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## MEMORANDUM

**DATE:** June 10, 2016  
**TO:** Dr. Bruce Harter  
Superintendent  
West Contra Costa Unified School District  
**FROM:** Harold M. Freiman  
**RE:** Campaign Contribution and Expenditure Limits

You requested legal counsel's guidance for the Governance Committee regarding whether the West Contra Costa Unified School District ("WCCUSD") Board of Trustees ("Board") can impose campaign finance limits. As described in further detail below, the Board does have authority to implement campaign finance limits, as long as the limits are closely drawn to support a sufficiently important interest. It is important to note that these limits may end up being entirely voluntary, rather than mandatory, as the statute authorizing such limits provides no mechanism for enforcement. Additionally, federal courts have greatly restricted when and how campaign finance limits may be imposed, particularly in relation to limits on how much a candidate may spend.

There are two primary types of campaign finance limitations: limits on the amount of money a candidate can spend on a campaign ("expenditure limits"), and limits on the amount of money a candidate can accept ("contribution limits"). Both forms of limitation are authorized by the Education Code. (Ed. Code § 35177.) However, the courts have held that the United States Constitution severely limits what would otherwise appear to be a broad grant of discretion under state law.

The Governance Committee asked for the following information:

- Sample policies from other districts;
- How campaign finance regulations impact those seeking District contracts;
- An overview of state law in relation to campaign contribution limits;
- Different rationale for enacting campaign finance limits; and
- Whether candidates may be subject to expenditure limits.

We address the above questions throughout this memorandum because there is substantial overlap between the issues. We have also attached the Sweetwater Union High School District,

City and County of San Francisco, and City of Oakland regulations on campaign finance limitations for your reference.

## **I. OVERVIEW OF APPLICABLE LAW**

### **A. Education Code Section 35177**

Under state law, a School Board candidate has various disclosure obligations when running for office, such as contribution and expenditure reporting requirements, which are regulated by and through the Fair Political Practices Commission (FPPC). However, the FPPC does not impose contribution limits on school district elections and the Education Code has left the implementation of limits to local discretion. Education Code section 35177 states: “**The governing board of a district may by resolution limit campaign expenditures or contributions in elections to district offices.**”

Although the Education Code permits the Board to limit expenditures and contributions, as explained below, mandatory expenditure limits have been determined by the Supreme Court to be unconstitutional. Therefore, any expenditure limits the Board chooses to enact must be made explicitly voluntary in order to avoid infringement of First Amendment rights. Contribution limits must also be closely drawn to support a sufficiently important public interest.

It is also important to note that the Education Code provides no mechanism for the District to enforce any contribution limits set by the Board. This means that any contribution limits would also likely be voluntary, as there is no mechanism for remedy in the event of noncompliance by a candidate. Cities sometimes enact voluntary expenditure limits and mandatory contribution limits, but because they operate under a different authority, they have greater ability to enforce these limits through their broader police power.

### **B. Constitutional Restrictions on Campaign Finance Limits**

The Supreme Court of the United States in *Buckley v. Valeo* and *Randall v. Sorrell* examined the constitutionality of campaign contribution and expenditure limits. (*Buckley v. Valeo* (1976) 424 U.S. 1, “*Buckley*”; *Randall v. Sorrell* (2006) 548 U.S. 230, “*Randall*”) The Court concluded that mandatory campaign expenditure limits were unconstitutional and a violation of the First Amendment right to free speech and association. (*Id.*) However, the Supreme Court noted in both cases that limits on campaign contributions are constitutional so long as they are not overly restrictive, they allow the candidates to compete in the race, and they do not operate to protect incumbents. (*Id.*)

#### **1. Buckley v. Valeo**

Forty years ago, in *Buckley v. Valeo*, the Court upheld a \$1,000.00 contribution limit for federal elections, finding that it involved little direct restraint on the contributor’s speech and that the limits were closely drawn to match a sufficiently important interest. (*Buckley, supra*, 424 U.S. 1, 25.) The Court noted that the contribution limits imposed seemed unlikely to have any “dramatic adverse effect on the funding of campaigns” and that the overall effect was only “to require candidates and political committees to raise funds from a greater number of persons... rather than to reduce the total amount of money potentially available to promote political expression.”

