School is back in session, and it’s a Presidential election year. Although independent schools, as institutions, are strictly prohibited from engaging in partisan political activities, there are greater opportunities than ever for schools, students, and the rest of the academic community to get politically involved.

From an academic perspective, election year politics provide students invaluable real-life opportunities to learn about the electoral process and the importance of civic engagement. Independent schools have the opportunity to guide students and show them how they can directly effect change and shape our country’s future as part of their core educational mission.

From an institutional perspective, schools also have their own vital stake in addressing key issues such as maintaining charitable tax status, remaining exempt from state mandated testing, and other issues that get to the heart of remaining independent schools. Just because it’s an election year, it doesn’t mean that schools are prohibited from pursuing their own public policy agendas; they just need to be careful about the way they do it.

Given the complexity of the legal and tax framework in which independent schools must operate, it is no easy task to be politically active while complying with the ever changing array of federal, state, and local laws. Institutionally, the consequences could not be more serious if a school makes mistakes, including unwelcome media attention and loss of alumni support, audits and investigations, excise taxes and penalties payable by the school and its responsible managers, and even the possible loss of a school’s all-important tax-exempt status.

Most significantly, as tax-exempt organizations recognized under Section 501(c)(3) of the Internal Revenue Code, NAIS member schools must be careful not to run afoul of the tax law prohibition against institutional, partisan political activities. Also of importance are federal election laws, which mostly overlap with the federal tax rules, but may have additional reporting requirements and penalties for noncompliance. Although beyond the scope of this article,

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1 These and other key issues are included in the 2012 NAIS Legislative Agenda, which broadly includes education, tax and nonprofit 501(c)(3) community, employee relations and benefits, environment and energy, and budget and appropriations issues.
independent schools must also be familiar with state and local laws. Take for example a Florida teacher who faced thousands of dollars of fines for helping students register to vote without complying with the state’s controversial election law, which has since been struck down.2

The purpose of this article is to provide a practical explanation of this legal framework, followed by an analysis of various factual scenarios of interest to NAIS member schools, to illustrate both the political “do’s” and “don’ts” during this election season. The legal discussion and practical analysis provided in this article are not intended as legal advice, however, so schools should consult with their own legal counsel regarding the implications of their own specific activities.

Federal Tax Law

Section 501(c)(3) status confers a number of benefits that are important to the survival and long-term success of independent schools. For example, in addition to the most obvious benefit of not having to pay taxes, Section 501(c)(3) status helps foster donor generosity by allowing tax deductible charitable donations. It also enables independent schools to receive grants from private foundations.

In order to maintain their tax-exempt status, schools and other Section 501(c)(3) organizations must comply with federal tax law. Among other things, this means NAIS member schools must avoid engaging in prohibited political activities in connection with federal, state, and local elections.3

Prohibition Against Institutional Political Activity

Under the Internal Revenue Code, Section 501(c)(3) organizations are “absolutely prohibited from directly or indirectly participating in, or intervening in, any political campaign on behalf of (or in opposition to) any candidate for elective public office” at the federal, state, and local level.4 As will be explained below, this is an institutional prohibition against partisan campaign activities by the school itself and others acting on its behalf. Schools are still allowed to participate in a wide variety of nonpartisan political activities and members of the school community remain free to do what they want in an individual and personal capacity.

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2 See http://www.news-journalonline.com/columns/footnote/2012/08/31/is-judges-ruling-too-late-to-bring-back-new-voters.html This new Florida law and similar laws enacted in other states have reportedly caused some nonprofit organizations to cease engaging in voter registration activities. See http://www.nytimes.com/2012/03/28/us/restrictions-on-voter-registration-in-florida-have-groups-opting-out.html?_r=1 Even if these state and local laws are ultimately ruled invalid, like the Florida law, it remains important for schools to be aware of these laws in planning activities.

3 26 CFR 1.501(c)(3)-1(c)(3)(iii).

4 See IRS Website, The Restriction on Political Campaign Intervention by Section 501(c)(3) Tax-Exempt Organizations, at http://www.irs.gov/Charities-&-Non-Profits/Charitable-Organizations/The-Restriction-of-Political-Campaign-Intervention-by-Section-501(c)(3)-Tax-Exempt-Organizations. The IRS Website has extensive resources available to help understand and comply with this prohibition as well as information about political activities that are allowed.
Starting first with what is prohibited, the IRS has made clear that partisan campaign-related activities, such as endorsing a candidate, or making a campaign contribution by the school, are always prohibited. By engaging in such conduct, schools and other Section 501(c)(3) organizations risk serious consequences, including revocation of their tax-exempt status, excise taxes and other penalties, as well as the loss of donors and the reputational consequences associated with being the target of a governmental audit or investigation into unlawful political conduct.

