



State of New Jersey

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Via Facsimile Copier (212) 566-7116 and Regular Mail

April 27, 2011

Gregory E. Nagy, Esq.  
Genova, Burns & Giantomasi  
Trinity Centre  
115 Broadway, 15<sup>th</sup> Floor  
New York, NY 10006

### Advisory Opinion 01-2011

Dear Mr. Nagy:

The Commission considered your request for an advisory opinion at its meeting of April 26, 2011, and directed me to issue this response. You have submitted the request on behalf of “Better Education for New Jersey Kids, Inc.” (hereafter, “Better Education”). You stated that Better Education intends to make expenditures in New Jersey elections which fall within the definition of “independent expenditures” under the Reporting Act and Commission regulations, and you stated that Better Education will comply with all Commission filing requirements for the making of “independent expenditures.” You asked the Commission for a determination that Better Education is not a “political committee” or “continuing political committee” and that contribution limits will not apply to its fundraising. You consented to an extension of time to answer until the April 26, 2011 meeting.

### Questions Presented

1. Will Better Education incur a filing obligation for independent expenditures? 2. Will Better Education incur a filing obligation as either a political committee or a continuing political committee? 3. If Better Education incurs a filing obligation as either a political committee or a continuing political committee, do the contribution limits apply to its receipts?

### Commission Response

The Commission hereby advises you that Better Education will incur a filing obligation for independent expenditures when making expenditures for communications containing explicit election advocacy. Better Education will not incur a filing obligation as either a political

committee or continuing political committee because it does not have as its major purpose the support or opposition of candidates or public questions, or the making of expenditures for communications containing explicit election advocacy. The contribution limits, which apply to political committees and continuing political committees, therefore do not apply to its fundraising.

### **Submitted Facts**

You state that Better Education's objective is to influence public policy concerning the public school system. To achieve this objective, it plans to undertake public education, issue advocacy, and the making of independent expenditures. Better Education will not make monetary or in-kind contributions to candidates or committees and does not have a major purpose of aiding or promoting candidates, or supporting or opposing a public question. Further, the making of expenditures for communications with explicit words of advocacy to support or oppose candidates is not its major purpose. Better Education anticipates fundraising primarily in the State of New Jersey, but not with the stated or principal purpose of making contributions to New Jersey candidates or committees, and the entity will not reference candidates in its fundraising.

Better Education does not currently file with the Commission. You write that Better Education is organized as a "Section 527" organization under the Internal Revenue Code and will be submitting reports to the Internal Revenue Service of the contributions it receives and the expenditures it makes. It does not file with the Federal Election Commission (FEC) as a political committee.

### **Discussion**

#### **1. Will Better Education incur a filing obligation for independent expenditures?**

##### **Applicable law**

In general, an "independent expenditure," is an expenditure to support or defeat a candidate or public question in an election, which expenditure is not coordinated with a candidate or any other person or group. N.J.S.A. 19:44A-11 and N.J.A.C. 19:25-12.7. The Commission has interpreted "support or defeat" to require explicit election advocacy in the communications paid for by such expenditures, in accordance with the United States Supreme Court's decision in Buckley v. Valeo, 424 U.S. 1 (1976). Therefore, communications containing issue advocacy or other text not explicitly calling for the election or defeat of a candidate, or public question, do not fall within the Commission's definition of an "independent expenditure."

The Reporting Act defines an "independent expenditure" as follows: "It shall be lawful, however, for any person, not acting in concert with any other person or group, to expend personally from his own funds a sum which is not to be repaid to him for any purpose not prohibited by law, or to contribute his own personal services and personal traveling expenses, to support or defeat a candidate or to aid the passage or defeat of a public question...." N.J.S.A. 19:44A-11. The statutory requirement has existed since 1973. L. 1973 c. 83 §11, eff. April 24, 1973. The threshold expenditure amount is adjusted every four years pursuant to the cost-index adjustments, N.J.S.A. 19:44A-7.2, and is currently \$1,200.00.

Commission regulation N.J.A.C. 19:25-12.7 defines an "independent expenditure" according to whether or not the expenditure is made by an entity already reporting to the Commission, see

N.J.A.C. 19:25-12.7(a), or by “a person from his, her, or its own funds,” see N.J.A.C. 19:25-12.7 (b). Pursuant to these regulations, an independent expenditure is an expenditure of more than \$1,200 in an election, made without the cooperation or prior consent or suggestion of a candidate or any person acting on behalf of the candidate, “to support or defeat a candidate.” It is also an expenditure, made without consultation with or at the suggestion of any individual or committee supporting or opposing a public question, “to aid the passage or defeat of a public question.”