(*Id.* at p. 21-22.) The Court found that the interest of preventing corruption and the appearance of corruption was sufficiently important to justify the statute’s contribution limits, and that the limits were closely drawn. (*Id.* at p. 21) In determining whether a particular contribution limit is closely drawn, the court noted that the amount of that limit could make a difference.

The Court dealt with several issues in this case: whether the contribution limits unjustifiably burdened First Amendment freedoms of speech and association; employed overbroad dollar limits; and whether the limits discriminated against candidates opposing incumbent officeholders and against minority-party candidates. In determining whether contribution limits violate the First Amendment, the court noted that “even a ‘significant interference with protected rights of political association’ may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms.” (*Buckley, supra*, p. 25, citing to *Cousins v. Wigoda* (1975) 419 U.S. at p. 488.)

In *Buckley*, the Court found that the primary purpose of the limits was constitutionally sufficient in order to limit campaign contributions to \$1,000. (*Buckley, supra*, at p. 26.) The purpose of the limits at issue in *Buckley* was “to limit the actuality and appearance of corruption resulting from large individual financial contributions.” (*Id.*) The Court recognized the need for a candidate to accrue financial contributions from others to conduct a successful campaign, but also recognized the danger of large contributions in order to secure political quid pro quo’s and the importance of avoiding the appearance of improper influence. (*Id.* at pp. 26-27.)

In upholding the campaign contribution limits, the Court noted that the limitation’s focus was “precisely on the problem of large campaign contributions—the narrow aspect of political association where the actuality and potential for corruption have been identified—while leaving persons free to engage in independent political expression, to associate actively through volunteering their services, and to assist to a limited but nonetheless substantial extent in supporting candidates and committees with financial resources.” (*Id.* at p. 28.) It is also important to note that the court upheld these contribution limits because they were also applied in the same manner to “all candidates regardless of their present occupations, ideological views, or party affiliations,” and therefore the appellant’s assertion that the limits discriminated against candidates opposing incumbent officeholders was not valid. (*Id.* at 31.)

## 2. Randall v. Sorrell

Approximately 30 years later, in *Randall v. Sorrell*, the court again looked at the issue of campaign contribution limits, this time in the context of state election contests. Unlike in *Buckley*, the Court in *Randall* found the campaign contribution limits at issue to be a violation of the First Amendment because they burdened protected interests in a manner disproportionate to the public purposes they were enacted to advance. (*Randall, supra*, 548 U.S. 230.) The Court found the contribution limits in question to be too low and determined that they could damage the electoral process by preventing challengers from mounting effective campaigns against incumbent officeholders and reduce democratic accountability. (*Id.* at p. 232.)

The campaign contribution limits that were reviewed in *Randall* were set to \$200 for state representatives and up to \$400 for gubernatorial candidates per two year general election cycle, which are far lower amounts than the \$1,000 limit imposed decades earlier in *Buckley*. The Court considered five factors to determine whether the limits were too restrictive and not

narrowly tailored, and therefore unconstitutional. (*Id.* at p. 253.) The factors the court examined were as follows:

1. Whether the “contribution limits will significantly restrict the amount of funding available for challengers to run competitive campaigns”, i.e. whether the limits will allow a challenger to overcome the name recognition advantage enjoyed by an incumbent.
2. Whether the limits on contributions to political parties “balance (1) the need to allow individuals to participate in the political process by contributing to political parties that help elect candidates with (2) the need to prevent the use of political parties ‘to circumvent contribution limits that apply to individuals.’” (*Id.* at p. 258-259, quoting *Colorado II*, 533 U.S. 431, 435.)
3. Whether volunteer services and related expenses (i.e. travel expenses) are counted toward the same very small contribution limit. Volunteers incur expenses, such as gas, during their services and the Act examined in *Randall* included those expenses against an individuals’ contribution limit. It is problematic if volunteers can no longer donate their time for fear that they will violate campaign contribution limits. The Court acknowledged that a reasonably high contribution limit would help avoid scenarios where volunteers run afoul of the law.
4. Whether the limits were adjusted for inflation. The Court noted that each year the limits actually decline in value, so limits that are already low will inevitably be too low over time.
5. Whether there was a “special justification that might warrant a contribution limit so low or so restrictive as to bring about the serious associational and expressive problems that we have described [i.e. factors one through four].” (*Id.* at p. 261.)

