

Political Speech during Election Season
TASB Legal Services
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As everyone in our country is well aware, it is election season. Nationally, the race for President of the United States dominates the media. Locally, many school districts are gearing up for school board and tax rollback (or “ratification”) elections. With the campaigns in full swing, it seems everyone has an opinion.

Are there any limits on when and where members of the school community can speak out on election matters? The answer is yes. We’ll look briefly at the campaign rights of school districts, board members, candidates and other citizens, employees, and students.

The District Itself

Can a school district take an official position in an election? No, not if public funds will be used directly or indirectly to reach or disseminate the position.

School district employees and officials cannot use public funds, directly or indirectly, for *political advertising* to advocate for or against a candidate or measure that will appear on a ballot. Tex. Elec. Code §§ 251.001(16) & 255.003(a). In the school district context, this law most commonly prohibits the use of public funds to support particular candidates (including incumbents seeking reelection), school district bond elections, and school district tax elections.

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). The Texas Ethics Commission, which is the state agency that oversees the implementation of this provision, interprets the prohibition broadly. According to the Commission, even the conduct of a meeting on public property involves an indirect use of public funds. Board members and school employees who violate this prohibition could face fines or criminal penalties; violations can also jeopardize the validity of the 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. The statute includes no definition for either *electioneer* or *other resources of the district*, and no court or other legal authority has offered a formal interpretation of the statute.

May public funds be used to communicate anything about an election? 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). For example, factual information includes information about what is at stake in a bond or tax 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, like “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 that 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” (Ethics Commission “Guide”) on its Web site at www.ethics.state.tx.us/pamphlet/pad-pol.html.

Board Members

May board members use their own time and money to campaign for candidates and causes? Yes.

Public officials, who are acting independently, without the use of public funds, have a free speech right to engage in political advocacy. In its Guide, 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, like a Rotary Club meeting, and advocate for passage of a bond election; or a school board member may write a letter to the newspaper editor in support of a tax rollback (or “ratification”) election.

When engaging in advocacy using his own time and resources, a trustee need not conceal his 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).

Can a board member send an email from her home computer to the private email accounts of friends and family, urging them to vote for a certain candidate in the presidential election? Yes.

As stated, a board member may speak, write, or distribute political advertising of any sort, as long as school funds are not used directly or indirectly. This applies to emails campaigning for or against particular measures, such as bond or tax elections, and particular candidates in national, state, and local elections. Moreover, 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 email.” 1 Tex. Admin. Code § 20.1(13).

But beware! Emails can be printed and passed out, thereby becoming flyers; school district employee time spent writing or even reading email 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 wants to send personal email advocating for a particular outcome in a bond or other election, she might consider adding a short disclaimer stating that the email is personal, rather than official school district business, and was created using personally owned equipment and accounts.

Could the board member send a similar email from a school computer? Preferably not.

Emails on a school computer are typically governed by the district’s acceptable use policy. See TASB Policy CQ(LOCAL). Such policies often permit limited personal use of the district’s computer equipment and Internet service, as long as the personal use does not incur an additional cost to the district. Nevertheless, it may be difficult to distinguish personal from official use of school equipment. Because so much is at stake when campaign speech is at issue, we recommend that board members avoid personal, election-related communications on school district equipment.

During a reelection campaign, may a sitting board member use school resources to assist in his campaign? No.

Election Code Section 255.003 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 that a school teacher and school secretary broke the law when they distributed a campaign flyer for a school board candidate that they had created in the computer lab and copied on the school’s copier, even though they made and distributed the flyers before school and reimbursed the district for the costs. Tex. Ethics Comm. Sworn Complaint Order No. SC-210101 (2001).

For purposes of his reelection campaign, a school board member should have only the same access to district events, staff, and resources as the other candidates.

Employees

Are school employees permitted to advocate for or against particular candidates or measures (like a bond or tax election)? Not on work time or using district resources, including office supplies and computer equipment.

School district employees cannot use public funds, directly or indirectly, for *political advertising* to advocate for or against a candidate or measure that will appear on a ballot. Tex. Elec. Code §§ 251.001(16) & 255.003(a). The Texas Ethics Commission interprets the prohibition broadly to include any employee time and all school district resources like copy and fax machines, supplies, facilities, and computer equipment. See the Commission’s Guide, referenced above. School employees who violate this prohibition could face fines or criminal penalties.

