

October 8, 1999

**FOR PUBLIC RELEASE**

RE: Advisory Opinion A14-99

The School Ethics Commission is in receipt of your request for an advisory opinion on behalf of the Board that you represent. You have asked whether a member of your Board has a conflict of interest in violation of the School Ethics Act, N.J.S.A. 18A:12-21 et seq. because the Board member's spouse is a founder of a proposed charter school that will service children from his school district. The Commission rendered this opinion at its meeting of September 28, 1999.

You have provided that the charter school proposes to service as many as 35 children from the Board member's school district. Its application sets forth that it proposes to open in September 2000. The spouse of the Board member is one of the founders of the charter school. The Board is scheduled to hold a public hearing next month and will thereafter submit comments to the Commissioner of Education on the advisability of establishing the charter school. Your Board would like answers to five questions set forth at the conclusion of the request. First, does the Board member whose wife is a founder of the charter school face a conflict of interest? Second, may the Board member participate in the discussions and vote on any resolution recommending or not recommending the creation of a charter school? Third, should the Board member abstain from participation in the public meeting and open discussions, both as a Board member and as a member of the general public? Fourth, while the application is being reviewed for possible approval, may the Board member vote on any budget matters within the school district? Fifth, if a charter school is approved and created, may the Board member vote on any budget matters within the school district after the approval?

You correctly state that the provisions of Act that are applicable to this issue are N.J.S.A. 18A:12-24(a), (b), (c) and (f). N.J.S.A. 18A:12-24(a) of the School Ethics Act provides:

No school official or member of his immediate family shall have an interest in a business organization or engage in any business, transaction,

or professional activity, which is in substantial conflict with the proper discharge of his duties in the public interest.

The definition of a “business” set forth at N.J.S.A. 18A:12-23 excludes a “public entity” such as a charter school. Therefore, the Board member’s spouse does not have an interest in a business organization under the Act. The spouse’s founding of a charter school could be considered a professional activity, however. Thus, at issue is the question of whether the spouse’s professional activity as a founder of a charter school is in substantial conflict with the board member’s discharge of his duties in the public interest.

In Public Advisory Opinion A22-96 (February 26, 1997), the Commission advised that a board member would be in violation of N.J.S.A. 18A:12-24(d) of the School Ethics Act if he were to serve as a charter school trustee in the same district as his board. N.J.S.A. 18A:12-24(d) prohibits a school official from undertaking any employment or service, whether compensated or not, which might reasonably be expected to prejudice his independence of judgment in the exercise of his official duties. This provision does not encompass the conduct of a school official’s spouse, and thus, does not apply to the present situation. However, the analysis is instructive. In A22-96, the Commission reasoned that a member of a district board of education is charged with, among other things, adopting a district budget. A charter school trustee is charged with the adoption of the charter school’s budget, a budget which to a large degree relies on the district’s budget, and thus the per pupil expenditure adopted by the local board(s) of education from which its students come. Thus, the Commission reasoned that the local board’s determination of its local levy budget per pupil may reasonably be expected to conflict with the charter school trustee’s interest in obtaining as much funding as possible per pupil for the charter school. The Commission did not render advice in Advisory Opinion A22-96 as to whether a board member could be the “founder” as opposed to a “trustee” of a charter school.

Your first question is whether the Board member has a conflict of interest. The Commission finds that a founder of a charter school is distinguishable from a trustee of a charter school because a trustee will be responsible for the daily operations of the charter school that he or she serves. In contrast, a founder may assist in the set up of the school and then have no say in the operations of that school from the point that a charter is granted and a board of trustees is appointed to operate the school. If this is the case and the spouse’s involvement with the charter school is as a founder only, then the Commission advises that her position would not be in substantial conflict with the board member’s proper discharge of his duties in the public interest.

The second question you have asked is whether the Board member may participate in discussions and vote on any resolution recommending or not recommending the creation of the charter school? This question raises issues under N.J.S.A. 18A:12-24(b), (c), and (f). N.J.S.A. 18A:12-24(b) provides:

No school official shall use or attempt to use his official position to secure unwarranted privileges, advantages or employment for himself, members of his immediate family, or others.

In order to establish a violation of subsection b, it has to be demonstrated not just that there is a privilege extended or an advantage given, but that the privilege or advantage is unwarranted. Since the question refers to a resolution to recommend to the Commissioner of Education the approval of the charter school, this could be construed as using the board member's position to secure an unwarranted privilege. It may also present a conflict pursuant to N.J.S.A. 18A:12-24(c).

N.J.S.A. 18A:12-24(c) of the Act provides:

No school official shall act in his official capacity in any matter in which he, a member of his immediate family, or a business organization in which he holds an interest, has a direct or indirect financial or personal involvement that might reasonably be expected to impair his objectivity or independence of judgment.