This five factor test is significant because any court that reviews campaign contribution limits following the holding in *Randall* will very likely analyze the limits in question using these same factors. In *Randall*, the Court weighed all five factors, and concluded that the contribution limits were not narrowly tailored, and therefore violated the First Amendment. The Court explained that the contribution limit in question:

burdens First Amendment interests by threatening to inhibit effective advocacy by those who seek election, particularly challengers; its contribution limits mute the voice of political parties; they hamper participation in campaigns through volunteer activities; and they are not indexed for inflation. [The state] does not point to a legitimate statutory objective that might justify these special burdens.

(*Id.* at p. 261-262.)

The *Randall* Court noted that “contribution limits that are too low can also harm the electoral process by preventing challengers from mounting effective campaigns against incumbent officeholders, thereby reducing democratic accountability” and “a statute that seeks to regulate campaign contributions could itself prove an obstacle to the very electoral fairness it seeks to promote.” (*Randall, supra* 548 U.S. 230, 248-249.)

### 3. Expenditure Limits versus Contribution Limits

In *Buckley*, the court explained the reasoning for finding expenditure limits altogether unconstitutional, stating that “a restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.” (*Buckley, supra*, 424 U.S. 1, 19.) The Court went on to note that communicating ideas necessarily involves the expenditure of money, from handbills to television or radio ads. (*Id.*)

The Court then compared contribution limits, defining them as a “limitation upon the amount that any one person or group may contribute to a candidate or political committee” and noting that they entail “only a marginal restriction upon the contributor’s ability to engage in free communication.” (*Buckley, supra*, 424 U.S. 1, 20, 21.) While the contribution is merely a general expression of support for the candidate, it “does not communicate the underlying basis for the support” and the “quantity of communication by the contributor does not increase perceptibly with the size of his contribution.” (*Id.* at p. 21.) Finally, the court concluded that “a limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor’s freedom to discuss candidates and issues.” (*Id.*) Therefore, under current law, expenditure limits are not allowed unless explicitly made voluntary, but contribution limits are allowed if properly structured.

## II. CAN THE DISTRICT ESTABLISH CAMPAIGN FINANCE LIMITS?

### A. Parameters for Establishing Limits

Under the Education Code, the Board has the authority to implement finance limits, but there are limitations on that authority, as discussed above.

In deciding what the amount of any limit should be, the Board may want to consider the \$1,000 federal limits that were upheld in *Buckley* in 1976 (based on our calculation relying on the Bureau of Labor Statistics Consumer Price Index Inflation Calculator, this equates to approximately \$4,200 today), versus the \$200 state limits that were struck down in *Randall* in 2006 (equal to approximately \$235 today). Currently, California limits for state offices are set to \$4,200 for individual contributions and \$8,500 for campaign committees.

If the Board wanted to enact campaign contribution limits, it would need to ensure they are closely drawn to a sufficiently important interest. The Board would need to articulate such interests clearly. The Board should also consider the five factors the Court in *Randall* applied to determine the constitutionality of the campaign contribution limits imposed. To determine whether these limits are narrowly tailored, the Board should consider the effect on challengers versus incumbents, the ability of individuals to contribute to political parties that help elect candidates, potential impacts on volunteer services, adjustment for inflation, and what special justifications the Board might have for imposing limits.

## **B. Risks of Campaign Contribution Limits**

In implementing campaign contribution limits, there are potential risks. Because Education Code section 35177 does not provide a mechanism for enforcement, the Board may not be able to enforce any limits it implements if they are not followed by a particular candidate.

The Board should also be aware of the potential for litigation if a candidate, contributor, special interest group or others files suit against the Board for the imposition of campaign contribution limits. The courts apply a “strict scrutiny” test to cases involving First Amendment rights, which means that the court will look to ensure that the limits imposed are narrowly drawn to obtain a sufficiently important interest. There are no published cases concerning school district campaign finance limits under Education Code section 35177, so there is little relevant guidance in this area. However, the available federal guidance shows the strict role the court takes in looking at campaign contribution limits. Any limit considered too restrictive will be considered a violation of the First Amendment and be struck down if challenged. If the court were to strike down a District imposed contribution limit, the District potentially may have to pay the opposing party’s attorneys’ fees and costs, in addition to its own litigation costs. This amount could be significant if the litigation is protracted or ends up on appeal to a higher court. This is another reason to consider very narrowly drawn limitations on campaign contributions.

