



To Gift or Not to Gift: A Primer on Public Funds

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Origins of “Public Funds”

- In his first inaugural address, Thomas Jefferson equated “good government” with a “wise and frugal government” that among other things, does not “take from the mouth of labor the bread it has earned.”
- Jefferson’s observation is a primary reason why decisions on how to use public resources are especially sensitive. Most taxpayers understandably believe that a dollar that goes to the agency is a dollar they don’t get to spend (or, in Jefferson’s metaphor, the “bread out of taxpayers’ mouths”).
- Public dollars are a quintessential example of “other people’s money.”
 - Most public funds are acquired through the involuntary levy of taxes, compared to private revenues which are acquired through a voluntary transaction.

Public Funds Definition

- For purposes of state law, public funds are identified as any monies that are collected and retained in the community colleges' accounts. Community college funds are considered public funds, unless the college is acting as a custodian for privately raised funds in a separately maintained agency fund or account.
- Depending on how the auxiliary organization is formed, generally funds maintained by associated student body organizations, or ASBs, are quasi-public funds subject to the constitutional gift clause and direction and control by the board of trustees in the same manner as all other college funds.

Public Scrutiny Test

- ALL funds received by a college:
 - Are considered public funds.
 - Must be used to support the public purpose (i.e., the educational mission).
- A college should use the public scrutiny test when determining whether the expenditure is appropriate.
 - Questions: Will the tax-paying public view the expenditure as necessary to support public education? Can you defend the expenditure to a total stranger? Would it pass the “smell test”?
 - Answer: If you are already questioning whether the expenditure is appropriate, it may very well not be!

Nonpublic Funds Definition

- For purposes of state law, nonpublic funds are dollars that are collected and retained by outside organizations such as booster organizations and foundations. This also includes employee association accounts.
- The college should not act as custodian for privately funded monies of a separately maintained agency fund or account, such as a staff social fund paid for exclusively by employee contributions.
- Many college auxiliary organizations such as college foundations, bookstores, and associated student government are considered public benefit corporations and should be treated similarly.

California State Constitution Definition

- The use of public funds is strictly defined in the California State Constitution.
- Article 16, Section 6 prohibits public agencies, including community college districts, from making a gift of or lending public funds to any individual, association, municipal or other corporation.
 - The legislature shall have no power... “to make any gift or authorize the making of any gift, or any public money or thing of value to any individual, municipal or other corporation whatever...”

Let's Be Accountable

- As the Governmental Accounting Standards Board (GASB) white paper on [“Why Governmental Accounting and Financial Reporting Is – and Should Be – Different”](#) reported in April 2013:

Due to their unique operating environment, governments have a responsibility to be accountable for the use of resources that differs significantly from that of business enterprises. Although businesses receive revenues from a voluntary exchange between a willing buyer and seller, most governments obtain resources primarily from the involuntary payment of taxes. The restriction against gifts of public funds is in place to ensure accountability to constituents and prevent misuse of this public money. [Emphasis added.]

Public or Private Purpose

- As the California Supreme Court explained in *City of Oakland v. Garrison* (1924) 194 Cal. 298, 302, “Where the question arises as to whether a proposed application of public funds is to be deemed a gift within the meaning of that term as used in the constitution, the primary and fundamental subject of inquiry is as to whether the money is to be used for a public or private purpose. If it is for a public purpose within the jurisdiction for the appropriating board or body, it is not, generally speaking, to be regarded as a gift.” [Emphasis added.]
- The purpose of the expenditure, not the recipient, is the most important factor to consider.

Exceptions

- The expenditure of public funds is generally deemed to be for a public purpose when the expenditure:
 - Is specifically authorized by the constitution or statute.
 - Is the subject of a judicially-established exception.
 - Directly and tangibly benefits the education of students within the college (its own constituency).
 - If the governing board has reasonably determined that a particular type of expenditure serves a legitimate public purpose, is otherwise not illegal, and is within the scope of the college's jurisdiction and purpose, courts will generally defer to the board's decision.
 - Generally, the local board of trustees has broad authority.

Application to Education

- An expenditure that does not have an obvious, tangible benefit or connection to the education of the college's students should be carefully reviewed.
 - However, incidental private benefit is not an automatic disqualification.
- Consider the purpose, including specific grant requirements.

Consideration

- Consideration is a benefit or something of value commensurate with the amount of the payment.
 - Thus, an expenditure is not a gift if the college receives a benefit or something of value commensurate with the amount of the expenditure in exchange.

Can't Merely be for Goodwill

- The role of schools and colleges has evolved to supporting students in nontraditional ways. Schools and colleges no longer simply refer students to assistance; they now provide assistance directly. This includes items such as food, clothing and technology.
- Historically, unless specifically provided through a formally adopted program or grant requirement, a college's jurisdiction does not extend to the aid of the indigent and the like, or to the promotion of social welfare, though these may be lawful public purposes for other agencies.
 - The lines are blurring. Be thoughtful. Balance the public purpose, student need and the college's role. Exercise due care and diligence.

Can't Merely be for Goodwill (cont.)

- Even if an expenditure incidentally benefits an individual, it is not a gift if it serves a valid public purpose of the college.
 - The board policy or resolution should cite the reasons that justify the determination that the expenditure serves a public purpose.
 - The public purpose must be something more tangible than abstract “goodwill” or “public relations.”
- Expenditures driven by personal motives or moral obligations, or for noble or virtuous purposes such as a desire to convey compassion, sympathy, joy, or gratitude, are not justified and generally do not serve a primary public purpose and are therefore likely gifts of public funds, even if they have been a longstanding local custom or are based on benevolent feelings.