You have set forth that the Board is about to vote whether to recommend the approval of the charter school in question. The Commission has determined that the Board member's spouse has a personal involvement in the charter school since she is a founder of that charter school. A founder's main functions are to formulate the concept for the school, complete the application and ultimately see that the school receives a charter. Thus, the spouse's personal involvement might reasonably be expected to impair the board member's objectivity if he were to participate in discussions and vote on whether to recommend the approval of the charter school. Thus, the Commission advises that the board member would violate N.J.S.A. 18A:12-24(c) if he were to participate in discussions and vote on the Board's resolution to recommend to the Commissioner the approval of the charter school. Regarding other resolutions concerning the charter school, the Commission finds that the spouse's personal involvement in the charter school will continue until the charter is either granted and the board of trustees established, or until a charter is denied. At that point, the Commission believes that the founder's role will cease if she does not take on another role within the school. However, if the Board votes to appeal a grant of a charter, the ensuing litigation may prolong the role of a founder.

The third question is whether the Board member should abstain from all participation in the public meeting and open discussions both as a Board member and as a member of the general public. Assuming that this refers to the resolution to recommend the charter school, the Board member would be acting in his official capacity if he participated in the discussions during the public meeting as much as when he votes. Therefore, the Board member would violate subsection c if he did not abstain from all participation. Regarding expressing his views as a member of the general public, he would not be acting in his official capacity, however, he could still be construed as violating N.J.S.A. 18A:12-24(b) for using his position to secure unwarranted privileges

for his spouse. He will be recognized as a Board member and his opinion, even if he expresses it as a member of the public, will be given greater weight because of his position. Therefore, the Commission advises against participating as a member of the general public as well.

The fourth question is “[w]hile the application is being reviewed for possible approval, may the Board member vote on any budget matters within the school district?” This question raises issues under N.J.S.A. 18A:12-24(c) and (f). The question as to whether subsection c is violated turns on whether the Board member or his spouse has a personal involvement with the school district budget that might reasonably be expected to impair his objectivity or independence of judgment in discussing or voting on the budget.

In Advisory Opinion A22-96, the Commission discussed the Charter School Program Act of 1995, N.J.S.A. 18A:36A-1 et seq., at length. Therein, the Commission noted that a charter school is “a public school operated under a charter granted by the Commissioner of Education which is operated independently of a local board of education and is managed by a board of trustees.” N.J.S.A. 18A:36A-3(a). The board of trustees, upon receiving a charter from the Commissioner, is deemed to be the public agent authorized by the State Board of Education to supervise and control the charter school. Id. Specifically, the board of trustees is authorized “to decide matters related to the operation of the school including budgeting, curriculum, and operating procedures, subject to the school charter.” N.J.S.A. 18A:36A-14(a). The Commission further noted that a large portion of the budget of a charter school derives from per pupil payments from the student’s district of residence. N.J.S.A. 18A:36A-12 provides that the school district of residence must pay directly to the charter school for each student enrolled in the charter school who resides in the district a presumptive amount equal to 90% of the local levy budget per pupil for the specific grade level in the district along with any categorical aid attributable to the student. Thus, the budget issues are of paramount concern to the board of trustees of a charter school. In contrast, founders are only responsible for meeting the application criteria. Although the application includes a proposed budget for the charter school, until a charter is granted, a charter school is not affected by changes in the budget of the school district.

Based on the foregoing, the Commission finds that if the board member’s spouse were a trustee who was going to be making decisions as to the operating budget of the charter school based on the funds that are primarily derived from the district, then the Commission would find that she had a personal involvement precluding her spouse from acting on the school district budget. However, as a founder, the spouse is not responsible for the operations of the charter school. Therefore, the spouse does not have a personal involvement in the district budget such that the board member’s objectivity might reasonably be expected to be impaired when he discusses and votes on it. Thus, the Commission advises that the board member may participate in discussions and vote on budget matters while the application is pending without violating N.J.S.A. 18A:12-24(c).

N.J.S.A. 18A:12-24(f) provides:

No school official shall use, or allow to be used, his public office or employment, or any information, not generally available to the members of the public, which he receives or acquires in the course of and by reason of his office or employment, for the purpose of securing financial gain for himself, any member of his immediate family, or any business organization with which he is associated.

Thus, in order for there to be a violation of subsection f, there must be a possibility of securing financial gain for the board member, his spouse or any business organization with which he is associated from the use of his office or information acquired by reason of the office.

Based on the above provisions of the Charter School Program Act, there may be a financial gain to the charter school as a result of an increase in the school district's budget. However, as set forth above, a public entity such as a charter school does not constitute a business organization under the Act. Regarding the board member and his spouse, there is no information to indicate that either of them has the potential to secure any financial gain for themselves by increasing the amount of the school district's budget. Thus, the Commission advises that the board member would not violate N.J.S.A. 18A:12-24(f) by participating in discussions and voting on the district's budget while the application is pending.

The fifth question is "If a charter school is approved and created, may the Board member vote on any budget matters within the school district after the approval?" As set forth above, in the Commission's view, the role of a founder is to establish the school and see it through to the approval of a charter. Thereafter, if the board member's spouse does not undertake another role within the charter school such as a member of the board of trustees, then her personal involvement in the charter school will be expected to cease. Thus, under the present facts, the Commission advises that the board member would not violate N.J.S.A. 18A:12-24(b), (c) or (f) of the Act if he were to vote on budget matters within the school district after the charter school has been approved.

We hope this answers your inquiry.

Sincerely yours,

Robert W. Bender  
Acting Chairperson

I hereby certify that this advisory opinion was made public by the School Ethics Commission at its public meeting on November 23, 1999.

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Lisa James-Beavers, Executive Director