



FAIR CAMPAIGN PRACTICES ACT MEMO

The purpose of this memorandum is to discuss generally what campaign activities are allowed and how the Fair Campaign Practices Act (FCPA) applies to school boards, school districts, and school district employees. Knowledge of these limitations helps avoid complaints of campaign violations and questions of propriety in local communities.

This memo is a resource for information purposes only and does not constitute legal advice. Specific questions should be referred to the school board's own legal counsel.

The FCPA, in combination with the Colorado Constitution, make up Colorado's campaign finance laws. The FCPA prohibits political subdivisions of the state, such as a school district, from "mak[ing] any contribution in campaigns involving the nomination, retention, or election of any person to any public office" and from "expend[ing] any moneys from any source, or mak[ing] any contributions, to urge electors to vote in favor of or against" ballot questions or ballot issues.¹

FCPA Complaints

Any person who believes that a violation of the FCPA has occurred may file a complaint with the Secretary of State no later than 180 days after the complainant knew or should have known of the alleged violation.² The elections division within the Secretary of State's office must then review the complaint and either dismiss it for failure to state a claim, allow the respondent an opportunity to cure the violation, or conduct additional review to determine if a hearing is necessary.³

If the Secretary of State (SOS) asks for a hearing, the SOS's office is then responsible for pursuing the complaint at the hearing.⁴ After the hearing, the hearing officer will issue an initial determination in the case. The initial determination is then reviewed by the Deputy Secretary of State who will then prepare a Final Agency Decision. All Final Agency Decisions are subject to judicial review.⁵ If the hearing officer determines that a violation has occurred, the state constitution and state statute provide significant financial penalties.⁶ The school district's legal counsel should be consulted whenever the possibility of an FCPA complaint arises.

¹ C.R.S. § 1-45-117(1)(a).

² C.R.S. § 1-45-111.7(2)(a)-(b).

³ C.R.S. § 1-45-111.7(3)(b).

⁴ C.R.S. § 1-45-111.7(5)(V).

⁵ C.R.S. § 1-45-111.7(6)(b).

⁶ Colo. Const. art. XXVIII, § 10; C.R.S. § 1-45-111.5.

Finally, any person seeking guidance regarding the application of the FCPA to their campaign activities may request that the Secretary of State’s office issue an advisory opinion. A person may then rely upon the Secretary of State’s advisory opinion as an affirmative defense to any FCPA complaint.⁷

Board of Education

Factual summary

Generally, school districts prepare factual summaries on their own ballot issues and rely on the “blue book” published by the state for information on the statewide initiatives.

The FCPA allows the school district to spend public money (no limit on the amount) or make a contribution in kind to dispense a factual summary on any issue of “official concern” before the electorate.⁸ An issue of “official concern” is defined as one that will appear on the election ballot in the jurisdiction.⁹

The factual summary must include arguments both for and against the proposals on the ballot. The summary may not state a conclusion or opinion in favor of or against any particular issue addressed by the summary.¹⁰

If public funds are going to be used to dispense a factual summary, the board should adopt a resolution that expresses the issue of official concern and specifically authorizes an expenditure of public funds or contributions in kind to dispense the summary.

Decisions from the Colorado Office of Administrative Courts illustrate the importance of ensuring that any “factual summary” or presentation includes both the pros and cons.¹¹

Expressing opinions and advocacy

The FCPA specifically allows the board to pass a resolution or take a position of advocacy on state and local ballot issues.¹² It is permissible for district personnel to assist the board in drafting the resolution and to perform other incidental tasks related to its passage.

⁷ C.R.S. § 1-45-111.7(8).

⁸ C.R.S. § 1-45-117(1)(b)(I).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *See, In the Matter of the Complaint filed by Jill Duvall regarding alleged campaign and political finance violations by the Elbert County Board of County Commissioners and Robert Rowland, a Commissioner thereof*, Case No. OS 2013-0012 (December 24, 2013), *aff’d without opinion* (Colo. App. 2015), *reh’g denied* (Colo. 2015) (county violated the FCPA when it paid a consultant to speak at town meetings regarding a local ballot issue, as presentation painted a “dire, one-sided picture of the county’s financial condition” and was designed to encourage voters to vote a certain way); *Douglas Bruce and Helen Collins v. School District 11 and Nicholas Gledich*, Case No. OS 2017- 0009 (Nov. 7, 2017) (school district violated FCPA when it printed postcards with content focusing only on the positive aspects of the proposed tax increase).

¹² C.R.S. § 1-45-117(1)(b)(III)(A).

It is also permissible to report passage of the resolution and to distribute the resolution through established, customary means (other than paid advertising) by which information about board resolutions is regularly provided to the public.¹³

Board members

Expressing opinions and advocacy

Board members may express a personal opinion on any matter before the electorate.¹⁴

State law allows a board member to respond to unsolicited questions about any candidate, ballot issue, referred measure, or certified recall measure. In addition, state law allows a board member to spend up to \$50 of public money in the form of letters, telephone calls, or other activities incidental to expressing an opinion on the subject.¹⁵

This provision does not authorize policymakers to make a direct contribution of public funds to the campaign. This provision is in state law simply to cover incidental expenses that might occur and should not be used otherwise or “pooled” to cover a larger expenditure.

School district employees

Unsolicited questions

Employees are allowed to respond to unsolicited questions about state and local ballot issues.¹⁶ This is allowed by statute to assure that information about ballot issues is available.

Assisting the board in passage of a resolution

It is permissible for district personnel to assist the board in drafting the resolution and to perform other incidental tasks related to its passage.

