



DEPARTMENT OF JUSTICE

Justice Building
1162 Court Street NE
Salem, Oregon 97301-4096
Telephone: (503) 378-4400

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In 1985, we issued an opinion concerning the use of student incidental fees, which all students at Oregon public universities were required to pay to fund extracurricular activities.^{1/} The opinion addressed whether those fees could fund student organizations that would use them to engage in specific types of political or ideological advocacy. 44 Op Atty Gen 448 (1985). Since then, both the Oregon law authorizing the fees and the analysis that applies to assessing the constitutionality of using those fees for political purposes has changed. In light of those developments, we have been asked us to revisit our 1985 opinion and advise whether its conclusions should still be relied on. This opinion is limited to that question and does not attempt to answer the original questions under the current state of the law.^{2/} Below, we set out the question and our short answer, followed by a discussion of the 1985 opinion, the developments since then, and how those developments affect the continuing validity of conclusions in our 1985 opinion.

QUESTION PRESENTED

Do statutory and case law developments since 1985 affect the analysis used in the 1985 opinion such that any or all of its conclusions no longer should be relied on?

ANSWER GIVEN

Yes. Given those developments, the following conclusions should no longer be relied on:

1. That ORS 260.432 forbids providing student incidental fees to organizations that, through the expenditure of the received funds, will support or oppose ballot measures before Oregon voters;
2. That “constitutional constraints” prohibit providing student incidental fees to an organization that, through the use of received funds, will intervene or participate in any campaign, endorse or oppose a candidate, or take a position on an issue in an election campaign for the purpose of assisting or opposing a candidate; and,
3. That student incidental fees may fund organizations’ political or ideological speech activities only if the program is under the supervision or control of the board and if



the activity will directly benefit the collective interests of the students who must pay them. Off-campus activities generally will not meet the latter requirement.^{3/}

DISCUSSION

I. 1985 Attorney General Opinion

In 1985, the State Board of Higher Education, for each institution under its control, was authorized to:

Prescribe incidental fees for programs under the supervision or control of the board found by the board, upon its own motion or upon recommendation of the recognized student government of the institution concerned, to be advantageous to the cultural or physical development of students[.]

Former ORS 351.070(1)(d) (1985). That subsection's language was repealed by Or Laws 2013, ch 747, § 200. All students were required to pay those fees, in addition to tuition, as a condition of enrollment.

At that time, we were asked whether the fees could fund an organization that would use them to advocate definitive positions on: (a) ballot measures before Oregon voters; (b) legislation before the Oregon Legislative Assembly; (c) administrative rules or policies of state or federal agencies, including the State Board of Higher Education; or, (d) issues before state or federal judicial tribunals. 44 Op Atty Gen at 449.

A. **Former ORS 351.070(1)(d) authorized funding for political and ideological advocacy**

We first considered whether *former* ORS 351.070(1)(d) authorized the funding of political or ideological advocacy activities. We concluded that it did. We reasoned that "cultural" development encompassed the full spectrum of artistic, humanitarian and intellectual endeavors, including political or ideological advocacy, hence the board could find that those types of activities were advantageous to student cultural development. 44 Op Atty Gen at 453-54.

B. **ORS 260.432 prohibited certain expenditures for ballot measure advocacy**

We next considered whether an Oregon election finance law, ORS 260.432, prohibited funding organizations that would use the fees to promote or oppose the adoption of a ballot measure before Oregon voters. We concluded that it did.

ORS 260.432 (1985) provided, in pertinent part, that [n]o person shall attempt to, or actually, coerce, command or require a public employee to influence or give money * * * to promote or oppose * * * the adoption of a measure" and "[n]o public employee shall solicit any money * * * or otherwise promote or oppose * * * the adoption of a measure."

We found that statute to apply to the provision of student incidental fees, because the fees unquestionably were public funds and, although students were not public employees, any funded activity “must by definition be under the supervision and control of the board * * * [and] [t]he board cannot do indirectly that which it cannot do directly.” 44 Op Atty Gen at 456. Accordingly, we concluded that “the board does not have authority to fund through incidental fees an organization or program advocating support or opposition of a measure before Oregon voters.” *Id.*

C. Other constitutional constraints limited use for partisan election activities

Next, relying on “constitutional observations” made by the Oregon Supreme Court in *Burt v. Blumenauer*, 299 Or 55, 699 P2d 168 (1985), and the persuasive authority from other jurisdictions discussed in that case, we concluded that the fees could not be used “for any partisan election activities whatsoever” including “use of incidental fee funds by any group or organization to intervene or participate in any campaign, to endorse or oppose a candidate, or to take a position on an issue in an election campaign for the purpose of assisting or opposing a candidate.” 44 Op Atty Gen at 456-57.

