

**LETTER OPINION  
2004-L-55**

August 23, 2004

The Honorable Bob Martinson  
State Representative  
2749 Pacific Avenue  
Bismarck, ND 58501-2513

Dear Representative Martinson:

Thank you for your letter requesting my opinion on whether a school district may expend public funds to advocate the school board's position on a pending ballot measure. Consistent with recent opinions issued by this office, it is my opinion that while a school district may provide the public with neutral factual information, it may not, without express legislative authority, expend public funds to advocate the school board's position on a ballot measure.

**ANALYSIS**

Your letter concerns a ballot measure included on the recent primary election ballot. The question before the voters was whether to eliminate the Bismarck Public School District's existing unlimited mill levy. You submitted a flyer you indicated was mailed in a school envelope and apparently with school-paid postage to parents in the school district regarding the impact of the mill levy measure. The flyer (and others like it) was signed by a principal and the president of the local parent-teacher organization. The return addresses on the flyers included a Bismarck middle school and the Bismarck Public Schools' office. Press reports appear to indicate the flyers were sanctioned by the school board.<sup>1</sup>

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<sup>1</sup> See Sheena Dooley, *Bismarck Voters Back School District's Taxing Authority*, *Bismarck Tribune*, June 9, 2004 ("Letters were sent to parents and ads were run on the radio. Board president Marcia Olson said those efforts paid off. 'I was feeling very frustrated by the end of this because I didn't feel like we were getting our message out because if people understood what the results would be if the measure passed, they would vote in our favor, which they did,' Olson said. 'We kept on trying and using every avenue we could to get the word out and we were successful.'").

A similar situation was presented in N.D.A.G. 2002-L-61 involving a county using public funds to publish a newspaper insert containing information regarding a pending measure on whether to approve the construction of a new courthouse. One of the cases cited in the opinion was Citizens to Protect Public Funds v. Board of Education, 98 A.2d 673 (N.J. 1953). In that case, a school bond referendum was at issue and a local school board authorized funds for printing a booklet containing not only facts regarding school demographics, architectural sketches, the costs and tax impact, but urging a yes vote and listing the consequences of a no vote. I quoted the following passage from that case:

[t]he public funds entrusted to [a political subdivision] belong equally to the proponents and opponents of [a] proposition, and the use of the funds to finance not only 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 then is not within the implied power and is not lawful in the absence of express authority from the Legislature.

N.D.A.G. 2002-L-61 (quoting Citizens, 98 A.2d at 677-78). I concluded the following in N.D.A.G. 2002-L-61:

Although a fact-finder conceivably could reach a contrary conclusion, it is apparent to me that no fair minded reading of the newspaper insert could lead to a conclusion other than the overall intent and purpose of the newspaper insert was to promote passage of the bond issue, and not to provide a fair and balanced presentation of the issues before the voters. In my opinion the newspaper insert went beyond a fair presentation of facts to advocacy by the county for passage of the bond issue for a new courthouse. The expenditure of public funds for the newspaper insert in such a manner is inappropriate and unlawful.

Likewise, in this instance, while a fact-finder could conceivably reach a different conclusion, it appears to me that a fair-minded reading of the flyer in the context in which it was distributed was to promote defeat of the measure and not to provide a fair and balanced presentation of the issues. See note 1 above. The flyer mentioned that similar measures have failed twice in the past; it predicted significant staff and teacher layoffs and impacts on class size and possible consolidation or closure of smaller schools. The flyer also argued school programs, courses, teaching materials, and building maintenance would be adversely affected. It also downplayed potential property tax savings "compared to the potential long-term impact on property values if school quality in the community is compromised." While undoubtedly the passage of the ballot measure would have had serious fiscal effects for the school district's budget and programs, the flyer could have been drafted in a more fair and balanced manner.

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I found no statute that permits a school district to expend public funds for the purpose of issue advocacy on pending ballot measures. Cf. N.D.A.G. 2004-L-36 (district health unit authorized by law to expend public funds to publicize effects of secondhand smoke). Consequently, it is my opinion that while a school district may provide the public with neutral factual information, it may not lawfully expend public funds to advocate a school board's position on a pending ballot measure. School board members and district employees are certainly free to communicate their position on ballot measures that may affect the fiscal well-being of the district; they cannot, however, do so at public expense absent a statute permitting such activities.

Sincerely,

Wayne Stenehjem  
Attorney General

jjf/pg

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts. See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).