According to the IRS, whether a Section 501(c)(3) organization is engaging in prohibited political activity is generally not a black and white question, but instead requires a subjective analysis of all relevant facts-and-circumstances. In 2007, the IRS published a revenue ruling that explains this subjective facts-and-circumstances test, and also provides 21 examples of different types of activities that are allowed or not depending upon the specific fact pattern.

_Voter Education, Voter Registration & Get-Out-the-Vote Drives_

Generally speaking, the IRS has ruled that general election-related activities by Section 501(c)(3) organizations are allowed, if conducted in a neutral and non-partisan manner. For example, Section 501(c)(3) organizations are allowed to engage in “voter education activities,” such as hosting a candidate forum, debate, or publishing voter education guides, provided these activities are carried out in a non-partisan manner. Similarly, activities aimed at encouraging participation in the electoral process, such as voter registration and get-out-the-vote drives are also allowed, provided they are organized and operated in a non-partisan manner.

In determining whether activities are sufficiently non-partisan to be allowed, the IRS will look for evidence of bias, including whether the organization’s activity or activities explicitly favor or oppose one candidate over another, or would have that effect. In the context of hosting a candidate forum or debate, for example, the IRS has advised that a Section 501(c)(3) organization could show prohibited bias or preference through biased questioning procedures, providing unequal access or platforms for opposing candidates, or by only addressing a limited number of issues, which in context would tend to favor one candidate or party over another.

_Candidate Appearances_

Candidates are allowed to make appearances if they are speaking or participating as non-candidates, such as current office holders, policy experts or celebrities. Key requirements are that there be no mention of the campaign, the meeting be in an academic setting, and there be no actual or implied endorsement by the school or teacher. Otherwise, the school must provide an

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5 “Contributions to political campaign funds or public statements of position (verbal or written) made on behalf of the organization in favor of or in opposition to any candidate for public office clearly violate the prohibition against political campaign activity.” Id. See also 26 CFR 1.501(c)(3)-1(c)(iii) (“Activities which constitute participation or intervention in a political campaign . . . include, but are not limited to, the publication or distribution of written or printed statements or the making of oral statements on behalf of or in opposition to such a candidate.”)

6 Rev. Rul. 2007-41, 2007-25 I.R.B. 1421. Like the IRS Website, this revenue ruling is must reading for independent schools involved with political activities. Many of the examples and commentary in this section come from Rev. Rul. 2007-41 and are not separately cited.
equal opportunity to all candidates for the office to appear. In no event is campaign fund-raising allowed.

**Institutional vs. Individual Activity**

Importantly, schools must remember that the federal tax law prohibition on political campaign intervention only applies at the institutional level, barring partisan political campaign activity by the school itself, or others acting on its behalf. It is not intended to deter members of the school community from engaging in campaign activities in their own names and in their individual or personal capacity. School leaders and others are allowed to endorse candidates and engage in political campaign activities on their own time, as long as they make clear that they are acting in their individual and personal capacity, and their titles, if used, are for reference purposes only (and not to imply any endorsement by the school). Leaders should not, however, make partisan comments in official school publications or at official school functions.

As a general matter, it is advisable for schools to adopt a clear policy that no one may participate or intervene in any political campaign on the school’s behalf, and take steps to ensure that individual campaign activities and efforts are not attributed to the school. On the other hand, schools should not adopt a position so draconian that it deters personal involvement in the electoral process and civic engagement, which would be contrary to educational goals and values espoused by NAIS member schools. Such a policy can be as simple as:

As a Section 501(c)(3) nonprofit organization, a School may not participate or intervene in a political campaign to support or oppose any candidate. For this reason, school staff and other members of the school community may never participate or intervene in a political campaign on the School’s behalf or in a manner that may imply any endorsement or support by the School. However, staff may participate in the political process and other kinds of civic engagement in ways of their own choosing, acting alone or through outside groups, as long as they make clear that they are acting in their individual and personal capacity. Support may also be provided for sanctioned student activities, but only after checking with school officials.

