

Watch What You Say

Board Members Must Mind P's & Q's Regarding Campaign Speech

by Joy Baskin

School board members, like all citizens, have a role to play in the political process. But when board members spend public funds or act as a governmental body, state laws, such as the Election Code and the Open Meetings Act (OMA), may limit what trustees can say and when they can say it. The following Q&A outlines some important do's and don'ts for trustees during bond elections and their own reelection campaigns.

Bond Elections

Q: May school board members advocate in favor of calling a bond election?

A: Yes. Although there are limitations on when and how board members may advocate for the *passage* of a bond election, board members may advocate for and vote in favor of *calling* a bond election.

Q: May school board members and school employees advocate in favor of passing a bond election?

A: Not if public funds are used in the advocacy. Public funds may not be used, directly or indirectly, to advocate in favor of passing the bonds.

The Texas Election Code provides that an officer or employee of a political subdivision may not spend or authorize the spending of public funds for "political advertising." Tex. Elec. Code § 255.003(a) ("Section 255.003").

Political advertising means a communication supporting or opposing a candidate or a measure that, in return for consideration, is published in a newspaper or other periodical or is broadcast by radio or television; or appears in a pamphlet, circular, flier, billboard or other sign, bumper sticker, or similar form of written communication; or on a Web site. Tex. Elec. Code § 251.001(16).

Board members and school employees who violate this prohibition could face fines or criminal penalties, in addition to jeopardizing the validity of the bond election. In addition, the Texas Education Code provides, "Notwithstanding any other law, the board of trustees of an independent school district may not use state or local funds or other resources of the district to electioneer for or against any candidate, measure, or political party." Tex. Educ. Code § 11.168.

If a board member or school employee wants to send and receive personal e-mail advocating for a particular outcome in a bond election, we suggest using personal (not school) computers and e-mail accounts for the communications.

Q: May public funds be used to communicate anything about a bond election?

A: Yes, public funds can pay for the dissemination of factual information but not advocacy. The prohibition in Section 255.003 does not apply to a communication that factually describes the purposes of a measure, if the communication does not advocate passage or defeat of the measure. Tex. Elec. Code § 255.003(b). Factual informa-

tion includes information about what is at stake in the bond election, as well as information about the conduct of the election (date, polling sites, etc.).

The Texas Ethics Commission warns, however, that even communications with mostly factual information can still violate Section 255.003 if they also include persuasive slogans, such as "Do the Right Thing for Our Kids." For example, the commission concluded that a superintendent violated Section 255.003 by using district funds to pay for a brochure containing factual descriptions but also advocated a vote for the bonds. Tex. Ethics Comm. Sworn Complaint Order No. SC-230205 (2003).

The commission emphasizes that there is no *de minimis* exception to the amount of advocacy that can be included in school district materials. See the Texas Ethics Commission's pamphlet entitled *A Short Guide to the Prohibition Against Using Political Subdivision Resources for Political Advertising in Connection with an Election* on its Web site at www.ethics.state.tx.us/pamphlet/pad_pol.html.



Q: Does the prohibition on political advertising apply to e-mails sent to or from school district computers?

A: No, but board members should still be cautious with e-mail. In administrative rules adopted pursuant to the Election Code, the Texas Ethics Commission has adopted a definition of *political advertising* that repeats the statutory definition with one important exception: “the term [political advertising] does not include a communication by e-mail.” 1 Tex. Admin. Code § 20.1(13). Arguably, then, a school employee or official would not violate Section 255.003 by sending e-mails advocating for or against a bond election.

But beware! E-mails can be printed and passed out, thereby becoming fliers; employee time spent writing or even reading e-mails could be seen as an indirect use of funds; and finally, the Texas Education Code’s prohibition on electioneering may prevent board members from sending such communications. *See* Tex. Educ. Code § 11.168.

If a board member or school employee wants to send and receive personal e-mail advocating for a particular outcome in a bond election, we suggest using personal (not school) computers and e-mail accounts for the communications.

You may even consider adding a short disclaimer on e-mails you create stating that the e-mail is personal, rather than official school district business, and the e-mail was created using personally owned equipment and accounts.

Q: May the board pass a resolution in support of passing the bond election?

A: Conservatively, no. Although no public funds are

directly expended when board members state their opinions aloud in a board meeting or the board votes to pass a resolution in support of the bonds, the Texas Ethics Commission has indicated that district resources are used indirectly if the meeting occurs at a school district facility. Because the resolution is likely to be recorded, printed, and distributed in some way, including in minutes of the meeting, the commission recommends against this practice.