If the independent expenditure is “made by a person from his, her or its own funds,” expenditure information must be reported on a form (Form IND) which provides the name of the person making the expenditure, an itemization of the expenditure, and, if the maker is an individual, occupation and employer information. N.J.A.C. 19:25-12.8 (b). The expenditure information must be filed on the dates established for election-cycle reports by a political committee, and also within the 48-hour notice requirement if applicable, see N.J.A.C. 19:25-12.8A. Political identification requirements also apply to all independent expenditures, no matter what the source. See N.J.A.C. 19:25-12.7 (c) and N.J.A.C. 19:25-13.3, requiring an additional statement that the expenditure was not made with cooperation of a candidate or committee acting on behalf of a candidate.

As indicated above, the statute refers to a “person” who expends “personally from his own funds.” Commission regulation N.J.A.C. 19:25-12.7(b) refers to a “person” who expends from “his, her, or its” own funds. An incorporated entity such as Better Education, as well as an unincorporated entity, can fall within the category of a “person” making an independent expenditure. The Commission does not believe that the statutory or regulatory context restricts the maker of an independent expenditure to an individual as distinguished from a corporate entity, or an unincorporated entity. In fact, both statute and regulation add additional reporting requirements of occupation and employer information for a “person” who is an “individual” making an independent expenditure, see N.J.S.A. 19:44A-11 and N.J.A.C. 19:25-12.8 (b)2. See also Title 1 (“Acts, Laws and Statutes”) of the New Jersey Statutes Annotated, providing that the word “person” includes “corporations, companies, associations... unless restricted by the context to an individual as distinguished from a corporate entity.” N.J.S.A. 1:1-2 (“Words and phrases defined”).

### **Issue Advocacy Communications Distinguished**

The Commission’s “political communication” regulations, N.J.A.C. 19:25-10.10 and 10.11 specify when expenditure costs are reportable. N.J.A.C. 19:25-10.11(c) provides that any “political communication” not prepared, made or circulated with the consent or cooperation of a candidate and incurred or paid for by any other person or entity shall be reported in accordance with N.J.A.C. 19:25-12 (see N.J.A.C. 19:25-12.8, above). N.J.A.C. 19:25-10.10 (a) defines a “political communication” as a communication containing an “explicit appeal for the election or defeat of a candidate....” The definition of a “political communication” therefore does not include communications, uncoordinated with a reporting entity, that do not contain explicit election advocacy, or that are known as “issue advocacy” communications.

In Advisory Opinion 10-2001, the Commission wrote that issue advocacy expenditures undertaken by an entity do not generate reporting or other requirements under the Reporting Act. In that Advisory Opinion, the National Right to Life Committee, Inc. (NRLC) had written that its primary purpose was to administer and expend funds to encourage support for “pro-life issues, policies and programs” and to engage in “non-partisan voter education, including ...

voter guides, pamphlets ... and television advertisements....” NRLC intended to spend the threshold amount on communications not coordinated with any candidate, which communications would praise or criticize a gubernatorial candidate for his position on pro-life issues and actions while in office, without using express or explicit words advocating the election or defeat of a candidate. The Commission discussed and applied the United States Supreme Court’s reasoning in Buckley v. Valeo, 424 U.S. 1, 40-45. The Commission stated that a communication made independently of any candidate or political committee “must contain explicit words of advocacy of election or defeat of a candidate” in order to be subject to federal or state recordkeeping and reporting requirements, i.e., the communication must contain express words of advocacy of election or defeat, such as “vote for,” “elect,” “support,” “defeat,” “reject.” The Commission determined that the proposed communications were “issue advocacy” communications and could not be construed “to support or defeat a candidate” within the meaning of the independent expenditure reporting rules at N.J.A.C. 19:25-12.7 and 12.8. Advisory Opinion 10-2001. See also Advisory Opinion 11-2001.

### **Commission Response to Question One**

The information which you provided indicates that many of Better Education’s contemplated communications will be issue advocacy communications, which are not within the Commission’s jurisdiction. You indicated that Better Education intends to make “independent expenditures” and to comply with the filing requirements for such expenditures. To the extent that the expenditures are for communications containing explicit election advocacy, not coordinated with a candidate, or group as set forth in the definitions described above, Better Education will incur a filing obligation for independent expenditures as discussed above, pursuant to N.J.A.C. 19:25-12.7(b) and (c), N.J.A.C. 19:25-12.8(b) and N.J.A.C. 19:25-12.8A.

