

October 12, 2004

**FOR PUBLIC RELEASE**

RE: Advisory Opinion A30-04

The School Ethics Commission is in receipt of your request for an advisory opinion. You have asked the Commission whether you may appeal a Section 504 determination that was decided after you became a member of your local board of education although the request for it was filed before you became a board member. You also ask whether you may be reimbursed for tuition and/or attorney's fees if the child prevails. You ask whether the situation would be different if the complaint was made under the provision of the New Jersey Constitution requiring a thorough and efficient education.

You have set forth that you are a board member who has a child in the district. You and your husband filed for a Section 504 determination before you were elected as a board member. Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794 (Section 504) is a federal law designed to protect the rights of individuals with disabilities in programs and activities that receive federal funds from the U.S. Department of Education. Section 504 provides, in pertinent part, "No otherwise qualified individual with a disability in the United States . . . shall solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . ."

Pursuant to its authority in N.J.S.A. 18A:12-28(b), at its meeting on September 30, 2004, the Commission determined that you have the same rights as any similarly situated parent. Specifically, you do not have a substantial conflict of interest in violation of N.J.S.A. 18A:12-24(a) or (g) by serving as a member of your board and pursuing an appeal of a Section 504 determination or seeking tuition or attorney's fees. The Commission further advises, however, that you must abstain from all board discussions and decisions involving the 504 determination pursuant to N.J.S.A. 18A:12-24(c).

Your inquiry turns on the application of several provisions of the Act. First, N.J.S.A. 18A:12-24(a) sets forth:

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;

N.J.S.A. 18A:12-24(g) sets forth:

No school official...shall represent any person or party other than the school board or school district in connection with any cause, proceeding, application or other matter pending before the district in which he serves or in any proceeding involving the school district in which he serves... This provision shall not be deemed to prohibit representation within the context of official labor union or similar representational responsibilities.

One may view the appeal of a 504 determination and pursuing tuition and legal fees as a transaction in substantial conflict with your duties as a board member. One may also view such an appeal as representing a person other than the school board in a matter pending before the District. However, the Commission believes that N.J.S.A. 18A:12-24(j) provides an exception in your situation. It sets forth, "Nothing shall prohibit any school official, or members of his immediate family, from representing himself, or themselves, in negotiations or proceedings concerning his, or their, own interests." Since the Legislature included this exception in the Act, which is contrary to N.J.S.A. 18A:12-24(g) as it relates to a proceeding of an immediate family member, the Commission finds that it must have intended it to relate to a situation such as this. You and your husband filed this case when you were not a board member. You were later elected to the board, but now wish to appeal a decision that you feel was in error. The Commission advises that pursuant to N.J.S.A. 18A:12-24(j), you may do so without violating the School Ethics Act.

Because the Commission has concluded that you would not be in violation of the Act if you pursued the appeal of the Section 504 determination, it does not see the need to address the alternate question of whether the situation would be different if you pursued a complaint under the "thorough and efficient" clause of the New Jersey Constitution.

Although the exception found in N.J.S.A. 18A:12-24(j) allows you to pursue the appeal and legal fees, it does not mean that you may act in your capacity as a board member when your matter is discussed and voted upon by the Board. The requirement that you abstain from matters involving the litigation surrounding the Section 504 determination is found in N.J.S.A. 18A:12-24(c), which sets forth:

No school official shall act in his official capacity in any matter where he, a member of his immediate family, or a business organization in which he

has an interest, has a direct or indirect financial involvement that might reasonably be expected to impair his objectivity or independence of judgment. No school official shall act in his official capacity in any matter where he or a member of his immediate family has a personal involvement that is or creates some benefit to the school official or member of his immediate family;

If you are seeking legal fees and costs, then you clearly have a direct financial involvement in the 504 determination such that you could not be objective when discussing it. Because the determination involves your child, you also have a personal involvement that creates a benefit to you and your immediate family members. Since you and your spouse have both a financial and personal involvement in the outcome of the Section 504 determination appeal, you cannot act in your official capacity with any matter before the Board having to do with the determination. You also cannot be present when the Board discusses the matter in executive session. If you choose to pursue the appeal, you cannot act both as a Board member and a litigant when your appeal is being discussed. If you did, you would be in violation of N.J.S.A. 18A:12-24(c).

In summary, the Commission advises that you would not violate N.J.S.A. 18A:12-24(a) or (g) by appealing the Section 504 determination because N.J.S.A. 18A:12-24(j) provides an exception. However, you would violate N.J.S.A. 18A:12-24(c) if you were to participate in discussions and vote on matters involving the Section 504 determination.

We trust that this opinion answers your inquiry. Because the Commission believes that this opinion will be of interest to other board members, it is making it public.

Sincerely yours,

Paul C. Garbarini,  
Chairperson

PCG/LJB/e:lisa/opinions/A3004

I hereby certify that the School  
Ethics Commission voted to make  
this opinion public at its meeting  
on December 21, 2004.

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Lisa James-Beavers  
Executive Director