Governing Board Policies and Regulations

Governing board policy and administrative regulations govern everything at the college not covered by federal, state and local laws.



AND



Governing board policy and administrative regulations ensure there is an understanding of allowable and effective uses of public funds.

Good governing board policy is how to get to “YES.”

Importance of Board Policy

- If the governing board has determined that a particular type of expenditure serves a public purpose, courts will almost always defer to that finding.
 - Document the determination in the appropriate board policy.
- The following can be considered gifts of public funds unless in board policy:
 - Scholarships.
 - Donations to charity.
 - Recognition of, and awards to, students and employees for excellence, accomplishments, and exceptional contributions.

Examples of Useful Board Policies and Administrative Regs

- [2021 CAI Pre-Apprenticeship and Apprenticeship RFA, Appendix C “Guidelines, Definitions and Allowable Expenditures](#)
- [San Diego Community College District, Board Policy 2717 – Personal Use of Public Resources \(11/09/23\)](#)
- [K-12 Policy: Awards and Recognition](#)
- [K-12 Policy: Awards For Achievement](#)
- [K12 Administrative Regulation: Awards For Achievement](#)

Examples to Consider

- There are various circumstances to consider when determining whether a particular expenditure is a gift of public funds.
- The following slides outline some common scenarios and examples that reflect current executive, administrative and judicial interpretation of this legal principle.

Situations Requiring Scrutiny

- Celebrations (holiday, year-end, employee recognition) that involve refreshments and full meals for students or staff.
- Purchases of items such as high-end branded shoes, lettermen jackets, tickets to entertainment venues (e.g., Cirque du Soliel, Disneyland), gift cards.
- Contributions to political campaigns or charities/organizations.
- Travel exceeding college policy or reasonable limits.
- College employee official services as in-kind support / gift.
- Reimbursed purchases made outside of the normal district procurement process.
- Awards to community.

Generally Allowable Expenditures

- Expenditures not in conflict with, inconsistent with, or preempted by any law, and which is not in conflict with the purposes for which the public entity was established.
- Salaries and benefits for employees.
- Uniforms and regalia for college bands, choirs or athletic teams.
- Rental of caps and gowns for commencement ceremonies.
- Supplies and equipment, including instructional materials and textbooks.
- Maintenance of college facilities and equipment.
- Research and promotional activities to advance public education.

Generally Allowable Expenditures (cont.)

- Awards to students and employees for excellence, accomplishments, and exceptional contributions (if in board policy). But not for life events that occur for everyone.
- Flowers or decorations for a college's awards ceremony or commemorative event.
- Transportation services for students.
- Refreshments/meals for meetings for the purpose of conducting college business (e.g., curriculum meeting during lunch).
- Snacks, refreshments, and food for students during the instructional day that are deemed to contribute to the educational process (e.g., finals week, prepared to learn).

Generally Unallowable Expenditures

- Contributions or donations to religious, community, charity or other nonprofit groups.
- Purchase of private purpose flowers, other gifts, celebration or sympathy benefits to convey compassion or sympathy, or to meet a perceived moral obligation.
- Gift certificates for individuals.
- No exception for small gifts (*de minimis doctrine*).
- Alcohol.
- Memberships in private clubs or organizations.

Generally Unallowable Expenditures (cont.)

- Presents or gifts to anyone, including employees, volunteers, or students.
- Professional enhancement vs. public benefit.
- Holiday or other staff parties or picnics.
- Reimbursement for employees' mileage from their residence to their place of work.
- Personal benefit to college official; conflict of interest doctrine.

Charitable Contributions

- When might public agency support for charitable organizations be appropriate?
 - When the charity provides a service that complements or enhances one the public agency provides.
 - When there is an identifiable secondary benefit to the public agency.
 - When the charity provides a service the public agency could provide but chooses not to.
- Include in board policy a list of allowable charities using college or associated student organization funds, and include the benefits to the agency associated with providing resources to each specific charity.

Misuse of Public Funds

- Colleges and public officials can face legal liability, including taxpayer lawsuits, civil and criminal penalties, as well as the loss of public confidence, for the misuse or improper expenditure of public monies (California Government Code Section 8314 and Penal Code Section 424).
- The California Supreme Court also found that public officials may be held personally liable if they fail to exercise due care and reasonable diligence in authorizing the expenditure of public funds.
- Whether or not an official has acted with due care depends on various factors including, for example, whether the expenditure's impropriety was obvious, whether the official was alerted to the possible invalidity of the expenditure, and whether the official relied upon legal advice in making the expenditure.

Reminders

- Colleges and their employees are prohibited from using public funds for private purchases and expenses.
- In general, using college funds in a manner that is not either explicitly or impliedly legal is unlawful.
- Colleges should consult legal counsel for guidance if they believe an expenditure could be construed as a gift of public funds.

Conclusion

- All public agencies, including community college districts, are subject to the constitutional prohibition against gifts of public funds.
- In reviewing proposed expenditures, colleges should exercise due care and diligence in determining whether a particular expense serves a primary public purpose.
- Although the analysis may be somewhat confusing and unclear at times, in the world of public education, expenses are most likely justified when they will directly benefit the education of students at the college.
- The best way to guard against gift of public funds issues is through board policy.
- When in doubt, seek legal guidance.

Questions?

Thank You!