### **2. Will Better Education incur a filing obligation as either a political committee or a continuing political committee?**

#### **Applicable law**

The Reporting Act defines a “political committee” (PC) as “any two or more persons acting jointly, or any corporation, partnership, or any other incorporated or unincorporated association which is organized to, or does, aid or promote the nomination, election or defeat of any candidate... for public office...or... the passage or defeat of a public question in any election, if the persons, corporation, partnership or incorporated or unincorporated association raises or expends [\$2,100.00] or more to so aid or promote the nomination, election or defeat of a candidate...or passage or defeat of a public question. “ N.J.S.A. 19:44A-3i; N.J.A.C. 19:25-1.7.

The Reporting Act defines a “continuing political committee” (CPC) as “any group of two or more persons acting jointly, or any corporation, partnership, or any other incorporated or unincorporated association... which in any calendar year contributes or expects to contribute at least [\$4,900.00] to the aid or promotion of the candidacy of an individual, or of the candidacies of individuals, for elective public office, or the passage or defeat of a public question.... and which may be expected to make contributions toward such aid or promotion...during a subsequent election....” N.J.S.A. 19:44A-8; N.J.A.C. 19:25-1.7. The Commission must also certify the group as a CPC, see N.J.S.A. 19:44A-8.

Registration statement requirements and periodic, including pre-election, disclosure requirements of contributions and expenditures apply to political committees, which file on an

election-cycle basis, and continuing political committees, which file on a quarterly basis, see N.J.S.A. 19:44A-8 and 8.1. Contribution limits apply to political committees, except for public question political committees, and to continuing political committees, see N.J.S.A. 19:44A-11.3 through 11.5 and N.J.A.C. 19:25-11.1A. Political identification requirements also apply. N.J.S.A. 19:44A-22.3. The expenditure thresholds for filing are also adjusted every four years pursuant to N.J.S.A. 19:44A-7.2.

### **The “major purpose” test**

The Commission has also followed the Buckley decision in determining whether or not an entity making expenditures over the statutory monetary thresholds in an election or calendar year must file with the Commission as a “political committee” or “continuing political committee.” The Commission’s Advisory Opinions have required that an entity must have as its “major purpose” the support or opposition of candidates in order to comply with constitutional requirements set forth in Buckley.

**Advisory Opinion 06-2001.** In Advisory Opinion 06-2001, the Democratic Governors Association (DGA) asked the Commission whether or not it was subject to the reporting and other requirements of the Act as either a “political committee” (PC) or as a “continuing political committee” (CPC) based upon its activity. The Commission advised that under the submitted facts, the “major purpose” of DGA did not appear to be aiding or promoting New Jersey candidates or committees, and DGA should not be deemed to have recordkeeping and filing requirements as a PC or CPC. The Commission applied a “major purpose” analysis pursuant to the Buckley decision. The Commission stated that the Court in Buckley had written that to avoid reading the term “political committee” as applying to groups engaged purely in issue discussion, and thereby to avoid a potentially overbroad and constitutionally impermissible interpretation, the Court suggested that “political committee” be construed so that it “need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate.” Advisory Opinion 06-2001, citing Buckley at 424 U.S. 79.

The Commission determined that the New Jersey election activity undertaken by DGA was episodic and only a portion of its overall activities, and that it fell into the category of a “contributor.” The Commission further noted that in other fact circumstances, such as the solicitation of contributions with the stated or principal purpose of making contributions to New Jersey candidates or committees, or if the extent of the DGA’s overall activities and expenditures made it apparent that its “major purpose” was to aid or promote New Jersey candidates or committees, the PC or CPC definitions would become applicable.

**Advisory Opinion 10-2001.** In its Advisory Opinion 10-2001, discussed above under issue advocacy expenditures, the Commission also addressed reporting obligations as a political committee by an entity engaging in issue advocacy communications. The Commission determined that such an entity would not incur a filing obligation either for independent expenditures or as a political committee.

