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March 10, 2016
AO-16- 01

Mitchell D. Chester, Ed.D.,
Commissioner
Massachusetts Department of
Elementary and Secondary Education
75 Pleasant Street
Malden, MA 02148-4906

Re: Appointed public officials taking a position on ballot questions

Dear Commissioner Chester:

This letter is in response to your recent request for an advisory opinion.

You have stated that you are a full-time state employee, serving as Commissioner of Elementary and Secondary Education. The Board of Elementary and Secondary Education (Board) appointed you as Commissioner in 2008, under the authority of M.G.L. c. 15, § 1F. Pursuant to that statute, you serve as secretary to the Board, its chief executive officer and the chief state school officer for elementary and secondary education in Massachusetts. Your general powers and duties as Commissioner are set forth in M.G.L. c. 69, § 1A. Among other duties, you are responsible for analyzing the present and future goals, needs and requirements of public education in the Commonwealth and recommending to the Board comprehensive means to achieve a well-coordinated system of high achievement in public education.

Several public education-related initiative petitions have been certified by the Attorney General and may appear on the ballot this fall. They include: "Initiative Petition for a Law Relative to Ending Common Core Education Standards" (Petition No. 15-12); and "An Act to Allow Fair Access to Public Charter Schools" (Petition No. 15-31). In addition, "An Initiative Petition for an Amendment to the Constitution of the Commonwealth to Provide Resources for Education and Transportation through an additional tax on incomes in excess of one million dollars" (Petition No. 15-17) has also been certified by the Attorney General, but since this petition would require a constitutional amendment, it will not be on the ballot this fall.



You anticipate that while acting in your official capacity as Commissioner, you will take a position on these ballot questions. You have asked several questions regarding the extent to which you "may use public resources to inform and guide public debate." Short answers follow each question and are explained in the discussion below.¹

QUESTIONS

1. May public resources be used to pay staff assigned to analyze the impact of the ballot questions?

Yes.

2. May public resources be used to prepare an official statement regarding your position?

Yes. As discussed below, however, public resources may not be used to proactively distribute the statement as part of a campaign for or against a ballot question.

3. May public resources be used to distribute information to the voters about your position?

No. Public resources may not be used to proactively distribute information to "guide public debate." As noted in response to Question 2, your staff may prepare a statement. The statement may be distributed to individuals or entities who ask for copies, but it may not be proactively distributed to voters using public funds. The statement may, however, be posted on the agency's website. In addition, like any other public record, the statement may be copied and distributed by a ballot question committee, using private funds.

4. May public resources be used to communicate with the Board regarding the ballot questions, including providing the Board with information about your position?

Yes.

5. May public resources be used to communicate with the press and the public regarding the ballot questions? For example, if a radio station asks for an interview regarding the agency's position on the ballot question, would it be appropriate for you to be interviewed and state during the interview that you support or oppose a ballot question? Also, would it be appropriate for you to write an op-ed piece for a newspaper, or call a newspaper and offer to speak with the editorial board of the newspaper, and then to visit the newspaper to discuss your views on the ballot questions?

Yes, such activities regarding a ballot question, relating to a matter within the scope of your official responsibilities, would be consistent with the campaign finance law.

¹ Please note that the answers in this letter are limited in scope to the campaign finance law. You should also consult with the State Ethics Commission to ensure compliance with the conflict of interest law, M.G.L. c. 268A.

DISCUSSION

Based on the Supreme Judicial Court's opinion in Anderson v. City of Boston, 376 Mass. 178 (1978) appeal dismissed, 439 U.S. 1069 (1979), public resources may not be used to promote or oppose a ballot question. See IB-91-01 (stating that public resources may not be used to distribute information regarding a ballot question, except to the extent authorized by statute).

In *Anderson*, the court recognized a distinction between appropriating funds and requiring staff to support a public information campaign to influence a ballot question, on the one hand, and speech regarding a ballot question on the other. The court stated that although municipal employees could not be required to devote time during the workday to a public information effort relating to a ballot question, "individual city employees may have certain rights of speech, even during working hours, concerning [a ballot question.]" 376 Mass. at 199-200.

Anderson does not prohibit officials from endorsing a ballot question, or acting or speaking regarding ballot questions, if in doing so they are acting within the scope of their official responsibilities. As noted in IB-92-02, "if appointed officials were prohibited from stating their positions regarding a ballot question related to their official responsibility, such a prohibition would unnecessarily (and probably unconstitutionally) restrain such officials from carrying out the duties of their offices."

In IB-92-02, the office listed several ways in which officials may speak regarding ballot questions. The bulletin stated that an official may, for example, "respond to questions from the press or the public about the official's position on a ballot question that is within the official's responsibilities." Such an official may not however, undertake actions that are inconsistent with his or her official responsibilities or the campaign finance law. Officials may therefore not expend public funds to campaign for or against a ballot question, e.g., by placing an advertisement in a newspaper urging a "yes" or "no" vote on the ballot question, or by distributing printed information to voters regarding the ballot question, unless authorized to do so by the Legislature.²

In applying the *Anderson* decision in the context of speech by policy-making officials, it is important to keep in mind that the decision prohibited the appropriation of \$975,000 by a city to urge voters through "vigorous advocacy" to influence an election. The kind of speech suggested by your questions is very different from and is not prohibited by *Anderson*.

Policy-making officials are customarily expected (if not required) to take positions on matters within the area of the official's responsibilities, or affecting their agency. An appointed policy-making official may speak to the press regarding a ballot question that concerns a matter within the official's area of responsibilities, but should be careful to avoid using public resources as part of a campaign to advocate a vote for or against a ballot question.

² See, e.g., M.G.L. c. 53, § 18B, allowing local government officials to provide information to voters regarding ballot questions in certain instances.

Commissioner Mitchell D. Chester, Ed.D.

March 10, 2016

Page 4

Consistent with this limitation, you may write "op-ed" pieces for a newspaper, and it would be appropriate to contact the editorial board of a newspaper or other media outlet and offer to provide the editorial board or media outlet with your views regarding the impact of a ballot question relating to a matter within the scope of your official responsibilities. During the course of the interview, you may indicate your support of or opposition to the ballot question. You may also, in the emails that you send out on a weekly basis to superintendents and other persons who have requested the emails, provide updates on legislative discussions regarding the issues that will be addressed by the ballot question.

In addition, the Board may make the agency's analysis available in response to requests and, like any other public record, the analysis may be copied and distributed, using private funds, by a private entity such as a ballot question committee. Also, the agency's analysis may be posted on the agency's website or Facebook page. If the analysis is posted on the website, a link to the analysis may be included in an agency newsletter, email, briefing, or social media post.

This opinion is issued within the context of the Massachusetts campaign finance law and is provided solely on the basis of the information provided in your letter and information provided by your staff. Please contact us if you have further questions regarding this or any other campaign finance issue.

Sincerely,

A handwritten signature in cursive script that reads "Michael J. Sullivan". The signature is written in black ink and is positioned above the printed name and title.

Michael J. Sullivan
Director