**Continued Lobbying and Issue Advocacy**

The prohibition against campaign activities also should not deter communications, grassroots lobbying, and other activities by schools in support of their legislative and public policy agendas, just because it is election season. This is a particularly tricky area, however, because such efforts tend to be highly visible and may be criticized as in indirect effort to influence the outcome of an election. In deciding whether and how to engage in such activities, it is important to consider carefully the factors the IRS will analyze, which include:

- whether a candidate is mentioned or involved;
- whether any statement or communication expresses approval or disapproval of a candidate;
- the proximity of any communications and activities to an election;
• whether there is a reference to the election or voting;
• if the issue being discussed distinguishes the candidates;
• whether the communications is part of an ongoing series of communications; and
• whether the timing of the communication or activity coincides with a non-electoral event, such as a legislative hearing or vote.

Although such communications and activities are allowed depending upon these circumstances, it would be best to discuss these issues with your legal counsel before proceeding to help structure them so that they will qualify as permissible lobbying or issue advocacy.

**Student Educational Activities**

Importantly, under federal tax law, the scope of permissible campaign-related activity may be broader for schools than other Section 501(c)(3) organizations, particularly when it comes to student-focused, educational activities. In guidance materials, the IRS has recognized that tax-exempt schools are permitted to provide support—including facilities, faculty, and financial resources—in connection with campaign-related student activities, which are part of a “formal course of instruction,” or arise out of student “participation in academic programs and academic-related functions of the educational institution.”

For example, the IRS specifically ruled that a tax-exempt university does not engage in prohibited political campaign intervention by allowing students to work on a political campaign of their choice, as part of their coursework in a political science class that is designed to “acquaint students with the basic techniques of effective participation in the electoral system.” Similarly, the IRS ruled that a Section 501(c)(3) educational organization does not engage in unlawful political conduct by providing office space, faculty advisors, and financial support for a student-run newspaper that contains student editorial opinions on political and legislative matters.

In any situation where students are engaged in partisan campaign activities, it remains important to make the point that they are acting in their individual and private capacities, and not on behalf of the school. Also, school officials should consult federal, state, and local election laws to determine what, if any, financial and other support schools can provide, as discussed in the next section.

**Federal Election Law**

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7 As noted below, although allowed by the IRS, providing such support may trigger election law restrictions and reporting requirements, which must always be checked.

8 Rev. Rul. 72-512, 1972-2 C.B. 246. In this ruling, the IRS emphasized that the tax-exempt university in question did not seek to influence students’ choice of candidate or control students’ campaign work, and that students’ campaign work was reasonably germane to a “formal course of instruction.” The fact that school personnel and facilities were used, did not make the school “a party to the expression or dissemination of political views of the individual students in the course of their actual campaign activities within the intendment of Section 501(c)(3).”

In addition to the federal tax law discussed above, schools should be aware of federal election law, which further regulates political activities by independent schools. Although many of the rules overlap, federal election law sometimes has additional restrictions, reporting requirements, and penalties for noncompliance.

Unlike federal tax law, which broadly defines political activities in terms of trying to “influence” the outcome of an election using a subjective facts-and-circumstances test, federal election law employs a more objective monetary standard. The basic question from the perspective of the Federal Election Commission (“FEC”) is whether an organization has made a “contribution” or “expenditure” or otherwise provided anything of value to support or oppose a candidate for federal office. Another important distinction is that federal election law only applies to federal candidates and elections, not at the state and local level, which are also covered by the Section 501(c)(3) tax prohibition.

Until recently, federal election law generally prohibited corporations from engaging in any political campaign activities except through a political action committee (PAC), which is prohibited for a Section 501(c)(3) organization. In 2010, however, the United States Supreme Court decided *Citizens United v. FEC*, which held that it is unconstitutional to bar so-called express advocacy communications (e.g., “vote for” or “vote against”) and other campaign activities by corporations, as long as such activities are independent and not coordinated with any candidate, and they are properly reported to the FEC.

Practically speaking, the IRS prohibition against political activities is much broader than the corporate prohibition, even after *Citizens United*, so that anything allowed by the IRS should be allowed by the FEC (subject to certain restrictions and reporting requirements discussed below).

For example, under FEC regulations, an individual may volunteer services to a campaign as long the individual is not compensated by anyone for such services. This corresponds to the tax rule that allows teachers and staff to engage in whatever political activities they want on their own time, as long as they are acting in their individual and personal capacity. For this reason, if a teacher or other member of the staff engages in campaign activities during normal, paid working hours, it would not only violate the Section 501(c)(3) prohibition, but would possibly be unlawful if the teacher is working directly with a campaign (since it would be a coordinated

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10 This federal election law is comprised of the Federal Election Campaign Act of 1971, Title 2 of the United States Code, implementing regulations issued by the Federal Election Commission, Title 11 of the Code of Federal Regulations, and various advisory opinions and other helpful legal guidance that can be found at FEC’s website at http://www.fec.gov.