**Advisory Opinion 02-2003.** In Advisory Opinion 02-2003, the Commission considered whether or not the Continental Airlines, Inc. Employee Fund for a Better America (CEFBA) was a contributor as an “association or group” for purpose of the contribution limits, and whether or not CEFBA acquired a filing obligation as either a PC or CPC. The Commission determined that the CEFBA was a contributor as an “association or group” and not a PC or

CPC. The Commission's analysis was based upon three considerations: 1) the major purpose of the entity; 2) the solicitation of contributions; and 3) whether or not the entity also filed reports with the Federal Elections Commission (FEC). Based upon the representation that contributions to the entity were made "without knowing what candidates will be supported or what issues will be endorsed," the Commission concluded that the method of soliciting contributions "provides no evidence that its 'major purpose' is to aid or promote New Jersey candidates and committees."

### **Recent Federal case law**

Recent federal case law has concerned the constitutionality of government regulation of independent expenditures in elections. In Citizens United v. Federal Election Commission, 588 U.S. 1 (January 21, 2010), the United States Supreme Court held that a federal prohibition on corporate independent expenditures was unconstitutional. The Reporting Act does not have a prohibition on corporate spending in elections such as the one at issue in the Citizens United case.

Two months after the Citizens United decision, the Circuit Court of Appeals for the District of Columbia in SpeechNow.org v. FEC, 599 F.3d 686 (March 26, 2010) held that contribution limits applied to "political committees" making independent expenditures are unconstitutional. In an amended judgment dated October 28, 2010, the District Court for the District of Columbia enjoined the Federal Election Commission (FEC) from enforcing contribution limits for "political committees" making independent expenditures in federal elections. Both the Citizens United and the SpeechNow.org decisions upheld registration and reporting requirements.

It is important to distinguish between the definition of a "political committee" under New Jersey law, as discussed above, and the definition of a "political committee" under federal law. Under federal law, in general, an entity or group raising or spending more than \$1,000.00 to "influence" an election becomes a "political committee." See definitions at 2 U.S.C. §431 (4), 2 U.S.C. §431(8)(A), and 2 U.S.C. §431 (9) (A). The SpeechNow.org case addressed regulation under federal definitions.

The Commission does not believe that the recent federal case law compels the Commission to apply a different analysis other than the one followed above in answering your questions. The Commission also notes that legislation has been introduced in New Jersey to require registration and disclosure for issue advocacy organizations seeking to "influence" a New Jersey election by making independent expenditures. (See S-2379)

### **Commission Response to Question Two**

The information which you provided indicates that Better Education does not have as its major purpose the making of contributions to candidates, or the making of expenditures for communications with explicit election advocacy. You have further indicated that Better Education will not engage in fundraising with the stated purpose of making contributions to candidates, and that its fundraising solicitations will not use explicit words of advocacy of election or defeat of a candidate. The Commission therefore advises you that Better Education does not have a filing obligation as a political committee or continuing political committee.

**3. If Better Education incurs a filing obligation as either a political committee or a continuing political committee, do the contribution limits apply to its receipts?**

The Reporting Act and Commission regulations provide contribution limits for political committees and continuing political committees. If Better Education does not incur a filing obligation as a political committee or continuing political committee, the Commission's jurisdiction does not extend contribution limits to its fundraising.

**Conclusion**

The Commission hereby advises you that based upon the information which you provided, Better Education will incur a filing obligation for independent expenditures for communications containing explicit election advocacy. Better Education does not incur a filing obligation as a political committee or continuing political committee. Therefore contribution limits do not apply.

Your inquiry concerned campaign finance regulation. The Commission notes that under the lobbying laws, certain reporting requirements may arise in connection with "grassroots" lobbying, or communications with the general public, see N.J.A.C. 19:25-20.2 and N.J.A.C. 19:25-20.9A, and you should consult the Commission's Compliance Division concerning those requirements.

The Commission thanks you for your inquiry and for your extension of time to answer.

Very truly yours,  
Election Law Enforcement Commission

By: \_\_\_\_\_  
Carol L. Hoekje, Esq.

AO Request 01-2011



Advisory Opinion Request For Candidates and Committees

NEW JERSEY ELECTION LAW ENFORCEMENT COMMISSION
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PLEASE PROVIDE THE INFORMATION REQUESTED BELOW

A person, committee or entity subject to, or reasonably believing he, she or it may be subject to, any provision or requirement of the Campaign Reporting Act may request that the Commission provide an advisory opinion pursuant to N.J.S.A. 19:44A-6. Such request must include the following:

1. This request for an Advisory Opinion is being submitted on behalf of:

Full name of Person, Committee, or Entity:

Better Education for New Jersey Kids, Inc. (hereafter "Better Education" or "the corporation")

