

In the Matter of a Complaint by  
Tom Nicholas, Guilford

File No. 2011-091

### **AGREEMENT CONTAINING CONSENT ORDER**

This agreement by and between Tom Forcella (hereinafter referred to as "Respondent"), formerly of the Town of Guilford, County of New Haven, and the authorized representative of the State Elections Enforcement Commission is entered into in accordance with Section 9-7b-54 of the Regulations of Connecticut State Agencies and Section 4-177(c) of the General Statutes of Connecticut. In accordance herewith, the parties agree that:

1. Respondent was formerly superintendent for the Guilford Public Schools.
2. The Town of Guilford held a referendum on a high school building project on June 14, 2011.
3. The complainant alleged that the school district spent municipal funds to promote approval of the referendum by using the district's automated calling system to send a message from the Respondent to all parents in the school district.
4. That message stated:

Good Evening, This is Tom Forcella, Superintendent of the Guilford Public Schools. Tomorrow, Tuesday, June 14th is the referendum on the proposed new Guilford high school. All five poll locations will be open from 7:00 a.m. to 8:00 p.m. In Tuesday's referendum you will be asked if the Town of Guilford should appropriate \$89,970,800 for the design and construction of a new high school on the existing site. The net cost to the town will be \$64 million after state reimbursement. You will also be asked if the town should appropriate an additional \$1.75 million for energy conservation improvements and \$500,000 to include an emergency shelter in a portion of the new building. Your participation in this important referendum is encouraged. For more information about the proposed high school project, please visit the Guilford Public School's web site. Thank you and have a good night.

5. At the school district's website, visitors could view, among other things, a 20-minute, narrated slide presentation that identified several options to address the future of the high school and, among other things, put forth arguments in favor of the building project, including quotes from the NE accreditation agency, which said that the high school's condition had reached a critical point.
6. The Guilford Public Schools put forth a proposal to construct a new high school on April 19, 2011. The Guilford Board of Finance recommended appropriating funds for the project on May 16, 2011. On the same date, the Board of Selectmen set a referendum for June 14, 2011. Thus, on May 16, 2011 the referendum was legally pending.

7. The residents of Guilford voted on June 14, 2011 to approve the high school project.
8. Connecticut General Statutes §9-369b provides in pertinent part:
  - (a) . . . [N]o expenditure of state or municipal funds shall be made to influence any person to vote for approval or disapproval of any such proposal or question . . .
9. The Commission has consistently concluded that communications that recommend or urge support of, or opposition to, a referendum question, are subject to the restrictions found in §9-369b, General Statutes. In its determination of whether a publicly funded communication advocates the approval or disapproval of a referendum, the Commission has considered the communication as a whole, its content, style, tenor and timing.
10. The Commission has also concluded that using an automated phone system to inform voters of the time, place, and question presented in a referendum is not prohibited by Connecticut statute.
11. The Commission has determined previously that communications that advocate a particular result, either expressly or, when considered as a whole, make an ordinary reasonable person understand that the communication advocates for a particular result, would constitute advocacy. The Supreme Court analyzed this standard of review in *Sweetman v. State Elections Enforcement Commission* and concluded that the Commission could rely on that process to determine when communications advocated for or against the outcome of a referendum. *See* 249 Conn. 296, 316 (1999).
12. In prior decisions the Commission has found that the costs associated with a website or server maintained by the public schools would be an expenditure of public funds under § 9-369b. *See In the Matter of a Complaint by Matthew Grimes, Brookfield*, File No. 2008-070, ¶ 8 (concluding that message posted on town website while referendum was pending that urged support for budget violated General Statutes § 9-369b).
13. Stemming from decisions addressing automatic messaging systems, the Commission has also concluded that the use of an automated phone system, such as the one employed by the Guilford school district in this case, will qualify as an expenditure for the purposes of § 9-369b. *See In the Matter of a Complaint by William A. Michael (Bethel)*, File No. 2008-069 (State Elections Enforcement Comm'n, Aug. 13, 2008). (finding that use of automated messaging systems would represent expenditures under statute and extending the "time-place-date" exception to phone calls limited to that content). The Commission has recognized that the prohibition against using public funds to influence the outcome of a referendum does not apply to messages limited to statements of the time, place and date of an upcoming referendum.
14. The Guilford school system expended public funds on an automated messaging system that it used to deliver information to parents and staff, not only on this occasion but throughout the school year. The school system paid for the service on an annual basis. Although the school system did not incur a charge for the specific message at question in this matter, it did pay for

the ability to use the service and send messages as part of the annual package. This access to the messaging system allowed the respondent to send the message at issue in this case.