11 As noted earlier, a discussion of state and local election law is beyond the scope of this article, but still must be carefully checked to make sure that any particularly political activities are allowable, and also to comply with any state and local registration and reporting requirements that may apply.

12 Federal election law applies to schools primarily because they normally are incorporated under state law in addition to qualifying for Section 501(c)(3) tax exempt status by the IRS.
activity). Similarly, providing a corporate contribution or direct support to a campaign would violate both IRS and FEC rules. 13

Other examples of activities that are exempt from FEC requirements include candidate appearances focused on nonelection policy issues; debates; distributing factual voting records and voter guides consisting of candidates’ positions on campaign issues; registration and get-out-the-vote drives; and voter education activities. Like their tax counterparts, all of these election-related activities are mostly free from FEC requirements as long as they are nonpartisan, avoid express advocacy and fund-raising for candidates, and meet other conditions.

One area of uncertainty under both the federal tax and election laws is the extent to which the school’s facilities can be used by school administrators, faculty, staff, and students for their own independent campaign-related activities. Even though federal election law allows employees and others to make incidental use of corporate facilities for their individual, volunteer campaign work without any reporting or reimbursement obligations, there is no corresponding exemption under the tax rules, so this should be prohibited for school administrators, faculty, and staff, unless arrangements are made for the school to be paid for such use and it is made available on the same terms for all candidates. School administrators, faculty, and staff also should be barred from using school letterhead or their school email accounts to support their activities in order to avoid any appearance that the school is involved with their individual and personal campaign activities.

Although the federal tax law allows students to engage in partisan political activities as part of their classes and extracurricular activities, there is no corresponding exemption under the federal election law for the school to support these activities. Once again, care should be exercised in allowing the use of school facilities to support independent, partisan student activities without checking further with legal counsel and considering arrangements for the payment of same. In any event, it is important that students make clear that the role of the school and faculty is to provide academic oversight for their activities, and that the school itself does not endorse or support any candidate.

Questions and Answers for Further Guidance

1. A parent is running for office and wants us to take a group of students to one of her rallies, dressed in school shirts, for a photo opp. Can she do that?

Although students can freely attend rallies, and may individually decide on their own whether to wear a school shirt, this photo opportunity is staged and implies an endorsement or formal connection between the candidate and the school, so it is not allowed.

2. The candidates want to hold a debate in our school auditorium---can we do that?

The school is free to sponsor a debate if all candidates are invited, the debate is conducted in a nonpartisan manner, and there is no bias or preference for one candidate over another by the

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13 Citizens United did not address and left in place the long-standing prohibition against corporations making or facilitating campaign contributions.
school. Campaign fund-raising should be strictly prohibited. If sponsored by a third party, the school may rent or donate the space in keeping with its normal policies for third party usage.

3. **Our political science teacher wants to invite a candidate to talk to a class of seniors, can he do that?**

It depends upon the circumstances and content of the presentation. It is permissible if the candidate is speaking or participating as a non-candidate, such as talking about issues for which the candidate is responsible as a current office holder or policymaker, or is an expert or a celebrity. There should be no mention of the campaign and the presentation should be conducted in an academic versus a campaign rally-type setting and atmosphere. If he is appearing as a candidate, then the teacher, or possibly other teachers or the school must offer a similar opportunity to the opposing candidate(s), and no teacher or the school may indicate any bias or favoritism for one candidate over another. No campaign fund-raising should be allowed.

4. **Our board chair is running for Congress——does she need to resign first?**

Legally speaking, the board chair is free to run for Congress in her individual and personal capacity as long as she always makes clear that she is acting on her own behalf, and she does not use school assets or indicate there is any endorsement by the school of her candidacy. Practically speaking, it may be difficult for the board chair to maintain her identity separate from the school and for the school to avoid the appearance that it is favoring or endorsing the board chair’s candidacy. For these reasons, resignation or a leave of absence may be the better alternative, even if not legally required.

5. **Our head of school is very passionate about politics. Can she express her leanings without endangering the school?**

As long as she makes clear that she is speaking for herself as an individual and not for the school, the head of school is free to endorse or otherwise support any candidate she chooses. Partisan comments should not be made, however, in official school publications or at any official school functions. Any campaign publication where the head of school is listed should indicate that her title or affiliation, if listed, is provided for identification purposes only.