Mailing Address:

C/O Genova, Burns & Giantomasi

\*Day Telephone Number:

(212) 566-7188

Trinity Centre, 115 Broadway, 15th floor, NYC, NY 10006

\*Evening Telephone Number:

2. Indicate if the above named person, committee, or entity currently files reports with the Commission:

[ ] Yes [x] No

a. If yes, indicate in what capacity it is filing:

Candidate committee [ ]

Joint candidates committee [ ]

Political committee [ ]

Continuing political committee [ ]

Political party committee [ ]

Legislative leadership committee [ ]

Recall committee [ ]

Recall defense committee [ ]

Personal financial disclosure statement [ ]

Other (please describe): [ ]

b. If no, indicate if the above named person, committee, or entity has in the past filed reports with the Commission, giving elections (i.e., 2005 general election) or calendar years, and identify filing capacity:

N/A

c. If reports are or were filed under a different name than that appearing in Question #1 above, provide that name:

N/A

3. Please provide below a statement of the cognizable question of law arising under the Campaign Reporting Act, including specific citations to pertinent sections of the Campaign Reporting Act and Commission regulations (if known).

Is the corporation subject to any registration, reporting and/or contribution limit requirements under the New Jersey Campaign Contributions and Expenditure Reporting Act, N.J.S.A. 19:44A-1, et seq., (hereafter "the Act") and/or the regulations (N.J.A.C. 19:25-1, et seq.) of the Election Law Enforcement Commission (hereafter, "the Commission," or "ELEC") because it may make independent expenditures in New Jersey elections, other than the Independent Expenditure reporting requirements?

\*Leave this field blank if your telephone number is unlisted. Pursuant to N.J.S.A. 47:1A-1.1, an unlisted telephone number is not a public record and must not be provided on this form.





5. Please provide below a statement of the result that the person, committee, or entity seeks, and a statement of the reasoning supporting that result:

The corporation seeks an Advisory Opinion that states that because it intends to make solely independent expenditures in New Jersey elections it is not subject to any registration, reporting or contribution limit requirements under the Act or the Commission's regulations other than the filing of independent expenditure reports pursuant to N.J.A.C. 19:25-12.8 and 19:25-12.8A. Those rules require filing reports on the same dates as those applicable to a political committee, but do not require political committee registration and do not limit the amounts that may be donated by individuals to the corporation. Our reasons for supporting that result are set forth in the letter we have submitted with this request. We ask, therefore, that the Commission incorporate the enclosed letter as part of this request.

6. Person who is submitting this advisory opinion request on behalf of the committee or entity listed in Question #1:

Full Name:

Gregory E. Nagy, Esq.

Mailing Address:

Genova, Burns & Giantomasi

Trinity Centre, 115 Broadway, 15th floor, NYC, NY 10006

\*Day Telephone Number:

(212) 566-7188

\*Evening Telephone Number:

Fax Number:

(212) 566-7116

a. Official Capacity of Person Requesting Opinion:

Candidate

Treasurer

Organizational Treasurer

New Jersey Attorney representing requesting person, committee, or entity

Other (please describe):

7. ~~I hereby consent to an extension of the 10-day response period provided in N.J.S.A. 19:44A-6f to a 30-day period for Commission response, which period shall start on the date of Commission receipt of the completed advisory opinion request.~~

*The corporation hereby requests a response no later than March 16, 2011.*  
(CROSS OUT THIS PARAGRAPH IF CONSENT IS WITHHELD).

8. A request for an advisory opinion will not be considered filed until a fully completed and signed application is received by the Commission.

03-01-11

Dated:



Signature:

\*Leave this field blank if your telephone number is unlisted. Pursuant to N.J.S.A. 47:1A-1.1, an unlisted telephone number is not a public record and must not be provided on this form.

ANGELO J. GENOVA ◊+\*  
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 FRANCIS J. GIANTOMASI ◊+  
 JOHN C. PETRELLA ◊  
 JAMES J. MCGOVERN III ◊  
 LAURENCE D. LAUFER +  
 JEFFREY R. RICH ◊+  
 JUDSON M. STEIN ◊  
 SANDRO POLLEDRI ◊◊  
 KATHLEEN BARNETT EINHORN ◊+  
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 JAMES BUCCI ◊\*+  
 PATRICK W. MCGOVERN ◊+  
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 WILLIAM F. HARRISON ◊  
 DOUGLAS E. SOLOMON ◊+