In *Burt v. Blumenauer*, the Oregon Supreme Court considered whether county officials permissibly used county funds to oppose the adoption of an anti-fluoridation measure before the voters. The court held that ORS 260.432 prohibited that use. But, in what we acknowledged was dicta, the court engaged in a long discussion of potential constitutional restraints on the use of public funds by a government to take a position on a measure before the voters. The potentially pertinent constitutional restraints included the guarantee of a republican form of government, free and equal elections, and the rights of the people to consult for the common good and to instruct their representatives. 44 Op Atty Gen at 466 n 6.

Blumenauer concerned “government speech,” *i.e.*, the government using public funds to advance its own position before the electorate. The cases from other jurisdictions cited by the court in *Blumenauer* also exclusively concerned “government speech.” 299 Or at 58. Our opinion did not address whether funding student organizations that would use the funds to advance their own positions amounted to “government speech.” We simply concluded, without discussion, that “[o]ur conclusion * * * does not extend to the use of funds for making a campus forum available in which individuals or groups espouse their support or opposition on election matters, thus facilitating debate and exchange of wide-ranging viewpoints.” 44 Op Atty Gen at 466 n 8.

D. First Amendment constraints

Last, we discussed the lawfulness of appropriating incidental fees for lobbying before the Legislative Assembly and government agencies and for litigation activities. We concluded that no Oregon statute prohibited allocations for those uses; but the use of those fees for political/ideological speech-related activities implicated the free speech rights guaranteed by the First Amendment to the United States Constitution of students who were compelled to fund speech with which they disagreed. *Id.* at 457.

We relied on the United States Supreme Court's "compelled speech" precedents, particularly *Abood v. Detroit Board of Education*, 431 US 209, 97 S Ct 1782, 52 L Ed 2d 261 (1977), which involved a union's use of compulsory dues for lobbying and other political activities. The Court held that when the government forces individuals to contribute to the support of ideological causes that they oppose, their First Amendment rights are implicated. *Id.* at 234-35. To protect those rights, persons could be compelled to pay fees for those activities only if they are "germane" to the organization's mission. *Id.* at 235-36.

We summarized the appropriate analytical framework as follows: "expenditures are constitutionally permissible if a compelling or similarly weighty governmental interest is served by the funded activities and by the compulsory system for their funding * * * [and if] the programs supported by those fees * * * directly benefit the collective interests of the class members." 44 Op Atty Gen at 459.

Applying those principles to mandatory student incidental fees, we concluded that the state had a compelling interest "in facilitating a campus forum for the exchange of potentially controversial political and ideological viewpoints[.]" *Id.* at 460. We found equally compelling the state's interest in requiring all students to contribute financially. *Id.* at 461.

But we concluded that the "germaneness" requirement limited the circumstances in which fees paid by dissenting student could be used to fund political/ideological activities. We particularly cautioned that funding political or ideological advocacy in forums outside of the university environment might not meet the germaneness requirement, because those activities were less likely to serve the interests of students as a whole. *Id.* at 462. We also cautioned against funding the off-campus activities of "an entity devoted to the attainment of fixed ideological objectives; the cultural enhancement of the students forced to support the activity should be more than simply a by-product of the program if it is funded with incidental fees." *Id.*

II. First Amendment case law since 1985

Up until 2000, federal courts applied the same First Amendment analysis that we did in cases challenging public universities' authority to compel their students to fund political speech with which they disagreed. But in 2000, the United States Supreme Court ruled on such a challenge and applied a different analysis. In *Board of Regents of Univ. of Wisc. System v. Southworth*, 529 US 217, 120 S Ct 1346, 146 L Ed 2d 193 (2000), the Court considered whether the First Amendment prohibited the University of Wisconsin from compelling students to pay fees that would be used to fund registered student organizations (RSOs) that engaged in political and ideological expressive activities offensive to the students.

As a preliminary matter, the Court clarified that:

[t]he case we decide here * * * does not raise the issue of * * * the state-controlled University's right[] to use its own funds to advance a particular message. The University's whole justification for fostering the challenged expression is that it springs from the

initiative of students, who alone give it purpose and content in the course of their extracurricular endeavors.

* * *. If the challenged speech here were financed by tuition dollars and the University and its officials were responsible for its content, the case might be evaluated on the premise that the government itself is the speaker. That is not the case before us.

Id. at 229.

The Court held that the University “may determine that its mission is well served if students have the means to engage in dynamic discussions of philosophical, religious, scientific, social, and political subjects in their extracurricular campus life outside the lecture hall. If the University reaches this conclusion, it is entitled to impose a mandatory fee to sustain an open dialogue to these ends.” *Id.* at 233.

