

KAREN HELDMEYER,

Complainant,

v.

Case Nos. 2017-1B; 2017-2

PRE-K FOR SANTA FE,

Respondent.

RESPONSE OF PRE-K FOR SANTA FE
POLITICAL COMMITTEE

Introduction

Former Santa Fe City Councilor Karen Heldmeyer filed two complaints with the Santa Fe Ethics and Campaign Review Board ("ECRB") against the political committee, Pre-K for Santa Fe ("Committee"), alleging violations of the reporting and disclaimer requirements of the Santa Fe Election Code ("SFEC" or "the Code"). *See* Complaints filed by Karen Heldmeyer, March 22, 2017 (Case No. 2017-1B), and March 27, 2017 (Case No. 2017-2). This Response addresses both Complaints.

In her first Complaint, Ms. Heldmeyer states that she received a copy of a Santa Fe New Mexican editorial piece at her home but the editorial did not specify a political committee sponsor pursuant to §§ 9-2.5(B) or 9-2.5(D). In her second Complaint, Ms. Heldmeyer states that the Committee failed to check the business contributor box of the Committee reporting form, in violation of SFEC § 9-2.12(B). Because Ms. Heldmeyer's Complaints fail to allege facts sufficient to show probable cause of any violation, they should be dismissed as a matter of law.

Argument

The ECRB must dismiss a Complaint if the Complainant fails to allege legally sufficient facts which, if true, show probable cause to believe that there was a violation of the election code. SFCC § 6-16.4(A)(1).

As a threshold matter, laws governing the regulation of political speech must survive exacting scrutiny. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995) (“When a law burdens core political speech, we apply ‘exacting scrutiny,’ and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest.”). This is so because “[d]iscussion of public issues [is] integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people.” *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (internal quotations and citations omitted). This is particularly true in a ballot initiative election such as this. As the Tenth Circuit Court of Appeals explained:

There is nothing novel about requiring election campaign committees in this country to file periodic reports, including disclosures of names of contributors and the amount contributed. Many judicial decisions have considered whether particular reporting and disclosure requirements can withstand scrutiny under the First Amendment. The great bulk of those decisions, however, concern committees that are working for or against candidates for public office. Reporting requirements are justified as necessary to police whether anyone is contributing more than allowed to a candidate (the contribution limits being justified, in turn, by the need to prevent quid pro quo corruption, and the appearance of corruption) and to give the electorate useful information concerning the candidate's views and those to whom the candidate is likely to be beholden.

At issue on this appeal is a different type of campaign committee, not one seeking to elect or defeat a candidate, but one seeking to prevail on a ballot initiative. A citizen voting on a ballot initiative is not concerned with the merit, including the corruptibility, of a person running for office, but with the merit of a proposed law or expenditure, such as a bond issue. As a result, the justifications for requiring disclosures in a candidate election may not apply, or may not apply

with as much force, to a ballot initiative. Disclosure may facilitate ad hominem arguments-for whatever they are worth-on the merits of the ballot initiative; but there is no need for concern that contributors can change a law enacted through a ballot initiative as they can influence a person elected to office.

Sampson v. Buescher, 625 F.3d 1247, 1248-49 (10th Cir. 2010) (finding unconstitutional Colorado's campaign disclosure law as applied to a ballot measure committee that spent less than \$1,000 on advertising).

The U.S. Supreme Court addressed these fundamental principles in *McIntyre*, a case involving the distribution of anonymous leaflets opposing a proposed school tax levy. The Supreme Court, in finding unconstitutional (as applied) Ohio's statute prohibiting the distribution of campaign literature that did not contain the name and address of the person or campaign official issuing the literature, noted that "handing out leaflets in the advocacy of a politically controversial viewpoint is the essence of First Amendment expression." *McIntyre* at 347. The Court continued:

That this advocacy occurred in the heat of a controversial referendum vote only strengthens the protection afforded to Ms. McIntyre's expression: urgent, important, and effective speech can be no less protected than impotent speech, lest the right to speak be relegated to those instances when it is least needed. No form of speech is entitled to greater constitutional protection than Mrs. McIntyre's. *Id.* ... Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent.