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 LAWRENCE BLUESTONE ◊+  
 ERICA RUSTAD FERREIRA ◊~  
 ROBERT W. FERGUSON, III ◊  
 LAUREN J. MARCUS ◊

RONALD H. DeMARIA  
 (1939-2004)

MEMBER OF NEW JERSEY BAR ◊  
 MEMBER OF NEW YORK BAR +  
 MEMBER OF PENNSYLVANIA BAR \*  
 MEMBER OF DISTRICT OF COLUMBIA^  
 MEMBER OF FLORIDA BAR ~  
 MEMBER OF CONNECTICUT BAR ∞  
 CERTIFIED CIVIL TRIAL ATTORNEY ◊

March 1, 2011

ELEC RECEIVED

MAR 02 2011

**VIA OVERNIGHT MAIL**

New Jersey Election Law Enforcement Commission  
 28 West State Street, 13<sup>th</sup> Floor  
 Trenton, New Jersey  
 08608

Re: Request for Advisory Opinion

Dear Commissioners:

I write on behalf of our client, Better Education for New Jersey Kids, Inc. (the "corporation"). The corporation was recently incorporated pursuant to Section 15A:2-8, Corporations, Nonprofit, of the New Jersey Statutes. Further, the corporation has submitted notice to the Internal Revenue Service (IRS) of its "Section 527" status. As an Internal Revenue Code section 527 political organization, the corporation will be submitting reports to the IRS of the contributions it receives and the expenditures it makes.

The purpose of the corporation is to support transformational reform of the education system in New Jersey through political action. The corporation plans to make expenditures that will be within the scope of the term "independent expenditures." See *N.J.A.C. 19:25-12.7*. To date, no expenditures of this kind have been made. The corporation understands that if it makes independent expenditures in excess of \$1,200 it must submit to ELEC Independent Expenditure reports pursuant to *N.J.A.C. 19:25-12.8 and 19:25-12.8A*.

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The corporation has not and does not intend to make any monetary or in-kind contributions to or on behalf of any candidate committee, joint candidates committee, political committee, continuing political committee, political party committee or legislative leadership committee. *See N.J.A.C. 19:25-1.7* (defining “contribution”).

We seek an advisory opinion confirming, on the basis of the facts described above, that: (1) the contribution limits of *N.J.S.A. 19:44A-11.5(c)* and *N.J.A.C. 19:25-11.2* are not applicable to monies received by the corporation; and (2) the corporation’s contemplated activities would not subject it to regulation as a political committee or continuing political committee, or trigger any ELEC registration, reporting or recordkeeping requirement, other than the duty to submit Independent Expenditure reports, described above.

### Contribution Limits

In the absence of a prior ELEC pronouncement, we looked to developments in federal campaign finance law and found precedents we believe to be persuasive, given the similar statutory and regulatory nature of New Jersey law. Under the First Amendment, the amount of contributions may be limited by law, whereas the amount of independent expenditures may not be limited. *Buckley v. Valeo*, 424 U.S. 1 (1976). In *Citizens United v. FEC*, 130 S.Ct. 876 (2010), the U.S. Supreme Court held that corporations, like individuals, had a First Amendment right to make unlimited independent expenditures.

The holding in *Citizens United* is based on a long line of cases explicitly extending First Amendment rights to corporations in the context of political speech. *See First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 784 (1978) (political speech does not lose First Amendment protection “simply because its source is a corporation”); *see also Pacific Gas and Elec. Co. v. Public Util. Comm’n of Cal.*, 475 U.S. 1, 8 (1986) (plurality opinion) (“The identity of the speaker is not decisive in determining whether speech is protected. Corporations and other associations, like individuals, contribute to the ‘discussion, debate, and the dissemination of information and ideas’ that the First Amendment seeks to foster” (quoting *Bellotti*, 435 U.S. at 783)). Based on this long line of precedent and the recent holding in *Citizens United*, we respectfully submit that independent expenditures by corporations should not be treated differently than independent expenditures by individuals under the First Amendment and/or under ELEC’s independent expenditure regulations.

In *SpeechNow.org v. FEC*, 599 F.3d 686, 694-695 (D.C. Cir. 2010), the D.C. Circuit relied heavily on the *Citizens United* decision to strike down contribution limits applicable to groups that exclusively make independent expenditures:

In light of the Court’s holding [in *Citizens United*] as a matter of

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law that independent expenditures do not corrupt or create the appearance of *quid pro quo* corruption, contributions to groups that make only independent expenditures also cannot corrupt or create the appearance of corruption. The Court has effectively held that there is no corrupting “quid” for which a candidate might in exchange offer a corrupt “quo” . . . Given this analysis from *Citizens United*, we must conclude that the government has no anti-corruption interest in limiting contributions to an independent expenditure group such as SpeechNow.