The Court found its compelled speech precedents to be applicable in that they correctly identified that First Amendment rights are implicated when individuals are compelled to fund speech with which they disagree. *Id.* at 231. But “the means of implementing First Amendment protections adopted in * * * [the compelled speech] decisions are neither applicable nor workable in the context of extracurricular student speech at a university.” *Id.* at 230. The court explained that the:

standard of germane speech as applied to student speech at a university is unworkable * * *.

The speech the University seeks to encourage in the program before us is distinguished not by discernable limits but by its vast, unexplored bounds. To insist upon asking what speech is germane would be contrary to the very goal that the University seeks to pursue. It is not for the Court to say what is or is not germane to the ideas to be pursued in an institution of higher learning.

Id. at 232.

Instead, the Court held that the way to safeguard the rights of dissenting students is to ensure that the mandatory fee system is administered in a viewpoint neutral manner that does not discriminate against minority views in favor of majority views. *Id.* at 233. This standard is taken from the Court’s “public forum” cases. The Court drew an analogy between the nonphysical forum created through the mandatory fee system and physical public forums like parks, where speech restrictions must be imposed in a viewpoint neutral fashion. *Id.*

The Court had first applied the public forum analysis in the context of mandatory incidental fees in *Rosenberger v. Rector and Visitors of Univ of Va*, 515 US 819, 115 S Ct 2510, 132 L Ed 2d 700 (1995). In that case, students claimed that the University of Virginia’s

refusal to use mandatory student fees to pay the publishing costs of a student newspaper that articulated a religious viewpoint violated their First Amendment right to free speech. *Id.* at 829.

As in *Southworth*, the Court concluded that the funded speech was not that of the University either directly or indirectly. Instead, the university program funded the private speech of students when it paid for speech-related activities with mandatory student fees. *Id.* at 834. The Court reasoned that in creating a mandatory student activity fee and allocating the fee to student organizations for speech-related activities, the university had created a limited public forum and could not exclude speech because of the viewpoint expressed. Viewpoint discrimination is presumed to be impermissible when directed against speech that is otherwise within the forum's limitations. *Id.* at 829-30.

The Court in *Southworth* addressed the details of a viewpoint neutral system for allocating mandatory student fees only in two particulars. First, it explained that the First Amendment does not require a distinction between on-campus and off-campus activities:

We find no principled way * * * to impose upon the University, as a constitutional matter, a requirement to adopt geographical or spatial restrictions as a condition for the student organization's entitlement to reimbursement. Universities possess significant interests in encouraging students to take advantage of the social, civic, cultural, and religious opportunities available in surrounding communities and throughout the country * * * [and] are finding that traditional conceptions of territorial boundaries are difficult to insist upon in an age marked by revolutionary changes in communications, information transfer, and the means of discourse.

Id. at 234. But the Court clarified that the university was free to enact viewpoint-neutral restrictions on funding off-campus speech if it determined that off-campus speech did not relate to the purpose of the fee.

Second, the Court expressed reservations about the use of a referendum process to allocate mandatory incidental fees for speech and expressive activities, reasoning that, to the extent that it substituted majority vote for viewpoint neutrality, the process would "undermine the constitutional protection the program requires." *Id.* at 235. It explained that "[a]ccess to a public forum * * * does not depend upon majoritarian consent." *Id.* To be clear: *Southworth* decided the First Amendment constraints on fee allocations only in a mandatory student-fee system. *Southworth* does not require the viewpoint neutral allocation of optional or refundable student fees. *Id.* at 232. Accordingly, the Court's reservations about a referendum process do not apply in the context of a non-mandatory or refundable fee system.

III. Oregon statutory changes since 1985

Pertinent Oregon statutory law has also changed since we issued our opinion. Those changes call into question the continuing validity of conclusions in our 1985 opinion. *Former*

ORS 351.070(1)(d) required that fees be provided only for programs “under the supervision or control of the board.” That statute has been replaced with ORS 352.105, which provides that:

(1) The board for each public university listed in ORS 352.002 shall collect mandatory incidental fees upon the request of the recognized student government under a process established by the recognized student government of a university in consultation with the board. The process may include a student body referendum conducted under procedures established by the recognized student government. Mandatory incidental fees collected under this section shall be allocated by the recognized student government.

(2)(a) The mandatory incidental fee, use of the fee or decision to modify an existing fee may be refused by the board or the president of a university under the board’s control if the board or president determines that:

(A) The recognized student government assessed or allocated the mandatory incidental fees in violation of applicable local, state or federal law;

(B) The allocation conflicts with a preexisting contractual financial commitment;

(C) The total mandatory incidental fees budget is an increase of more than five percent over the level of the previous year; or

(D) The fee request is not advantageous to the cultural or physical development of students.

(b) The mandatory incidental fee, use of the fee or decision to modify an existing fee may not be refused by the board or the president of a university based on considerations about the point of view that the funding seeks to advance.

