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SCHOOL ETHICS COMMISSION

November 22, 2022

For Public Release

Subject: Public Advisory Opinion – A12-22

The School Ethics Commission (Commission) received your request for an advisory opinion on your own behalf as a member of the Board of Education (Board). The Commission's authority to issue advisory opinions is expressly limited to determining whether any prospective 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 preliminarily discussed this matter at its Advisory Opinion Committee meeting on July 13, 2022, and then discussed it again at its meetings on July 26, 2022, August 23, 2022, September 14, 2022, and October 17, 2022.

In your request, you inform the Commission that the New Jersey Department of Education (Department) "established a new health and fitness standard for K-12 schools" and has "indicated that the standards must be established and incorporated into the curriculum in every municipal School District," including the School District (District) in which you are a Board member, by the start of the 2022-2023 school year. You further inform the Commission that, in accordance with *N.J.S.A.* 18A:35-4.7, "parents have been given the right to opt out of health, family life or sex education."

Based on the aforementioned information, you inquire whether a Board member would violate the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*, if he/she (1) votes in the affirmative on a Board motion to refuse to implement the New Jersey Student Learning Standards (NJSLS) for Comprehensive Health and Physical Education for the 2022-2023 school year, and/or (2) votes in the affirmative on a Board motion to change the application of the statutory language in *N.J.S.A.* 18A:35-4.7 from "opt-out" to "opt-in."¹

¹ The Commission notes that the requestor did not specify which provision of the Act he/she believed was implicated by this inquiry; therefore, the Commission limited its review to determining whether the prospective conduct violated *N.J.S.A.* 18A:12-24.1(a) *only*, and did not analyze whether the prospective action/conduct could violate a different section of the Act.

Before the Commission can more fully respond to your inquiry, other relevant statutes and regulations applicable to your request must be considered for context. In addition to its statutory obligation under *N.J.S.A.* 18A:7F-46(a), “The State Board of Education is responsible for establishing State educational goals and standards according to P.L. 1990, c. 52, P.L. 1991, c. 3, and P.L. 1991, c. 62.” *N.J.A.C.* 6A:8-2.1(a). In addition, *N.J.A.C.* 6A:8-3.1(a) **requires** district boards of education to “ensure that curriculum and instruction are designed and delivered in such a way that all students are able to demonstrate the knowledge and skills specified by the NJSLS and shall ensure that appropriate instructional adaptations are designed and delivered ...”

The New Jersey Quality Single Accountability Continuum (QSAC) system is designed to evaluate and monitor the compliance of district boards of education in “five key component areas of school district effectiveness – *instruction and program*, personnel, fiscal management, operations, and governance – to determine the extent to which school districts are providing a thorough and efficient education.” *N.J.A.C.* 6A:30-1.1(a) (emphasis added). The “District Performance Review,” or DPR, is “the Department-developed self-assessment tool that measures a school district’s compliance with the quality performance indicators in all of the five key components of school district effectiveness. *N.J.A.C.* 6A:30-1.2. As part of this system, all school districts are required to assess health and physical education curricula to ensure that they are aligned with the NJSLS.

Finally, *N.J.S.A.* 18A:35-4.7, “Exclusion of pupils from program; statement of parent,” specifically states:

Any child whose parent or guardian presents to the school principal a signed statement that any part of the instruction in health, family life education or sex education is in conflict with his conscience, or sincerely held moral or religious beliefs shall be excused from that portion of the course where such instruction is being given and no penalties as to credit or graduation shall result therefrom.

With the above in mind, and returning to your inquiry, district boards of education have a clear and unequivocal obligation to “ensure that curriculum and instruction are designed and delivered” in a way that all students can demonstrate “the knowledge and skill specified by the [NJSLS].” This obligation is non-waivable, and there are consequences for non-compliance, including those through QSAC. Your inquiry, however, seeks to determine whether **individual school officials**, not the District and/or the Board (as a public body), would violate the Act if they voted affirmatively to refuse to implement the NJSLS for Comprehensive Health and Physical Education and/or voted affirmatively to change the application of *N.J.S.A.* 18A:35-4.7, whereby parents can “opt-in” as opposed to “opt-out” of instruction “in health, family education or sex education.”

Board members are required to abide by the Code of Ethics for School Board Members (Code), and this includes the following, “I will uphold and enforce all laws, rules, and regulations of the State Board of Education, and court orders pertaining to schools. Desired changes shall be brought about only through legal and ethical procedures.” *N.J.S.A.* 18A:12-24.1(a). Factual evidence of a violation of *N.J.S.A.* 18A:12-24.1(a) “shall include a copy of a

final decision from any court of law or administrative agency of this State demonstrating that [the school official] failed to enforce all laws, rules, and regulations of the State Board of Education, and/or court orders pertaining to schools or that [the school official] brought about changes through illegal or unethical procedures.” *N.J.A.C. 6A:28-6.4(a)*.

Based on the foregoing, if “a final decision from any court of law or administrative agency of this State” were issued and it showed that an individual school official had acted contrary to the laws, rules, and regulations promulgated by the State Board of Education, he/she could *then* be found in violation of *N.J.S.A. 18A:12-24.1(a)* for the conduct outlined in your request. Moreover, even if an individual school official could not be found in violation of *N.J.S.A. 18A:12-24.1(a)*, if the Board ultimately refused to implement the NJSLS for Comprehensive Health and Physical Education, or changed the application of the statutory language in *N.J.S.A. 18A:35-4.7* from “opt-out” to “opt-in,” the Board, as a public body, would be violating the aforementioned education laws and regulations, and ramifications could follow.

District boards of education are required to ensure that the curriculum and instruction provided to students aligns with the NJSLS. Although constructive criticism and divergent viewpoints and beliefs can always lead to a more robust and thoughtful determination, the time to do so, at least with regard to the 2020 NJSLS for Comprehensive Health and Physical Education, has passed. While the Commission is not presently aware of any relevant decisions against individual school officials, the failure of a district board of education to comply with the NJSLS for Comprehensive Health and Physical Education could lead to the issuance of a final decision that would support a violation of *N.J.S.A. 18A:12-24.1(a)*.

As a reminder, school officials must always be cognizant of their responsibility to protect the public trust, to honor their obligation to serve the interests of the public and the Board, and to periodically re-evaluate the existence of potential conflicts. In addition, the only way for a public school official to truly safeguard against alleged violations of the Act is to avoid any conduct which could have the appearance, actual or perceived, of being in violation of the Act.

Sincerely,

Robert W. Bender, Chairperson
School Ethics Commission