*Id.*

Subsequently, the Federal Election Commission (“FEC”) issued two advisory opinions exempting the funding of political action committees making independent expenditures from federal contribution limits. See FEC Advisory Opinions 2010-09 and 2010-11. Specifically, in FEC Advisory Opinion 2010-09, a social welfare organization sought to establish a political committee, under IRC section 527, for making independent expenditures only. Pursuant to the *Citizens United* and *Speechnow.org* decisions, discussed above, the FEC concluded that because the new committee “intends to make only independent expenditures, there is no basis to impose contribution limits on the” contributions the committee receives. See Advisory Opinion 2010-09 at p. 4.

Similarly, in FEC Advisory Opinion 2010-11, a nonconnected political committee sought guidance from the FEC on its proposed plan to solicit and accept unlimited contributions to fund its independent expenditures. Because this political committee also would make only independent expenditures, the FEC concluded that “there is no basis to limit the amount of contributions to the [c]ommittee from individuals, political committees, corporations and labor organizations.” See FEC Advisory Opinion 2010-11 at p. 3.

We respectfully submit that the constitutional principles discussed above and in these FEC opinions are no less compelling in their application to New Jersey campaign finance law. We therefore urge the Commission to follow the reasoning of these opinions and likewise opine that that the contribution limits of *N.J.S.A. 19:44A-11.5(c)* and *N.J.A.C. 19:25-11.2* are not applicable to monies received by the corporation.

### **Registration and Reporting**

In addition to submitting Independent Expenditure reports to ELEC, the corporation will submit reports to the IRS listing contributions received in excess of \$200 and expenditures made in excess of \$500. It is clear, however, that the act of making independent expenditures

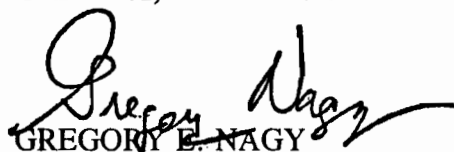
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does not subject a corporation to the additional registration, recordkeeping and reporting requirements of the Reporting Act (*N.J.S.A. 19:44A-1, et seq.*), because ELEC requires independent expenditures to be reported *regardless* of whether the individual or entity making the expenditure is subject to those other requirements. *See N.J.A.C. 19:25:12.7(a), (b) and 19:25-12.8(a), (b)*. Because the corporation will not make monetary or in-kind contributions to candidates or committees and it does not have a major purpose of aiding or promoting candidates, the corporation is not a political committee or a continuing political committee within the meaning of *N.J.A.C. 19:25-1.7*. *See, e.g.,* ELEC Advisory Opinions Nos. 06-2001 and 03-2003.

Thank you for your attention in this matter. Do not hesitate to contact the undersigned should you have any questions and/or see any additional information.

Respectfully Submitted,

GENOVA, BURNS & GIANTOMASI

  
GREGORY E. NAGY

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MEMBER OF FLORIDA BAR ~  
MEMBER OF CONNECTICUT BAR ∞  
CERTIFIED CIVIL TRIAL ATTORNEY ◊

March 8, 2011

ELEC RECEIVED

MAR 10 2011

VIA FACSIMILE TRANSMISSION AND OVERNIGHT MAIL

Carol L. Hoekje  
Legal Director  
New Jersey Election Law Enforcement Commission  
28 West State Street, 13<sup>th</sup> Floor  
Trenton, New Jersey  
08608

Re: Request for Advisory Opinion

Dear Ms. Hoekje:

We are in receipt of your letter, dated March 7, 2011, by facsimile transmission. On behalf of our client, Better Education for New Jersey Kids, Inc. (the "corporation"), we are pleased to have the opportunity to present additional information in addressing the questions you have raised. Specifically:

1. It is not clear what you mean by "to support transformational reform of the New Jersey education system through political action." Please explain the activity through which the entity anticipates achieving this objective.

*The corporation is seeking to influence public policy in the state of New Jersey to help bring about a public school system that serves and graduates students who will advance, compete and prosper in the real world. To achieve this objective, the*

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*corporation plans to undertake public education, issue advocacy, and independent expenditures.*

2. Please state specifically what the major purpose, or the major purposes, of the entity are as anticipated at the present time.