6. **Can we conduct voter education and get-out-the-vote drives? What about a voter registration drive?**

These activities are all allowed if they are conducted in a non-partisan manner, which don’t show any ratings, bias, or preference for any candidate over another. Be careful to check on state and local laws to avoid additional requirements for such activities.

7. **Can students participate in political campaigns as part of a course or a sanctioned extra-curricular activity?**

Partisan campaign activities by students in these circumstances are allowed as long as such activities are part of the curriculum and students are free to decide which campaign they wish to help. The students must make clear that they are acting in their individual capacity, and neither
the teacher nor the school can take any position or show any bias with respect to any candidate. Consult legal counsel before providing school facilities or financial support for any such student activities, since it may be necessary to avoid providing such support or to charge depending upon the circumstances.

8. Can the student Democrats Club distribute materials about its candidates?

If this is an officially sanctioned club or activity, and student Republicans have an equal opportunity to form their own club, then this should be allowed under IRS rules, because it would be considered part of the school’s educational activities and mission. Once again, consult legal counsel before making available any school facilities to or financial support for the club’s activities, and the school should never pay the cost for copying or reproducing any campaign materials.

9. A teacher wants to work on a campaign—any problems?

Teachers are free to work on a campaign in their individual capacity and on their own time as long as they don’t use any school facilities, equipment, or office supplies, including their school email address or letterhead that would imply any connection with the school for such activities.

10. How should a school respond to a request to make a cash or in-kind contribution to a campaign?

Just say no!

11. What if a school is invited to “endorse” a candidate?

It is forbidden!

12. The head is invited to contribute—any problems?

The head and others associated with a school are free to make personal campaign contributions as long as they are voluntary and not reimbursed. They should not use their school titles in making these contributions except if needed for purposes of identification (but never to indicate any endorsement or support by the school).

13. Can the school adopt a voluntary payroll deduction plan to allow individual employees to contribute to their Union PAC or any other political committee of their choice?

Yes, if conducted in accordance with FEC guidelines for such activities.

14. We want to continue building positive relationships with both current and newly elected officials to support our legislative and public policy agenda. Is this ok?

Schools are not expected or required to give up communicating with policymakers, or even candidates for that matter, on policy issues that are important to the school. Section 501(c)(3) organizations can continue to engage in lobbying activities regardless of the election cycle. They
just need to be careful about the way they do it.

15. Is our school barred from continuing to push our public policy agenda, including grassroots advocacy and other public communications about our position on critical issues?

Schools are also allowed to continue these activities, although so-called issue ads and other public communications will likely draw attention and could result in a complaint to the IRS. If audited, the IRS will apply a facts-and-circumstances test examining factors such as:

- whether candidates mentioned include approval for their positions on the issue;
- how close the communications are to the election or some other event like a Congressional hearing or state legislative vote;
- if the issue defines the candidates; and
- whether the communication is part of an ongoing series of communications that are independent of the timing of the election.

Schools are not prohibited from publicly communicating their legislative and public policy agenda during election season, but should consult legal counsel to make sure they are not running afoul of IRS rules, or triggering FEC reporting requirements.

16. What if our school faces a situation where its own programs and activities, or possibly its existence, is being challenged, and wants to be free of its Sections 501(c)(3) lobbying limits and political campaign prohibition?

Both federal tax and election law would allow the school to set up an affiliated Section 501(c)(4) social welfare organization to engage in unlimited lobbying activities. The Section 501(c)(4) organization could also engage in limited political activities, or set up a political action committee to engage in campaign activities.

17. Can we provide mailing and email lists of our students and alumni to a candidate?

These may be rented or sold for fair market value, but only if made available to other candidates and campaigns on the same terms.

18. Can partisan statements and editorials be included in our school newspaper?

The IRS has specifically addressed this situation and held that partisan comments are allowed since a school newspaper is a traditional and core educational function for a school.

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14 After Citizens United, FEC complaints for public communications are unlikely as long as the communication does not include express advocacy (e.g., “vote for” or “vote against”) or equivalent language.

15 Similar types of committees might be authorized under state and local law with respect to state and local issues and elections. As noted above, a fuller discussion of state and local laws is beyond the scope of this document, but are important to consider and understand.
The information in this document is not legal advice and schools should consult their own counsel, as well as state and local laws, regarding the issues discussed here.