Rupp, Anderson, Squires & Waldspurger, P.A. Newsletter
July 30, 2014

Advocacy for Ballot Questions and Referenda by School Districts

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With election season right around the corner, many school districts across the state are preparing to place questions on the ballot for this coming November. Along with such elections, most school districts prepare literature discussing the election and explaining the needs for a referendum to raise funds or renew levies. School districts need to be mindful of the potential dangers of advocating for the passage of a ballot question. A recent decision from the Minnesota Office of Administrative Hearings ("OAH") provides some guidance on what constitutes advocacy.

By the very nature of the referendum process, it is clear to voters that school districts would be in favor of the passage of a referendum because school boards must determine that a referendum is necessary prior to placing it on the ballot. While it may seem counterintuitive based on this clear preference for approval of a referendum, school districts may not advocate for or promote the passage of a referendum or levy in election materials that are provided to voters. Information must be provided by school districts in a neutral manner. The Minnesota Attorney General's Office has issued an opinion that school districts may not spend public funds to promote one side of a referendum issue. *See* Op. Atty Gen. 159a-3 (1966). Generally, school districts are allowed to spend funds to educate voters of the facts related to a referendum through the publication of materials that do not advocate for the passage of the referendum. *Id.*

If a school district were ultimately determined to have advocated for the passage of a referendum, it could potentially be considered an improper use of public funds, and such use of funds by the district may be subject to the Campaign Financial Reporting requirements and Fair Campaign Practices Act in Minnesota Statutes, Section 211A and 211B. In the case of *Abrahamson v. St. Louis County School District*, 819 N.W.2d 129 (Minn. 2012), the Minnesota Supreme Court held that a public school district is a "corporation" and subject to the campaign reporting requirements of Chapter 211A if it makes statements that urge the passage of a ballot question or

referendum. The Court in that case did not ultimately decide whether the school district's election materials constituted advocacy and sent the case to the OAH for an evidentiary hearing on that point. However, the Court strongly suggested that the statements made by that school district constituted advocacy.

After holding the evidentiary hearing in this case, the OAH ruled that the statements made by the school board related to the referendum constituted "advocacy." *See Abrahamson, et. al. v. St. Louis Co. Sch. Dist., et. al.*, OAH Case No. 65-0325-21677 (May 30, 2014). Essentially, the OAH panel found that the district acted to promote the ballot question and expended more than $750 for that promotion, meaning that the district failed to follow the reporting requirements outlined in the campaign finance laws for corporations. However, the district received only an official reprimand instead of significant sanctions since it served as the test case. In the future, districts will likely not be so lucky, and may be subject to fines and misdemeanor charges for board members if they advocate for the passage of a referendum and do not follow mandated campaign finance reporting.

In *Abrahamson*, the school district placed a referendum on the ballot for the issuance of general obligation school building bonds. The district then prepared and distributed pamphlets and newsletters to voters related to the referendum. The district argued that these materials were meant merely to inform voters.

The OAH decision did not include an analysis of each individual statement and publication made over the relevant four month period by the district; rather, the OAH determined that the seventeen alleged "advocacy" statements must be read as a whole to determine whether they constitute advocacy. The panel adopted the Supreme Court's holding that to "promote" meant to urge the adoption of or advocate for the passage of the referendum. *See Abrahamson*, OAH Case No. 65-0325-21677, at 20. When viewing these statements and publications as a whole, the OAH ruled that the District was clearly "promoting" the passage of the referendum. *Id.* at 22.

The OAH clarified that urging voters to vote, informing voters of the date of the election, and explaining the school board's rationale for seeking additional bond financing, as well as explaining the financial conditions and consequences if the initiative fails to pass do not constitute advocacy. However, it held that "[w]hen a district's communications or statements . . . are so one-sided that they cannot reasonably be read to mean anything but urging the passage of the referendum, then such communications have crossed the line from informational to promotional." *Id.* at 28.

The OAH went on to analyze and specifically hold that the following types of statements are considered promotional: outlining benefits that are not related to the referendum, but are merely logical outgrowths of passage of the referendum (the district stated that all third graders would be fluent readers, students would receive personalized learning, and that students would receive character education, none of which were directly related to the construction bond at issue); stating that bad outcomes such as school closure or going into statutory operating debt would happen instead of stating that they may happen; failing to provide a fair and balanced representation to the public of what would happen if the referendum failed; using outdated and inaccurate budget predictions and calculations; and presenting confusing or misleading comparisons to other local districts. *Id.* at 28-31.

The OAH ultimately held that "by stressing only exaggerated benefits of a 'yes' vote and then describing only the most extreme negative possibilities of a 'no' vote, the district was not providing balanced informational material to its readers; it was advocating for a specific result – the passage of the ballot question. While overly gloomy assumptions and worst case scenarios may not be enough to form the basis of a false campaign claim under Minn. Stat. 211B.06, they are sufficient to show that the statements are promotional and advocate for a particular result." *Id.* at 31.

Several of the statements at issue in *Abrahamson* were quite dire, including the potential dissolution of the District and increased taxes if the referendum failed. These types of statements

are opinions or speculation that the OAH concluded were one-sided and promoted the passage of a referendum. Although it may be likely that a school board would make certain cuts if a particular levy did not pass, it is possible that other budget cuts would instead be made, or that no cuts would be made. Similarly, statements claiming that without the passage of the referendum, school buildings will fall down or student education would suffer would most likely constitute advocacy.

If a district were ultimately found to have engaged in advocacy for the passage of a referendum, it would have to follow the laws for advocacy groups that spend money in political campaigns, including a number of annual reporting requirements. Failure to follow such requirements could lead to fines and potential misdemeanor convictions for board members.

Another concern, left unsaid by this OAH decision, is whether a school district is authorized to spend public funds to advocate for the passage of a referendum. That decision only addressed the allegations of the failure to follow the campaign finance laws. As discussed above, the Attorney General has concluded that school districts are not allowed to make expenditures for referendum advocacy. No Minnesota appellate court has yet decided this issue, as the Supreme Court in *Abrahamson* raised the issue, but did not ultimately make a decision on it. If a school district were to advocate for the passage of a referendum, a taxpayer may challenge the referendum results, arguing that the district inappropriately spent public funds based on the Attorney General's opinion.

In light of the *Abrahamson* decision, a school district should carefully review its election materials to ensure that it is merely educating voters, and not advocating for the passage of a referendum. If you are unsure of whether your election materials constitute advocacy, make sure that you have the materials reviewed by legal counsel, or have your counsel help draft acceptable language for such materials.