*See answer to question 1.*

3. Please state specifically whether or not supporting and opposing candidates in an election, or supporting or opposing a public question in an election, in the State of New Jersey, is anticipated as either: a) the major purpose; or b) a major purpose of the entity in this calendar year or in the next.

*As stated in my March 1, 2011 letter, "the corporation will not make monetary or in-kind contributions to candidates or committees and it does not have a major purpose of aiding or promoting candidates." Nor is supporting or opposing a public question in an election a major purpose of the corporation. Rather, the major purpose of the corporation is as stated in the answer to question 1 which primarily requires public education and issue advocacy. However, the corporation recognizes that in order to attain its goals it may be required to participate in the election process solely through independent expenditures and therefore would like to have that option available if needed.*

4. Does the entity anticipate making expenditures to support or oppose candidates in one or more New Jersey elections in this calendar year or in the next?

*Yes, solely by independent expenditure.*

5. If the answer to 4 is yes, are you able to identify a specific election at this time?

*No.*

6. If the answer to 4 is yes, will the expenditures be for communications which contain explicit words of advocacy of election or defeat of a candidate?

*Possibly yes.*



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7. If the answer to 6 is yes, please state whether or not the making of expenditures for those communications is anticipated as either: a) the major purpose; or b) a major purpose of the entity.

*No, the making of these expenditures is not the major purpose or a major purpose of the corporation.*

8. If the answer to 6 is yes, please state what percentage of the entity's total expenditures is anticipated to be spent for such communications.

*Undetermined, at this time.*

9. Does the entity anticipate engaging in other election-related activity in New Jersey elections other than activity that may have been described above? Please explain.

*No, the corporation will not make contributions in New Jersey elections; its only election-related activity will be independent expenditures.*

10. In addition to any expenditures described above, what other types of expenditures does the entity anticipate making?

*The corporation will make expenditures for public education and issue advocacy.*

11. What is the anticipated source of funding of the entity? Does the entity intend to engage in fundraising? Please describe the extent of anticipated fundraising, including the percentage of funds expected to be raised: a) inside New Jersey; b) outside New Jersey; or c) both.

*The corporation will raise private donations. The corporation hopes to raise in excess of \$1,000,000. The corporation anticipates raising most of its funds in New Jersey and some of its funds outside New Jersey.*

12. Does the entity anticipate soliciting contributions with the stated or principal purpose of making contributions to New Jersey candidates or committees?

*No.*

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13. Does the entity anticipate soliciting contributions with the stated or principal purpose or making expenditures in New Jersey to support or oppose candidates? Please explain.

*No. No particular candidates will be referenced in the corporation's fundraising solicitations.*

14. Does the entity anticipate soliciting contributions with the stated or principal purpose of making expenditures in New Jersey to support or oppose candidates using explicit words of advocacy of election or defeat of a candidate? Please explain.

*No. No explicit words of advocacy of election or defeat of a candidate will be used in the corporation's fundraising solicitations.*

15. Does the entity anticipate opening a separate depository account for the making of expenditures for New Jersey election-related activity?

*No.*

16. Does any New Jersey candidate participate in the management or control of the entity?

*No.*

17. Does the entity anticipate making expenditures for election-related activity in other states or jurisdictions? If so, please explain.

*No.*

18. Does the entity currently file with the FEC, or anticipate filing with the FEC as a political committee under the FEC requirements?

*No.*

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19. Please consult Commission Advisory Opinions 10-2001 and 11-2001. Does the entity anticipate making expenditures for "issue advocacy communications" as discussed in those Advisory Opinions? If so, what percentage of the entity's total expenditures are anticipated to be spent on such communications in New Jersey elections in this calendar year and in the next?

*Yes, the corporation anticipates making expenditures for issue advocacy communications. The percentage of spending for issue advocacy communications has not been determined at this time.*

20. When you state that the entity anticipates making "independent expenditures" as those are defined in the Reporting Act and Commission regulations, do you also mean to state that the communications paid for by these anticipated expenditures are not "issue advocacy communications" as discussed in Advisory Opinions 10-2001 and 11-2001? Please explain.

*No. The corporation anticipates making both independent expenditures and issue advocacy communications.*

Thank you again for the opportunity to address your questions. Please let me know if you need any additional information.

Very truly yours,

GENOVA, BURNS & GIANTOMASI

  
GREGORY E. NAGY