Q: May board members use their own time and money to campaign in favor of the bonds?

A: Yes. The Texas Ethics Commission states, “Although you may not use political subdivision resources for political advertising, you are free to campaign for or against a proposition on your own time and with your own resources.”

For example, a school board member may attend a community meeting, such as a Rotary Club meeting, and

advocate for passage of the bond election; a school board member may write a letter to the newspaper editor in support of the bonds; in fact, a board member may speak, write, or distribute political advertising of any sort, as long as school funds are not used directly or indirectly. See the Texas Ethics Commission’s pamphlet entitled *A Short Guide to the Prohibition Against Using Political Subdivision Resources for Political Advertising in Connection*



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with an Election on its Web site at www.ethics.state.tx.us/pamphlet/pad_pol.html.

Q: When using personal resources for political advocacy, does a school board member have to hide the fact that he or she is a sitting board member?

A: No. When engaging in advocacy using his or her own time and resources, a trustee need not conceal his or her position or claim to be acting as a private citizen. *See, e.g.,* Op. Tex. Ethics Comm. No. 321 (1996) (determining that a sitting judge did not violate the law by sending campaign solicitations on letterhead that she had purchased herself but that identified her position).

Q: May a school board member join a political action committee (PAC) to support the bonds?

A: Yes, but if several

board members join the same PAC, don't forget about the OMA. Board members are free to join special-purpose political action committees, organized under Texas Election Code Chapter 252. Board members may attend PAC rallies and related events; however, bear in mind that bond issues are public business over which the board has supervision or control, which means when a quorum is present, OMA requirements may be triggered. Tex. Gov't Code §§ 551.001(4)(A) (defining a meeting of a governmental body), .002 (requiring all meetings to take place in public), .041 (requiring all meetings to be posted).

School Board Campaigns

Q: During a reelection campaign, may a sitting board member use school resources to assist in his or her campaign?

A: No. Election Code Section 255.003, the same law that prohibits the use of public funds for political advertising during bond elections, prohibits the use of public funds in a campaign for election or reelection to the school board. For example, the Texas Ethics Commission found that a schoolteacher and school secretary broke the law when they distributed a campaign flier that they had created in the computer lab and copied on the school's copier for a school board candidate, even though they made and distributed the fliers before school and reimbursed the district for the costs. Tex. Ethics Comm. Sworn Complaint Order No. SC-210101 (2001).

Q: May a candidate ask a school employee to distribute campaign fliers through the school district's internal mailboxes?

A: No. Under Section 255.003, any use of school district employee time, no matter how minimal, is prohibited, as is any use of school district facilities, including, presumably, the mail system. *See, e.g.,* Tex. Ethics Comm. Op. No. 443 (2002) (concluding that Section 255.003 would be violated by using a school employee to place a trustee's campaign fliers in the teachers' lounge); Tex. Ethics Comm. Sworn Complaint Order No. SC-210541 (2001) (finding trustee violated Section 255.003 by sending two letters supporting his reelection to school employees' internal mailboxes).

Moreover, Section 255.0031 specifically prohibits an officer or employee of a state agency or political subdivision from knowingly using or authorizing the use of an internal mail system for the

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distribution of political advertising. Tex. Elec. Code § 255.0031(a).

Q: If the school district hosts an open forum opportunity for all school board candidates, such as a “Meet the Candidates” event, may a sitting trustee who is running for reelection participate?

A: Yes. When the school district creates an open forum opportunity that is available to all candidates, trustees who are running for reelection may make use of the open forum on an equal basis as the other candidates. Trustees must avoid, however, using their current position to assist them in their campaigns by seeking greater access to school facilities or school employees, for example. But when all candidates have an equal opportunity to appear at school events or distribute campaign literature, sitting trustees may participate, as well. Don’t forget that if a quorum or more of the board attends this event and public business is discussed, the OMA will be triggered.

Parting Thoughts

These do’s and don’ts about campaign speech can be difficult to navigate. As always, if you have questions about these or other legal issues, feel free to call the toll-free TASB Legal Line at 800-580-5345.

Lawmakers are currently addressing some of these issues during the 80th Texas legislative session. Please be aware that the Legislature may pass new laws that could alter some of this advice. Stay tuned to TASB Legal Services for updates in this area.★

Joy Baskin is director of TASB Legal Services.

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