Id. at 357.

While the Committee supports transparency in political campaigns, and will continue to voluntarily comply with the SFEC as enacted (and as instructed by the City Clerk and City Attorney), this Board must view the sufficiency of Ms. Heldmeyer's Complaints in context of these precedential laws and guiding principles.

I. Complaint 2017-1B should be dismissed because editorials are not regulated by the Santa Fe Election Code.

The Santa Fe Election Code requires political committees such as Pre-K for Santa Fe to place on its printed campaign material the name of an officer or other responsible person of the political committee sponsoring such materials and a telephone number. SFEC §§ 9-2.5(B) and (D). The Code defines “campaign materials” as “any published communication, electronic or otherwise, disseminated to more than one hundred (100) persons that either supports the election or defeat of any identifiable candidate or candidates or supports the approval or defeat of a ballot proposal, *other than communications to, or editorials, reports, or commentary by news media.*” SFEC § 9-2.3(E) (emphasis added).

Ms. Heldmeyer received a copy of an editorial that did not have what she states are the required disclosures. However, editorials are specifically excluded under the definition of campaign material. There is nothing in the Code that allows the City to regulate persons who merely republish or redistribute news articles, editorials, reports or commentary.¹ Even if there were such a requirement, the failure to identify the Committee would be harmless. First, any voter could simply search the Santa Fe New Mexican to find this public document to authenticate it. Second, the Committee distributed the editorial with other material that clearly and conspicuously identified its author. *See* Affidavit of Sandra Wechsler, April 3, 2017, ¶ 5, attached as Exhibit A (“Wechsler Aff.”). Finally, *although not required by law*, the Committee had intended to provide this disclaimer but inadvertently omitted it. *See*

http://www.santafenewmexican.com/news/local_news/complaint-filed-over-soda-tax-flier/article_9c5fe12c-0aab-56e8-a331-afb0378b1050.html.

¹ Nor would such a requirement survive First Amendment scrutiny. In addition to the constitutional protection afforded the media, the cost to duplicate this editorial was *de minimis*. *See* Affidavit of Sandra Wechsler, April 3, 2017, ¶ 5. *See also, Sampson v. Buescher*, 625 F.3d 1247 (10th Cir. 2010).

In sum, the City does not (and cannot) regulate news commentary and editorials such as the one at issue in Ms. Heldmeyer's Complaint.

II. Complaint 2017-2 should be dismissed because the business contributor disclosure reporting is not required in this special election.

SFEC § 9-2.12(B) requires a political committee that receives contributions from another entity that does not have to disclose its contributors to the city clerk, to "indicate as such on the campaign finance statement submitted to the city clerk pursuant to existing reporting requirements." However, according to the City Clerk and City Attorney, these reporting requirements do not apply to elections where there are no candidates on the ballot. *See Wechsler Aff.* ¶ 4. The City's waiver comports with U.S. Supreme Court and Tenth Circuit Court of Appeals precedent. Only in candidate races could such a requirement survive exacting scrutiny. As the Supreme Court explained:

In candidate elections, the Government can identify a compelling state interest in avoiding the corruption that might result from campaign expenditures. Disclosure of expenditures lessens the risk that individuals will spend money to support a candidate as a quid pro quo for special treatment after the candidate is in office. Carriers of favor will be deterred by the knowledge that all expenditures will be scrutinized by the [the campaign regulatory body] and by the public for just this sort of abuse.

McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 356 (1995) (emphasis added).

In any event, the City elected to waive this reporting requirement. As such, the Committee cannot be found liable for properly following the "existing reporting requirements" of SFEC § 9-2.12(B).

Conclusion

For the reasons set forth above, Pre-K for Santa Fe respectfully asks that the ECRB dismiss Ms. Heldmeyer's Complaints for failure to show probable cause of violations of the Santa Fe Election Code.