Expressing opinions and advocacy

Employees are allowed to use personal funds and personal time to urge electors to vote in favor of or against an issue.¹⁷ However, employees are not allowed to conduct campaign activities while they are “on duty.”

Social media has complicated the distinction between a school employee’s personal and work domains. For example, the Colorado Office of Administrative Courts found that a public charter school made an illegal contribution to a school board candidate’s campaign when its principal posted a link on the school’s Facebook page to an article about the board candidate, then “shared”

¹³ C.R.S. § 1-45-117(1)(b)(III)(B).

¹⁴ C.R.S. § 1-45-117(1)(b)(II).

¹⁵ C.R.S. § 1-45-117(1)(a)(II).

¹⁶ C.R.S. § 1-45-117(1)(a)(II).

¹⁷ C.R.S. § 1-45-117(1)(b)(III)(C).

it on his personal Facebook page where he added favorable comments about the candidate.¹⁸ The administrative law judge (ALJ) found that the actions violated the FCPA because they were the equivalent of the school “giving of a thing of value to the candidate, namely favorable publicity.”¹⁹ The ALJ ordered that the link be taken down as the sanction for the FCPA violation.²⁰

State law also allows an employee who has “policy-making responsibilities” to respond to unsolicited questions about any candidate, ballot issue, referred measure, or certified recall measure.²¹ In addition, state law allows an employee to spend up to \$50 of public money in the form of letters, telephone calls, or other activities incidental to expressing an opinion on the subject.²² This provision does not authorize policymakers to make a direct contribution of public funds to the campaign.

Electronic mail and website publications

The prohibitions of the FCPA apply equally to electronic mail communications and website publications. School district employees and board members may not use the district’s website or email system to advocate for or against a particular ballot issue. For example, a school district may not use an employee’s work time or technical expertise to utilize the school district’s website to advocate for or against a ballot issue, or to set up another website to advocate for or against a ballot issue.

Any activity that is permitted by the FCPA, as discussed above, may be done electronically. Thus, for example, the factual summary (with both sides) of a ballot issue may be posted on the district’s website. School employees may respond to unsolicited email questions about state and local ballot questions via the district’s email system. To the extent the school district also regularly posts board resolutions on the website, a board resolution on a ballot issue may be posted to the district’s website.

Again showing the importance of issuing a balanced factual summary and avoiding any “one sided” discussion, school district was sued under the FCPA in 2013 when its superintendent sent emails to district staff and residents concerning Amendment 66, which was a proposed state tax increase to fund education.²³ Although the emails contained no express language advocating for the passage of Amendment 66, the administrative law judge found that the emails “in effect urged voters to support Amendment 66 because they provided only a one-sided picture of Amendment 66, stressing its beneficial effects while paying virtually no attention to the opposing point of view.”²⁴ However, the judge found that the district had not violated the FCPA because there was

¹⁸ See, *Barela v. Liberty Common School*, Case No. OS 20150015 (October 14, 2015).

¹⁹ *Id.*

²⁰ *Id.*

²¹ C.R.S. § 1-45- 117(1)(a)(II).

²² C.R.S. § 1-45-117(1)(a)(II).

²³ See, *In the Matter of the Complaint filed by Rita Montero, Dorolyn Griebenaw, Kristen Tourangeau, Chuck Crowley, and Sherry Eastland, regarding alleged campaign and political finance violations by Denver Public Schools – District 1 and Superintendent Tom Boasberg*, Case No. OS 2013-0010 (January 22, 2014).

²⁴ *Id.*

no evidence the district spent any more money than it otherwise would have if the emails were not sent.²⁵

Campaign committees

An effective way for the school district to provide information to the public and also encourage a favorable response from the voters is for interested patrons to form a campaign committee. Campaign committees are required to file campaign disclosure information online as an “issue committee” with the Secretary of State.

School board members may serve on campaign committees as long as the open meeting requirements are met (e.g., if three or more board members serve on the committee, all committee meetings must be noticed to the public).

More information on campaign committees is available on the Secretary of State’s website.

Distribution of campaign material

The district should refer to its policy on distribution of noncurricular materials to determine whether distribution of campaign materials is allowed. If the district generally allows distribution of noncurricular materials, subject to time and place restrictions, then the district should also allow distribution of campaign materials subject to the same restrictions. It is impermissible to send campaign literature home with students.

Back-to-school nights

If the board has a policy that allows material to be distributed at back-to-school night, and the policy is applied in an even-handed fashion, then it is permissible for the district to allow campaign literature dealing with political issues to be distributed at back-to-school night. In most cases, simply providing a table on which interested persons may place materials is the best way to accommodate the request from board candidates as well as proponents and opponents of a ballot issue. There should be nothing in the campaign literature that implies that the district endorses or has taken any position on the issues, unless the board has taken a public position.

Community use of school facilities

If the district has a policy of permitting community use of its facilities, it is permissible to allow groups opposed to or supportive of a ballot issue to use the facilities as long as the policy is applied in an even-handed manner.

²⁵ *Id.*

Other state laws regarding campaigns

The following are considered impermissible behaviors during campaigns:

- Knowingly or recklessly publishing or circulating letters or the like that are false and designed to affect the vote on any issue or relating to any candidate.²⁶
- Making wagers with electors regarding the outcome of the election.²⁷
- Interfering with distribution of pamphlets, handbills, yard signs, posters, or other written election materials.²⁸

April 2020

²⁶ C.R.S. § 1-13-109.

²⁷ C.R.S. § 1-13-110.

²⁸ C.R.S. § 1-13-113.