601

Dear Mr. Pettit:

On behalf of the board of regents of higher education, you have requested my opinion on the following questions:

1. Are mandatory student fees at the various units of the Montana university system public funds?
2. Can public funds be expended for a student committee to un-elect a public officer?

In your first question you have asked if mandatory student fees are public funds. Public funds are monies raised pursuant to operation of law and are the total income of the government derived from all sources. *Fergus v. Brady*, 277 Ill. 272, 115 N.E. 393 (1917).

The various units comprising the Montana university system are public educational institutions subject to the general control and management of the Montana Board of Regents. The Montana university system is a branch of state government created and existing pursuant to constitutional and statutory authority, Article X, Section 9 (2) (a) of the Constitution of Montana provides:

The government and control of the Montana university system is vested in a board of regents of higher education which shall have full power, responsibility, and authority to supervise, coordinate, manage and control the Montana university system and shall supervise and coordinate other public educational institutions assigned by law.

The powers and duties of the board of regents are set forth at section 75-8501, Revised Codes of Montana, 1947, providing in pertinent part that the regents shall:

- (1) Have general control and supervision of the units of the Montana university system, which shall be considered for all purposes one university.
- (2) Adopt rules and regulations, not inconsistent with the constitution and the laws of the state, for its own government which are proper and necessary for the execution of the powers and duties conferred upon it by law.
- (3) Provide, subject to the laws of the state, rules and regulations for the government of the system.

- (10) Have general control of all receipts and disbursements of the system.

Mandatory student fees are imposed at the various units of the Montana university system as a prerequisite to registration. These student fees are imposed pursuant to direct statutory authority vested in the regents at section 75-8601:

- (1) The regents may:
 - (a) prescribe tuition rates, matriculation charges, and **incidental fees** for students in institutions under their jurisdiction. (Emphasis supplied)

The regents have allowed a great degree of flexibility and control over these funds by the student government associations at their respective institutions. The board of regents' policy with regard to activity and athletic fees, item 3-003-R1273, provides:

Student activity fees, including athletic fees, at units of the Montana University System, as established by prior action of the Board of Regents, shall not be considered as earmarked funds in Board policy. It is intended that budget allocations shall be established by officers of the respective student government associations pursuant to the Associated Students Constitution of the units as approved by the presidents of said units. No impairment of existing contractual obligations shall occur. Unit presidents shall establish administrative policies and copies shall be filed in the Office of the Commissioner of Higher Education.

In *Stringer v. Gould*, 314 N.Y.S.2d 309 (1970), a petition was filed seeking an order directing the board of trustees of the University of New York to rescind a resolution relating to a **mandatory** student activity fee and to prevent disbursement of funds alleged to have been unlawfully appropriated for political and other purposes. The state university officials authorized the student body to impose a student activity fee and claimed to have no voice or control over any appropriations or expenditures of the fund. The New York Supreme Court stated, however, that "if the Trustees still retain control of the fund it becomes subject to the requirements of law for disbursement of **State funds** since payment of the fee has been made mandatory." The court enjoined the expenditure of the monies appropriated and concluded that the responsibility, control and supervision of a mandatory student activity fee rests with the trustees of the university.

As pointed out above, the imposition of mandatory student fees at the respective educational institutions in Montana are, as in the *Stringer* case, under the control and supervision of university officials. Section 75-8504 (4) (b), R.C.M. 1947, further provides that in carrying out their powers, the regents may:

. . . **obligate:**

(b) receipts from student building, **activity, union and other special fees prescribed by the regents for all students;**"
(Emphasis supplied)

The legislature categorized in section 75-8507 the funds enumerated in section 75-8504, *supra*, including student activity fees, as "state funds." It provides:

No **state funds** except those specified in section 75-8504 shall be obligated or used for the purposes of this chapter, unless specifically directed by the legislative assembly. (Emphasis supplied)

The Constitution of Montana now provides at Article X, section 9 (2)(d):

The funds and appropriations under the control of the board of regents are subject to the same audit provisions as are all other **state funds**.
(Emphasis supplied)

Since the authority to impose mandatory student fees is vested in the governing board of the Montana university system, a division of state government, and the ultimate control and supervision of these funds rests with the board of regents, mandatory student fees are public funds.

In response to your second question, whether public funds can be expended for a student committee to unelect a public officer, it is a general principle of constitutional law that public funds must be expended only for a public purpose. The Constitution of Montana, Article VIII, section 1, provides:

Taxes shall be levied by general laws for public purposes.

Even though the constitution does not specifically refer to the expenditure of public funds, case law has held that the same limitation is imposed upon the expenditure of public money as is imposed on the levy of public money by taxation. **Collier v. Yelle**, 9 Wash. 2d 317, 115 P.2d 373 (1941). Thus, public funds must be used for a public rather than a private purpose. The rule regarding expenditure of public funds applies notwithstanding the funds may have been derived from a source other than taxation. **Mahan v. Board of Education**, 171 N.Y. 263, 63 N.E. 1107 (1902).

What constitutes a public purpose for which public funds may be expended is not a matter of exact definition and must be determined on a case-by-case basis. "The paramount test should be whether the expenditure confers a direct public benefit of a reasonably general character, that is to say, to a significant part of the public, as distinguished from a remote and theoretical benefit." **Opinion of the Justices**, 337 Mass. 777, 150 N.E. 2d 693 (1958). Public purpose is synonymous with governmental purpose. **Stanley v. Jeffries**, 86 Mont. 114, 284 P. 134 (1929).

Pursuant to the authority vested by law, section 75-8501 (3), R.C.M. 1947, supra, the board of regents of the Montana university system may promulgate rules and regulations "for the government of the system", including the expenditure of mandatory student fees. The regents' policy with regard to expenditure of these funds is enumerated in Item 3-003-R1273, supra. Although discretion with regard to the expenditure of funds has been granted to the student governments, the activity fund is a public fund and is subject to the requirements of law for disbursement of public funds.

A review of the relevant case law indicates that public monies expended for the purpose of electing a political officeholder would not be an expenditure for a public purpose. A Massachusetts court has held that appropriation of public funds for the purpose of political campaigns would not be for a public purpose and, therefore, improper. **Opinion of the Justices**, 347 Mass. 797, 197 N.E. 2d 691 (1964). An analogous situation is presented when funds are to be expended in a campaign, through advertisements and other means, to remove an elected public officer. However, the concept of public purpose may expand or change with developing and changing conditions. What constitutes a public purpose in a particular instance is largely for determination by the legislature. **Stanley v. Jeffries**, supra.

The Montana legislature has delegated the control and responsibility of the public funds of the university system to the board of regents. Therefore, as the state agency in general control and supervision of mandatory student fees of the university system, the Montana board of regents is charged with the responsibility of determining whether the expenditure of these funds is for a public purpose. The legislature has vested the regents with statutory control of such funds and if the regents, or the university administrators as the regents' delegated agents, determine that student fees may be expended in a particular manner as a public purpose, that determination is in the first instance for their decision, subject to review by the courts.

THEREFORE, IT IS MY OPINION:

1. Mandatory university system student fees are public funds.
2. Mandatory university system student fees must be expended for a public purpose determined in the first instance by the Montana board of regents.

Very truly yours,
ROBERT L. WOODAHL
Attorney General