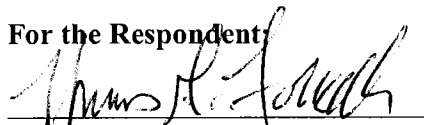
15. Likewise, the hosting and maintenance of a website, where the material advocating on behalf of the referendum was made available to the public, also cost the school system. However small, the school system made expenditures of public funds.
16. Respondent asserts that it was not his intent to advocate for a position on the referendum question through his use of the automated message system. Taking the communication of the Guilford school board's telephone communication and website as a whole, however, the Commission believes that the school system's communication would appear to advocate for a positive outcome on the referendum question. While the telephone call itself does not expressly advocate for a position on the referendum, it does refer individuals who would like more information about the high school project to consult the Guilford Public School's website. Once at this site, visitors could find information about the proposed high school plan, answers to frequently asked questions, the specifications from which the architects worked, as well as a narrated slide presentation that reflected that spending money to build a new high school was the best option for the community.
17. The Commission believes that the website, which was also paid for by public funds from the Guilford Board of Education, contained information that a reasonable person would view as advocating for a positive vote on the referendum. The slide presentation includes a section titled "Benefits of New Construction." The title page of the presentation included a quote from a New England Association of Schools and Colleges' Accreditation Report: "... the issues regarding the physical plant's shortcomings must be addressed." *See* <http://www.guilford.k12.ct.us/GHSFacility.php> (last viewed on November 7, 2011). A portion of the NEASC report also quoted in the slide presentation said that administrators, teachers, and staff had "exhausted all the alternatives possible" to address the facility short-comings. *Id.* The online, 20-minute presentation, among other things, laid out the specific plans and benefits of new construction, which was the topic of the referendum question.
18. The automated telephone call of June 13, which notified Guildford residents of the referendum vote on the eve of that vote and, more importantly, referred them to the school system's website that included material advocating for the high-school-building project that was the subject of the referendum, violated General Statutes § 9-369b's ban on the use of public funds to influence the outcome of a referendum question. Although the telephone call itself did not advocate for or against the referendum, the Commission believes that the website created and maintained by the Guilford Public Schools included advocacy materials that promoted the referendum. The Commission believes that the website alone, had it been the subject of the complaint, would have violated § 9-369b, since it used public funds to promote the outcome of a referendum when that referendum was pending.
19. The Commission has taken into consideration the limited impact and nature of the message at issue (i.e., the automated phone call) and the limited expense of said message in its resolution of this matter.

20. The Respondent admits all jurisdictional facts and agrees that this Agreement and Order shall have the same force and effect as a final decision and Order entered after a full hearing and shall become final when adopted by the Commission. The Respondent shall receive a copy hereof as provided in Section 9-7b-56 of the Regulations of Connecticut State Agencies.
21. Respondent neither admits nor denies the Commission's conclusions that the information on the website advocated for approval of the referendum question but is willing to accept the terms of this document in order to allow the Commission to resolve this matter.
22. It is understood and agreed that this agreement will be submitted to the Commission at its next meeting and, if it is not accepted by the Commission, it is withdrawn by the Respondent and may not be used as an admission in any subsequent hearing, if the same becomes necessary.
23. The Respondent waives:
  - (a) Any further procedural steps;
  - (b) The requirement that the Commission's decision contain a statement of findings of fact and conclusions of law, separately stated; and
  - (c) All rights to seek judicial review or otherwise to challenge or contest the validity of the Order entered into pursuant to this agreement.
24. Upon the Respondent's compliance with the Order hereinafter stated, the Commission shall not initiate any further proceedings against him pertaining to this matter.

**ORDER**

IT IS HEREBY ORDERED that the Respondent shall henceforth strictly comply with the requirements of Connecticut General Statutes §9-369b, and shall further ensure that no expenditure of municipal funds shall be made to influence any person to vote for approval or disapproval of a referendum question.

**For the Respondent:**



Tom Forcella  
Superintendent  
Guilford Public Schools  
Guilford, CT

**For the State Elections Enforcement Commission:**

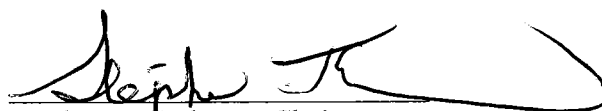
BY: 

Michael Brandt, Esq.  
Executive Director and General Counsel  
and Authorized Representative of the  
State Elections Enforcement Commission  
20 Trinity Street, Suite 101  
Hartford, Connecticut

Dated: 8/17/12

Date: 8/14/12

Adopted this 22 day of AUGUST of 2012, at Hartford, Connecticut.



Stephen F. Cashman, Chairman  
By Order of the Commission