

How to Successfully Navigate Your Board Through the Referendum Process

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When school districts undertake new capital projects, such as building a new school or an addition to an existing building, more often than not, they consider presenting bond referenda to their communities. Once approved by the voters of a school district, a bond referendum authorizes the selling of bonds to raise funds for school projects. That bond debt is paid off by taxpayers over several years.

The laws require that school board members remain neutral in the process of educating their voters on the advantages of adoption; but practically speaking, it is very hard for stakeholders to hide their enthusiasm for the possibility of securing the funds to, for example, construct or renovate schools or establish a significant new curriculum initiative like full-day kindergarten. That being said, just because someone is a school board member does not mean that they cannot advocate for passage of a referendum, it just means that they have to be careful in how they do so.

For example, board members *may* support a referendum through both public and private speech and action. They may do so by:

- Putting up lawn signs created by third parties;
- Distributing pamphlets created by third parties;
- Donating or contributing personal funds in support of a position;
- Writing letters to the editor; and/or*
- Posting on social media or other websites;*

* **NOTE:** All writings must include a disclaimer that the individual is a member of the school board but not speaking on behalf of the board.



However, board members *may not*:

- Claim to speak on the board's behalf without authorization to do so;
- Use board property or resources (including the website) to engage in private actions or speech;
- Share any information that is not public knowledge; and/or
- Write an opinion about a school issue without the necessary disclaimer.

The conduct of board members is governed by the School Ethics Act, *N.J.S.A. 18A:12-21 et seq.*, and the Code of Ethics, *N.J.S.A. 18:12-24.1*. These laws include various general prohibitions on board member conduct and require the abstention on votes or discussions of school district matters in certain circumstances such as where a board member or administrator has a personal interest in the matter. Both of these laws are administered and enforced by the School Ethics Commission 22

SEC), the agency ultimately responsible for determining whether an individual has violated these laws and setting the appropriate penalty for such violations.

Although the SEC regularly issues public advisory opinions on various potential school board conflicts, it has not issued any such advisory opinions directly on point as to whether a board member may publicly support (or oppose) a school referendum. The SEC has, however, issued opinions on board member speech generally; these opinions are informative to the issue at hand.

In Advisory Opinion A03-07, the SEC stated that board members are legally permitted to write letters to the editor in their individual, private capacities, subject to a caveat. The issue raised in A03-07 was that a board member who publicly espoused a personal opinion regarding a matter before the board of education might confuse the public into thinking that the member spoke on behalf of the board as a whole, rather than as a private citizen. In order to address this concern without fully prohibiting board members from engaging in their rights of free speech, the SEC advised that board members could make their personal written opinions public so long as those opinions contained a disclaimer confirming that the individual was a member of the board but was speaking/writing as a private citizen, not on the board's behalf. When speaking (or writing) as a private citizen, board members are not authorized to disclose confidential information or other information not known to the public that the member possesses solely because of his/her membership on the board.

The SEC provided further guidance regarding private speech in Advisory Opinion A36-14, stating that board members

could publicly support candidates for the board by putting up lawn signs, distributing pamphlets and posting to social media. The SEC confirmed that serving on a board of education does not strip a private citizen of his/her right to speak as an individual, even where such speech deals with the membership of the very board upon which that individual serves. In accordance with its opinion in A03-07, the SEC reiterated that any written speech by the board member, including social media posts such as Facebook and Twitter, must include the disclaimer that the individual is a board member but not speaking on the board's behalf. Likewise, the SEC confirmed that the board member could not use district resources such as the district's website or Facebook page to express their opinions. Board members may, however, use pre-printed materials created by third parties, such as lawn signs and pamphlets, without adding the disclaimer. Although it is less likely that there will be third-party created materials such as lawn signs created for a referendum as compared to a typical election where the candidates themselves create the materials and provide them to supporters, the opinion of the SEC should hold for both situations.

Although the SEC advisory opinions did not specifically address the issue of board members providing monetary support to campaigns, the contribution of money is generally viewed as a form of speech and will most likely be viewed in accordance with the SEC rules regarding board members' private speech. In one case, *Chester Twp. Bd. of Educ. v. Riley and Beatty*, C12-98, two members of the Chester Township Board of Education privately funded a legal challenge to a referendum approved by the voters that would raise funds for school construction in the district. Board members Beatty and Riley, who began the lawsuit as private citizens, were elected to the Chester board, then continued their opposition of the voter-approved referendum by further funding the lawsuit as well as voting "no" on various resolutions regarding the con-

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struction. The Chester board sought to remove Beatty and Riley as board members on the basis that they had an incurable conflict as a result of their lawsuit, also charging them with ethics violations based on their failing to abstain on votes related to the referendum.

The SEC confirmed that Beatty and Riley did not commit any of the alleged violations of the school ethics laws and that they were within their rights not to abstain on referendum-related votes. In a separate decision, the commissioner also confirmed that Beatty and Riley did not have an inherent conflict that would prevent them from serving as members of the board while funding the lawsuit to overturn the referendum results. (See Docket No.: 473-10/96, April 27, 1998.) Both the SEC and the commissioner found that neither Beatty nor Riley would stand to gain anything of value other than that which would be realized by every other citizen in the district (i.e., not having their taxes increased as a result of the referendum), and, thus, they were not prevented from spending their own money to take a stand on a district-related issue.

In view of the strict prohibition on advocacy for passage of a referendum by a school board, some school communities (but not the school board) establish political committees registered with the New Jersey Election Law Enforcement Commission ("ELEC"). According to ELEC regulations, a political committee

is "a group of two or more individuals acting jointly, or any corporation, association, firm company, or partnership which raises or expends \$2,400 or more in an election to...aid or promote the passage or defeat of a public question." (See *N.J.A.C.* 19:25-1.7.) The establishment of an ELEC-registered political committee allows individuals and groups to raise and spend a significant amount of money to advocate for passage of a referendum. In fact, unlike most candidate committees and political action committees, there is no limit to the amount of a contribution that a public question political committee may receive from a contributing party. (See *N.J.A.C.* 19:25-11.6.)

Although school board members are permitted to participate in the activity of political committees in the same manner as any other individuals, they must be careful to do so in their official capacities. In doing so, school boards must take particular care to ensure that political committees do not expend any district resources, including but not limited to the use of school board telephones, e-mails, or facilities. Use of school board resources for promotion of a public question in an election, under some circumstances, might even violate a series of criminal statutes.

Whether school board members seek to spread the word regarding a bond referendum through the use of a public question political committee or through SEC-compliant speech, passage often requires hard work by various local community groups. Traditional school-affiliated organizations like parent-teacher organizations and education-related labor unions are often useful resources in encouraging "yes" votes. Under most circumstances, both organization types would have a favorable view of expanded school facilities. School board members seeking passage may also seek to privately engage stakeholder community organizations. While each school district community is unique, some school district communities engage, for example, religious congregations (whose members

may be parents of students in the district or are related to them in some way) and local trade unions (whose members may directly benefit from any construction which may ensue, especially if the school board is considering the use of a Project Labor Agreement) whose involvement can be integral to building support.

Of course, it is very common and legal for a school board and its members to engage in an official informational

campaign to advise of the potential benefits and/or drawbacks of the adoption of a referendum. However, school board members engaged in such a campaign must be careful to remain objective and impartial in their official capacities. In this regard, there is nothing illegal about encouraging a school district's residents to vote – they just may not be told to vote one way or another.

Successful passage of a school district

referendum often involves many members of the community coming together to support the measure. School board members can be among those supporters without jeopardizing their position on the board – if they are careful to follow the guidelines here.

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