## **C. Risks of Campaign Expenditure Limits**

As discussed above, the federal courts have not allowed mandatory campaign expenditure limits that can be imposed on candidates. For this reason, as well as in light of the fact that Education Code section 35177 has no express enforcement mechanism, any attempt by the Board to adopt an expenditure limit that is mandatory on Board candidates would very likely be stricken down if challenged in court. Thus, any such limit must, at most, be voluntary.

Even if the Board were to adopt a voluntary expenditure limit, the possibility of legal challenges still exist. While the District might be able to defend any such litigation on the grounds that the policy is really more of a suggestion than a requirement, it is conceivable that a litigant would contend that the policy somehow unduly hampers or puts in a poor light a candidate who does agree to be bound by the voluntary guidelines adopted by the Board. To the extent that such a person could establish that the policy has impacts on the ability to run for office, or the effect of protecting incumbents, and applying the strict scrutiny standard for First Amendment cases in this subject area, a litigant might be able to build a case where there is at least some exposure to the District. Likely for this reason, most policies we have seen focus on campaign contributions, and not expenditures.

## **III. POLICIES FROM OTHER DISTRICTS**

We have not conducted an exhaustive search, but we have surveyed other school districts to see what form of campaign limitations have been enacted. We have thus far found very few school districts have enacted campaign finance limits. However, as an example, Sweetwater Union High School District in San Diego County has a mandatory contribution limit of \$750 for individual contributions. Additionally, the City and County of San Francisco has enacted limits that encompass both the City and School District elections. San Francisco limits individual and committee contributions to \$500, with overall limits of \$500 multiplied by the number of offices

to be voted on for individual contributions and \$3,000 for committee contributions. However, it is important to note that the San Francisco limits were adopted by the San Francisco County Board of Supervisors as an ordinance that was made applicable to all local elections in the county, including elections for the Board of Education of the San Francisco Unified School District. As a county ordinance, the county can include misdemeanor penalties and other enforcement options that a school district does not have the authority to impose.

We note that in the foregoing examples, the contributions are relatively low, and are under the \$1,000 limit found to be valid in *Buckley*, and well under the \$4,200 current value of the \$1,000 that was addressed forty years ago. As a result, there is a potential risk to these amounts if they are ever challenged.

Oakland and San Francisco both enacted voluntary expenditure ceilings for school board candidates.<sup>1</sup> In Oakland, school board candidates who accept the voluntary expenditure ceilings are permitted higher contribution limitations (increasing from \$100 to \$500 from any person per election). In San Francisco, the list of candidates who have accepted the voluntary expenditure ceiling are listed on the San Francisco Ethics Commission website. Both methods are a means of enticing candidates to adhere to voluntary expenditure ceilings. However, as discussed above, these methods could still potentially be subject to legal challenges.

Many school district boards, including WCCUSD, have implemented board bylaws which encourage all candidates to sign and adhere to the principles in the Code of Fair Campaign Practices pursuant to Elections Code 20440. Although the Code of Fair Campaign Practices does not contain campaign finance limitations, it encourages candidates to observe and uphold the principles of decency, honesty and fair play.

We have attached the Sweetwater Board Resolution, the San Francisco Ordinance, and the Oakland Ordinance to this memorandum.

#### **IV. RATIONALE FOR CAMPAIGN FINANCE LIMITATIONS**

The overarching rationale for campaign finance limitations is to promote fairness and integrity in elections. Below, we have listed examples of the rationale used by San Francisco, Oakland, and the Sweetwater Union High School District in enacting campaign finance regulations.