Dated: April 3, 2017

Respectfully submitted,

By: /s/ Sara Berger

Sara Berger

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Attorney for Pre-K for Santa Fe

**CITY OF SANTA FE
ETHICS AND CAMPAIGN REVIEW BOARD**

KAREN HELDMEYER,

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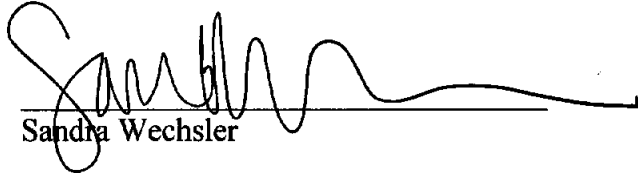
AFFIDAVIT OF SANDRA WECHSLER

STATE OF NEW MEXICO)
)
COUNTY OF SANTA FE)

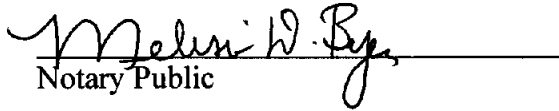
Sandra Wechsler, being first duly sworn, states as follows:

1. I am over the age of 18 and competent to make this Affidavit.
2. The statements in this Affidavit are based on my personal knowledge and beliefs.
3. I am a Campaign Consultant for the political committee, Pre-K for Santa Fe ("Committee").
4. On March 16, 2017, on behalf of the Committee, I attended a meeting held by the Santa Fe City Clerk. The purpose of the meeting was to discuss campaign finance reporting obligations of the political committees involved in the upcoming May 2, 2017, special election. Both the City Clerk and Assistant City Attorney, Zach Shandler, were in attendance. Mr. Shandler informed the Committee that since this was a special election where no candidates were running for office, the City did not require the Committee to check the "Contributor Disclosure Not Required" box on the business contributor sheet. A copy of the reporting form detailing the business contributor box is attached as Exhibit 1.

5. On March 21, 2017, the Committee conducted a canvass where the Committee distributed flyers to Santa Fe households. The material distributed is attached as Exhibits 2 and 3. Exhibit 2 is a reprint of an editorial that was published in the Santa Fe New Mexican on March 4, 2017. The cost of duplicating the editorial was \$487.41. Exhibit 3 is campaign material from the Committee supporting the ballot initiative.

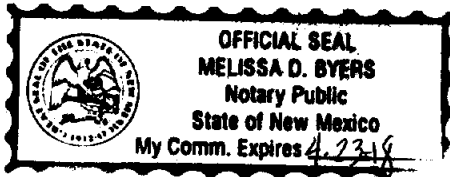

Sandra Wechsler

SUBSCRIBED AND SWORN TO before me by Sandra Wechsler on this 3rd day of April, 2017.


Notary Public

My Commission Expires:

4-23-18



EDITORIALS

SANTA FE ♦ NEW MEXICAN

Our View: Pre-K for all? It's time

Saturday, March 4, 2017

Everyone knows that not all children in Santa Fe are prepared on the first day of school.

Anna might not be able to tell a teacher her name or address. Juan can't count to 10 or recite the alphabet. Tyler can't name his colors. Too often, children such as these start out behind and never catch up.

Yet despite understanding that early childhood education is essential to helping less privileged children start right on day one, the state of New Mexico has been unwilling — or too broke — to offer universal pre-K for all families who want it. Public schools have expanded access to early childhood education, but every year, families are turned away. There's not enough space. Other moms and dads cannot afford private preschool; it's simply too expensive.

Everyone understands this. What has challenged reformers is figuring out how to expand access to high-quality preschool, so that all families — especially those who most need it — can attend if they choose.

Making preschool a reality is not just the responsibility of parents or of the state's education system, but of the community. At least that is how Mayor Javier Gonzales sees it. And that's why he launched his Early Childhood Initiative, a plan to use city funds to make sure that all children can attend preschool if their parents so choose. He even figured out a way to pay for it.

On Wednesday, the Santa Fe City Council will decide if the mayor's plan to pay for pre-K will be presented to voters in a special election this May. While all agree that preschool is a worthy notion, there is much debate over how the mayor wants to pay to improve access. He is proposing a 2-cents-per-ounce tax on sugary drinks, estimated by the city to bring in \$7.7 million a year in new revenue. Those dollars would be spent making pre-K more widely available, using existing programs and providers.

