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DEPARTMENT OF EDUCATION  
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April 28, 2015

**FOR PUBLIC RELEASE**

SUBJECT: Advisory Opinion—A05-15

The School Ethics Commission (Commission) is in receipt of your request for an advisory opinion on behalf of the Board of Education (Board). You have verified that you copied the entire Board, which is the subject of the request, and that the Board members “collectively and individually” waive their privilege to submit a response to this request, thus complying with N.J.A.C. 6A:28-5.2(b). The Commission will provide its advice based solely on the information included in your request. The Commission’s authority to issue advisory opinions is expressly limited to determining whether any proposed conduct or activity would constitute a violation of the School Ethics Act. N.J.S.A. 18A:12-31. Pursuant to N.J.S.A. 18A:12-28(b), the Commission discussed this matter at its March 24, 2015 meeting.

You inquire as to whether three members, who acknowledge they are otherwise conflicted under the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq., may vote on a motion to advertise for applicants for the position of Superintendent. The nature of the conflicts of the three conflicted Board members include: two Board members whose spouses are employed by the Board, and one whose brother is employed by the Board.

The Commission finds that the conflicts for the Board members arising under the Act are broad in scope, and touch upon any and all aspects related to the nature of the conflict. In this instance, the nature of the conflicts for the three Board members who are the subject of this advisory opinion request implicate N.J.S.A. 18A:12-24(b), (c), and the interpretation of the Martinez v. Albolino et al., Hackensack Board of Education, Bergen County, SEC Dkt. No. C45-11 (June 26, 2012) decision, and pertain to every matter surrounding and touching upon the position of Superintendent.

N.J.S.A. 18A:12-24(b) and (c) state, respectively:

b. 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;

c. 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;

The two Board members whose spouses are employed by the Board find their conflicts arising under Subsection (c), as a spouse is a member of one's "immediate family" as defined by the Act. N.J.S.A. 18A:12-23. The Board member whose brother is employed by the Board is governed by Subsection (b), as a brother is found by the Commission to be an "other" and as a relative defined by the Act and the Department's nepotism policy, which took effect January 17, 2006, and is found at N.J.S.A. 52:13D-21.2(d).

In the Martinez decision, the Commission determined that, with respect to the Superintendent, a conflicted Board of education member may not participate in any discussion pre- or post-hire, may not be a part of *any* aspect of the vetting process or any evaluation and contract discussion post-hire. That would include voting on who should be on the selection committee or which firm will conduct the search. The conflicted Board members may not be in the room when discussions are underway, and they should not be privy to any information regarding those discussions afterwards.

The Commission is mindful of the legislative purpose of the School Ethics Act, set forth in N.J.S.A. 18A:12-22(a), which states:

In our representative form of government, it is essential that the conduct of members of local boards of education and local school administrators hold the respect and confidence of the people. These board members and administrators must avoid conduct which is in violation of their public trust **or which creates a justifiable impression among the public that such a trust is being violated.** [Emphasis added.]

The Commission finds that the Act requires each Board of Education and its members to protect that trust and safeguard the public's respect and confidence in those they elect or those appointed to govern for its benefit. Therefore, consistent with the Martinez decision and the purpose of the Act, the Commission finds that, based on the nature of each member's conflict, the three conflicted Board members would violate N.J.S.A. 18A:12-24 (b) or (c), respectively, if any member were to participate in *any* matter related to the search, hiring of a selection agency, criteria, job description, or voting to advertise for applicants for the position of Superintendent or with regard to the Superintendent once he or she is seated. Board members with conflicts relating to the Superintendent and position of Superintendent should not participate in any matter relating to that post.

The Commission also notes that the Board maintains a quorum of non-conflicted members, in the situation as explained in your request, to successfully vote to advertise the position of Superintendent, and do not require the votes of the three conflicted Board members. (See Advisory Opinion A55-95.) As such, the Board is unable to invoke the Doctrine of Necessity to allow the conflicted Board members to participate in the vote, as their votes are not required for the Board to successfully vote to advertise for the Superintendent position.

To avoid violating the Act, the three conflicted Board members must recuse from any and all discussions in Executive Sessions, and abstain from any and all votes in public session, pertaining to any and all matters surrounding the position of Superintendent. In addition to each Board member's recusal on matters relating to the Superintendent, each Board member must also not be privy to the minutes of such discussions held in Executive Sessions until such time as they would otherwise be made available to the general public, such as with the adoption and publication of Board minutes. In short, in relation to all matters concerning the Superintendent and position of Superintendent, the three conflicted Board members only have rights as great as the public has and no more.

Sincerely,

Robert W. Bender, Chairperson  
School Ethics Commission