

February 26, 1998

FOR PUBLIC RELEASE

Subject: Advisory Opinion A30-97

This is in response to your December 18, 1997 request for an advisory opinion. In that request, you ask whether the private day care center in which you are a partner may bid and contract with the Board of Education (Board) to provide services to the School District (District). You further ask whether you may provide services if the other day care centers in the District have reached capacity, but your center has openings. For the following reasons, you are advised that it would be a violation of the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq., for the private day care center in which you are a partner to contract with the Board to provide services to District children.

You have provided the Commission with the following facts. Presently, the District has an elementary school, a middle school and a high school. You are one of two Assistant Superintendents of Schools in the District. You have been in that position since 1991. As Assistant Superintendent, your primary responsibility is to oversee technology and all technology related issues in the District. This includes the development of curriculum that uses computers and the installation of computers and fiber optics in the District. You also are responsible for evaluating the principal and vice principal of the middle school.

The District is an Abbott district. Presently, the District has full day kindergarten for five year olds and, since, 1967, has had a half day program for four year old children. As part of its responsibilities as an Abbott district, the District may be required to, or may determine to, provide full day programs for three and four year olds and half day programs for those children under three years of age. You advise that although the District presently is constructing a new school facility, the District may not have adequate facilities to provide the potentially new programs to the four and under children. Therefore, the Board may discuss contracting with local day care centers to provide the programs. The Board has not discussed this issue yet, nor has any plan been developed by staff or the Board. You advise, however, that it is likely that such a proposal will be discussed once the District's actual responsibilities to the younger children is finalized by the State. Your inquiry assumes that if the Board determines to use private day care centers, the Board will put the project out to public bid. You inform the Commission that you have not discussed any proposed plan with anyone in the District.

You further advise the Commission that you are a partner in a local day care/after school center (center) in the District. You have a one third interest in the business, which you and your partners opened in 1988. Your center provides services to three and four year old children. Thus, if the Board determines to put out to bid provision of services for the younger children, your center is a potential bidder. Accordingly, you have asked whether the Act would prohibit your center from bidding on the project, if the Board ultimately decides to provide programs to younger children by contracting with a local day center to provide programs.

Pursuant to N.J.S.A. 18A:12-24(a):

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

Based upon the facts provided, you do have an interest in a business organization. "Business" is defined as "any corporation, partnership, firm, enterprise, franchise, association, trust, sold proprietorship, union, political organization, or other entity..." N.J.S.A. 18A:12-23. "Interest" is defined as "the ownership or control of more than 10% of the profits, assets or stock of a business..." Ibid. Since you own one third of the center, you do have a business interest in the center as defined in the Act. The issue under section 24(a), then, is whether this business would be in substantial conflict with the proper discharge of your duties as Assistant Superintendent should the Board determine to put the services out to bid and your center wins the bid, thus resulting in a contract between the Board and your center to provide the above discussed services.

It is the Commission's opinion that such a contract would be in substantial conflict with your duties as Assistant Superintendent. As an Assistant Superintendent, you hold a high position in the District. There is one other Assistant Superintendent who presumably is on an equal level with you, and your superior, the Superintendent. Thus, in the hierarchy, you are at a top decision making level. While you and the other Assistant Superintendent may have different areas of responsibility, the fact still remains that you are at a high level and your opinions and recommendations most likely are solicited on numerous matters.

Also, as the Assistant Superintendent with responsibility over all technology issues and matters in the District, you have a wide range of authority. Technology permeates all aspects of education. The type and use of computers in every district in the State is an issue facing all boards of education and, as technology advances, the role of technology in education most likely will expand. Thus, as Assistant Superintendent in charge of technology, your responsibilities are wide ranging. Indeed, as you advised the Commission, your responsibilities include development of curriculum that uses computers. Technology and computers are used at all grade levels and you have not provided any facts that would suggest that technology and its role will not be an issue for the younger children. It appears that in your capacity as Assistant Superintendent, you most likely will be called upon to offer guidance on the role of technology for the four and under programs once the State sets forth the parameters of the required programs and the Board determines what approach to take. If your center were to have a contract to provide the services to the District, you would have a substantial conflict in discharging your duties as Assistant Superintendent. On the one hand, you would have to make decisions and recommendations to the Superintendent and/or Board on any technology related issues affecting the contracted out programs, and on the other you would be a business man seeking to make a profit on the contract.

N.J.S.A. 18A:12-24(c) also could be violated. This section provides:

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 or personal involvement that might reasonably be expected to impair his objectivity or independence of judgment.

This provision addresses not only actual but apparent conflicts. See, N.J.S.A. 18A:12-22. Based upon the facts provided, the public could reasonably perceive that any action you may take relating to the use of private day care centers to provide District programs is tainted by your business interest in the center. If your center were to bid on the project, the public could reasonably perceive that any decisions or recommendations you made that had any impact on the services to be provided were made not just with the District's interests in mind, but also the center's interests.

You also asked whether your center could contract with the District in the event other centers cannot provide the services. The Commission cannot offer an opinion on this issue with the present facts. In order to be able to answer this inquiry, the Commission would need to know the circumstances under which the other centers or other providers could not deliver the services.

We hopes this answers your inquiry.

Sincerely,

Paul C. Garbarini
Chairperson

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