##### San Francisco

- Inherent to the high cost of election campaigning is the problem of improper influence, real or potential, exercised by campaign contributors over elected officials.
- Fundraising distracts public officials seeking reelection from focusing upon important public matters, encourages contributions which may have a corrupting influence, gives

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<sup>1</sup> In Oakland, a candidate for School Board who voluntarily agrees to expenditure ceilings shall not make expenditures exceeding one dollar (\$1.00) per resident in the electoral district for each election for which the candidate is seeking office and, beginning in 1999, the expenditure ceiling may be adjusted annually according to cost of living increases. In San Francisco, any candidate for the Board of Education who voluntarily agrees to expenditure ceilings shall not make expenditures exceeding \$104,000, and the San Francisco Ethics Commission is authorized to adjust that amount according to cost of living increases, provided that such amounts shall be rounded to the nearest \$1,000.

incumbents an unfair fundraising advantage over potential challengers, and provides contributors with greater access to public officials than other members of the public.

- The amount of money raised by many candidates and committees supporting or opposing candidates also erodes public confidence in local officials by creating the appearance that elected officials may be unduly influenced by contributors who support their campaigns or oppose their opponents' campaigns.

### Oakland

- Monetary contributions to political campaigns are a legitimate form of participation in our political process, but the financial strength of certain individuals or organizations should not enable them to exercise a disproportionate or controlling influence on the election of candidates.
- The rapidly increasing costs of political campaigns have forced many candidates to raise larger and larger percentages of money from interest groups with a specific financial stake in matters under consideration by city government. This has caused the public perception that votes are being improperly influenced by monetary contributions. This perception is undermining the credibility and integrity of the governmental process.
- Candidates are raising less money in small contributions and more money in large individual and organizational contributions. This has created the public impression that the small contributor has an insignificant role to play in political campaigns.
- High campaign costs are forcing officeholders to spend more time on fundraising and less time on the public's business. The constant pressure to raise contributions is distracting officeholders from urgent governmental matters.

### Sweetwater Union High School District

- It is in the public interest to encourage broader participation in the political process by limiting campaign contributions to candidates for the Board of Trustees, and to place realistic and enforceable limits on the amounts of money that may be contributed to political campaigns in Board of Trustee elections.
- Regulating campaign contributions to candidates for local elective office will prevent corruption and avoid the appearance of corruption.

We note in relation to Sweetwater that the District was subject in recent years to a well-publicized scandal that included contractors making substantial payments to school officials, leading to the indictment of the former Superintendent and Board members, as well as others. This may have contributed to the desire for campaign finance reform in that District.

## **V. DISTRICT CONTRACTORS**

Although we have not seen District level regulations specifically limiting contractors' contributions to school board members, several other local agencies have enacted regulations on point. For example, the Bay Area Rapid Transit District ("BART") has implemented campaign limitations which contain rules regarding contributions from contractors. No contractor whose contract exceeds \$100,000 may provide to any member of the Board of Director, or any candidate for Board of Directors, any contribution valued at greater than \$1,000 during the time



period from the receipt of that prospective contractor's bid, through award. However, there is no limitation during the pre-bidding period.

Similarly, San Francisco prohibits any person who contracts with the City and County of San Francisco, including San Francisco Unified School District, from making a contribution to a local candidate if the contract has a total anticipated value of \$50,000 or more at any time during negotiations for such contract, and for six months after the contract is approved. The City of Oakland prohibits any person who contracts, or proposes to contract with, Oakland Unified School District for a transaction which requires approval by the School Board from making any contribution to a School Board member or candidate for School Board at any time between commencement of negotiations and either one hundred eighty (180) days after completion of, or the termination of, negotiations for such contract. Again, these examples do not include prohibitions that would prevent a prior donor from bidding on or negotiating a contract.

## **VII. CONCLUSION**

While the West Contra Costa Unified School District has the authority under the Education Code to implement campaign contribution and expenditure limitations, there are significant restrictions on doing so. Any expenditure limits should be made explicitly voluntary to withstand judicial scrutiny, but even then may not be entirely free from challenge. The District can also enact campaign contribution limits, as long as the limits are not too restrictive when considering the above factors. However, it is not clear how such limits would be enforced under Education Code section 35177, and without an enforcement mechanism, any limits enacted may end up being voluntary. Ultimately, if WCCUSD chooses to implement campaign finance regulations, they must be crafted very carefully to survive legal challenges.