(3) The recognized student government and the board shall seek to reach agreement on any dispute involving mandatory incidental fees, if necessary with the aid of mediation, prior to a decision by the board.

(4) If an agreement is not reached, the decision of the board may be appealed to the Higher Education Coordinating Commission by the recognized student government within seven days of the board’s decision. The board shall submit its response within seven days of the appeal. The commission shall render its decision within seven days of its receipt of the board’s response.

(5) Mandatory incidental fees are not subject to ORS 352.102.

IV. Case law and statutory changes affect the continuing validity of conclusions in our 1985 opinion

A. Applicability of ORS 260.432

As discussed above, ORS 260.432, an election finance law, prohibits certain actions by “public employees.” In our 1985 opinion, we concluded that ORS 260.432 applied when the State Board of Higher Education provided mandatory incidental fees to student organizations that would use them to advocate for or against a ballot measure. We reasoned that “[a]lthough students are not public employees, any activity lawfully funded with incidental fees must by definition be under the supervision or control of the board” and the board could not do indirectly what it could not do directly. 44 Op Atty Gen at 456.

Unlike *former* ORS 351.070(1)(d), ORS 352.105 does not require that programs funded with mandatory incidental fees be under the supervision or control of the boards that collect them. Hence, the statutory basis for our conclusion that ORS 260.432 applied no longer exists and our conclusion should no longer be relied on.

B. Constitutional constraints on government speech

Our conclusion that “constitutional constraints” prohibit the use of mandatory fees for partisan political activity also is in question given statutory and case law developments. As discussed, we based our conclusion on cases specific to “government speech.” The mandatory fee statute operative as of July 1, 2014, no longer limits funding to programs under the control or supervision of boards. And the United States Supreme Court has made clear that it does not consider mandatory incidental student fee systems similar to Oregon’s to implicate “government speech.” Those changes call into question the continuing validity of our conclusion that “constitutional constraints” applicable to government speech prohibit providing mandatory student incidental fees to students groups that will use them to engage in partisan political activities.

C. First Amendment case law since 1985^{4/}

Finally, the First Amendment analysis that we applied in 1985 no longer is correct in light of *Southworth*. Before July 1, 2014, there may have been some debate about whether the *Southworth* framework applied, as the Oregon statute permitted funding only for programs under the control or supervision of the board. That requirement raised at least some question whether Oregon’s system was distinguishable from the one reviewed in *Southworth* because the board might be deemed to have some responsibility for the speech. But under ORS 352.105 boards are no longer required to control or supervise the funded programs and the analytical framework in *Southworth* applies.

Under the *Southworth* framework, the pertinent analysis no longer is whether the political or ideological speech is germane to the university’s purpose. Thus, our application of the “germaneness” standard, and our conclusion based on that standard that use of the fees for

political or ideological speech was limited to uses that benefitted students as a whole no longer is correct. Allocations of mandatory student incidental fees for political or ideological speech activities now must be analyzed under the viewpoint neutrality standard.⁵¹ Moreover, the Court in *Southworth* expressly disavowed that the First Amendment requires universities to distinguish between on-campus and off-campus activities. Our conclusion to the contrary no longer is correct.



ELLEN F. ROSENBLUM
Attorney General

¹¹ In 1985, those fees were called “student incidental fees.” *Former* ORS 351.070(1)(d) (1985), since amended by Or Laws 2013, ch 747, § 200. They are now called “mandatory incidental fees.” ORS 352.105.

²¹ Oregon’s public universities generally no longer receive legal advice from the Department of Justice. *See* ORS 351.011(3) (providing that the Oregon University System “is not eligible to request or receive legal services from the Attorney General and the Department of Justice pursuant to ORS chapter 180, except as otherwise expressly provided by law.”); ORS 352.033 (providing that a university with its own governing board is not considered “a state agency, board, commission or institution for purposes of state statutes”); ORS 352.107(o) (universities with governing boards are authorized to hire attorneys “for the provision of all legal services”); ORS 180.060(2) (providing that the Attorney General shall give opinion in writing when requested by the Governor, any officer, agency, department, board or commission of the state or any member of the legislature). The Governor requested this opinion.

³¹ In 1985, we concluded that, under *former* ORS 351.070(1)(d), one condition for use of the fees was that the board determined the activity to be advantageous to the cultural or physical development of students. Under the new mandatory incidental fee statute, ORS 352.105, a board “may” refuse a fee request if it determines that the fee is not advantageous to the cultural or physical development of students.

⁴¹ In our 1985 opinion, we confined our free speech analysis to the federal constitution and did not consider the issue under the Oregon Constitution.

⁵¹ The viewpoint neutrality standard does not apply to optional or refundable student-fees systems.