May school employees advocate for or against candidates or measures on their own time with their own resources? Yes.

School employees retain their First Amendment right to campaign for or against a candidate or election measure in their non-work time, using their personal funds. The key is not to use school district resources—work time, money, facilities, equipment, supplies—for the political advertising.

Can a school employee send an email saying “Vote for Bob” from her home computer to all of her coworkers at their school email addresses?

For the reasons explained above, personal emails campaigning for or against a measure or candidate are permitted. Even emails sent to district email addresses are arguably not an impermissible use of district funds. See 1 Tex. Admin. Code § 20.1(13) (exempting email from the definition of political advertising). However, to avoid even the appearance of violating the law, employees should avoid engaging in political advocacy in favor of particular candidates or measures in ways that access school equipment.

Can an employee wear a button that says “Vote YES in the ISD tax election”? Not during work hours if the district’s dress code does not permit it.

Although school employees maintain their First Amendment rights at school, the school district, as a public employer, has the authority to regulate employee dress with reasonable, viewpoint-neutral guidelines. Many school districts prohibit employees from wearing campaign t-shirts and buttons during work time. This regulation may be based on the Election Code prohibition on using employee time to advocate for a candidate or measure. It may also be based on a concern that employees, who are viewed as representatives of the district while in their instructional and other roles, should not be using their influence over students’ political views. As with any dress code regulation, the guidance should be specific enough to give employees a clear understanding of what is expected, and the guidance should be provided to employees in advance, before any attempt is made to enforce the dress code.

Remember in enforcing any limits on campaign items or expression that not all of the time employees spend on district property is “work time.” Non-work time, like breaks or lunchtime, may offer employees the opportunity for free expression on any topic, including politics, among themselves (but not with students).

Can a high school employee wear a “Vote for Bob” t-shirt to the high school’s football game? Yes, unless the employee is there to work.

Legally, the answer depends on whether the employee’s attendance at the football game is considered work time for that employee. As a practical matter, however, even off-duty employees are likely to be viewed as representatives of the district while at a school-sponsored event. As a result, teachers and other employees should consider to exercise good judgment regarding their attire.

Can an employee park in the school parking lot with a bumper sticker that says “Vote for Bob”?

No legal authority has directly addressed this issue, but generally speaking, unless the expression an employee (or student) has chosen to affix to his or her personal vehicle as a bumper sticker or other sign is obscene or otherwise in violation of school rules, schools should probably avoid interfering with this form of personal expression.

Can a school employee arrive early for work and place flyers for a candidate in the teachers’ lounge or in teachers’ mailboxes?

Under local policy and practice, there may be a part of campus where public distribution of nonschool literature is permitted; this is often referred to as a *limited public forum*. See TASB Policy GKDA(LOCAL). If so, the flyers may be placed there, in accordance with policy. However, political advertising cannot be placed in an area of the school that is not part of a limited public forum. Op. Tex. Ethics Comm’n No. 443 (2002) (distribution of candidate fliers in the teacher’s lounge that was not a public forum violated the Texas Election Code). As a result, the teachers’ lounge is probably off limits.

Special prohibitions apply to the use of school mail systems, like teachers’ mailboxes. These communications systems are district resources, the district generally should not permit them to be used for political advertising. In 2003, the Legislature added a new provision which prohibits an officer or employee of a school district from knowingly using or authorizing the use of the district’s internal mail system for the distribution of political advertising. *Internal mail system* means a system operated by a school district to deliver written documents to officers or employees of the district. This restriction does not apply to the use of an internal mail system to distribute political advertising that is delivered to the premises of a school district through the U.S. Postal Service. Tex. Elec. Code § 255.0031. See TASB Policy CPAB (LEGAL).

Students

Can a student wear a campaign t-shirt to school?

Like employees, students maintain their First Amendment rights while at school. Nevertheless, the school district has the authority to regulate student dress with reasonable, viewpoint-neutral guidelines. Although a few school districts have prohibited t-shirts with slogans in their dress codes, most Texas schools allow t-shirts with messages. If this is the case, t-shirts with political messages should be permitted on the same basis as t-shirts with other messages. As with any dress code regulation, the guidance should be specific enough to give students and parents a clear understanding of what is expected, and the guidance should be provided in advance, before any attempt is made to enforce the dress code.

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.