The debate over taxing sugary drinks is beyond contentious already, with the goal — paying for preschool — becoming lost in the commotion. This is not a step for Santa Fe to take lightly. A so-called soda tax will impact families with less money more (although,

to be fair, no one has to drink sodas or other sugary drinks). That's concerning. It is true, as critics point out, that if people drink fewer sodas because they are more expensive, the revenue stream to pay for preschool could be inadequate. City councilors have questions, too, wondering about how the tax will be collected and how the money will be handed out. Good, let's have the debate. It's important.

What we have learned is encouraging. The tax is on soda and sugary-drink distributors — that means the local Coca-Cola plant, but also grocery store supply chains and big corporations such as Starbucks that sell sugar-sweetened drinks. The city plan calls for hiring a half- or full-time city employee to oversee collections, as well as a third-party vendor that specializes in such taxes. A soda tax should not lead to the creation of a new bureaucracy.

At the distribution point — where money is given to provide more preschool slots — the good news is that Santa Fe has a strong early childhood education infrastructure in place. There is Santa Fe Community College's Early Childhood Center of Excellence, Santa Fe County United Way preschool initiatives, Head Start, Santa Fe Public Schools and many private providers. City dollars will supplement what is already here. The goals are for more classrooms across the city to meet quality benchmarks under the National Institute for Early Education Research, for more families to be able to afford to send their children and for space to be available. Part of the initiative includes training, the creation of 56 new classrooms and employment of at least 196 additional teachers, administrators and staff.

Importantly, the city is not going to set up shop as a preschool provider. Key words from the city's plan: "Build on, but don't duplicate, Santa Fe's early childhood capacity and assets."

In a perfect world, the public school system would have all the money it needs to provide much-needed pre-K. Private providers would offer scholarships so that all families could afford to send children. A city such as Santa Fe, whose chief responsibilities are picking up trash, maintaining roads and ensuring public safety, would be less involved when it comes to ensuring the welfare of children. That is not the world in which we live.

Mayor Gonzales and his Pre-K for Santa Fe supporters see an acknowledged need. Nearly 1,000 3- and 4-year-olds in Santa Fe lack access to high-quality early learning programs. Some 72 percent of the children identified are Hispanic, with more than 58 percent living in households with an income below 200 percent of the federal poverty level, or \$36,325 for a family of four. The children who most need these educational opportunities, in other words, don't have them.

The mayor's Pre-K for Santa Fe plan identifies the need and finds a way to pay for it. On Wednesday, city councilors should ask their questions and hammer out differences — Santa Fe needs for this to be done right. Then, let the voters decide. Sooner, rather than later, not just because children are waiting but to avoid a long, ugly campaign. Pre-K for Santa Fe? It's about time.



VOTE TUESDAY, MAY 21

SANTA FE'S FUTURE IS IN YOUR HANDS



PRE-K FOR SANTA FE

Because Our Children Can't Wait

VOTE TUESDAY, MAY 2

REGISTER TO VOTE BY MONDAY, APRIL 3 AT SOS.STATE.NM.US

EACH CHILD DESERVES the opportunity to succeed. Pre-K for Santa Fe will ensure that all of Santa Fe's three- and four-year-olds have access to high quality pre-kindergarten so they can begin school better prepared to learn.

SCIENCE TELLS US that Pre-K sparks children's creativity and imagination and gives them the skills they need to be ready to learn when they go to school. There are close to 1,000 Santa Fe children who do not have access to high quality Pre-K. Shouldn't all Santa Fe children have an opportunity to succeed?

PRE-K FOR SANTA FE will be paid for by a two-cent per ounce tax on distributors of soda and other sugary beverages, thereby decreasing the risk of heart disease, diabetes, and obesity.

PRE-K FOR SANTA FE will create 200 jobs for Santa Feans in early education with good pay, professional development, and benefits.

For more information or to help out, please contact us at hello@prekforsantafe.org.

WWW.PREKFORSAntAFE.ORG

**Paid for and authorized by Pre-K for Santa Fe,
Celia Lopez, Chair, and Carmen Gonzales, Treasurer (505) 819-3284**

