

April 2, 2007

FOR PUBLIC RELEASE

SUBJECT: Advisory Opinion A03-07

The School Ethics Commission is in receipt of your request for an advisory opinion. You have asked for a clarification of *Advisory Opinion A02-06*, (March 10, 2006).

In *A02-06*, the Commission advised a board member that he could send a letter to the editor expressing his opinion about the budget as long as, in the letter, the board member did not hold himself out as a board member and the information was accurate and not confidential. You have set forth that you agree with the Commission's advice in *A02-06* on page 2 that, "In order to avoid a violation of N.J.S.A. 18A:12-24.1(e), you [a board member] must ensure that the letter does not indicate that it is written on behalf of the board." However, you have asked for clarification of what the phrase "hold yourself out as a board member" means and you have indicated that you believe that a board member should identify her or his title in the letter to the editor. Next, you took exception to the Commission's interpretation of the term "private action" in the Code of Ethics for School Board Members (Code) You have indicated that the opposite of "private action" should be "public action." You have also asked for clarification of the term "compromise the board" in the Code. Finally, you have argued that the Commission's advice in *A02-06* sharply curtails a board member's First Amendment rights.

At its March 27, 2007 meeting, the Commission determined, pursuant to its authority in N.J.S.A. 18A:12-28(b), that it reaffirms its advice given in *A02-06* that a board member would not violate the School Ethics Act (Act) N.J.S.A. 18A:12-21 et seq., by sending a letter to the editor expressing their opinion about the budget as long as, in the letter, the board member provides accurate information that is not confidential. The Commission also reconsidered its advice in *A02-06* that a board member should not hold

her or himself out as a board member in a letter to the editor. Id. page 1. After considerable deliberation, the Commission agrees that a board member should identify her or his title as a board member if she or he writes a letter to the editor. However, the board member must also indicate in the letter that it is neither authorized by nor written on behalf of the board. Therefore, the Commission advises that, if you wish to write a letter to the editor, you must identify yourself as a board member, but you must also indicate that the letter is not authorized by the board and that the letter is not written on behalf of the board. The information in the letter must not contain confidential information and it must be accurate. Last, you must ensure that your private action does not compromise the board.

As the Commission noted in *A02-06*, board members do not surrender the rights that they have as private citizens, such as First Amendment rights, when they become members of a school board. Previously, in *Sophia LaPorte v. Rashun Stewart and Cornell Davis*, C26-05, (September 27, 2005), the Commission upheld the rights of two board members to engage in political activity. In *LaPorte*, two board members were exercising their right to engage in political activity when, as private citizens, they participated in a press conference to endorse a candidate in the campaign for Mayor. In *LaPorte*, the Commission noted that the board members did not identify themselves as board members or state that they were at the press conference in their role as members of the board. Instead, the board members identified themselves as community activists who were endorsing a certain candidate. Similarly, in *Long Branch School Employees Association v. Avery W. Grant*, C15-03, (July 22, 2003) the Commission upheld the right of a board member to picket outside of a building where a district meeting was being held. The board member was protesting because he was not able to attend the meeting. However, the Commission has also found that a board member violated N.J.S.A. 18A:12-24.1(e) when she engaged in political activity. See, *I/M/O Eileen Quinn*, C45-04, (February 7, 2005). In *Quinn*, a board member printed and distributed a flier, during her reelection campaign and prior to passage of the budget, which contained incomplete fiscal information regarding the tax impact of the board's budget. The board's budget was ultimately defeated by a slim margin and the Commission found that the board member's action compromised the board's ability to raise revenue for the school district.

In *A02-06*, the Commission noted that the Legislature has established specific standards to guide the conduct of board members to ensure and preserve public confidence. See, N.J.S.A. 18A:12-22. These standards, set forth at N.J.S.A. 18A:12-24 and N.J.S.A. 18A:12-24.1, must be applied by the Commission in determining whether a board member's conduct is allowable under the Act. As the previous cases demonstrate, there are times when a board member's expression of opinion is permissible under the Act and there are times when such conduct is not permissible. The Commission believes that the standards established by the Legislature do not sharply curtail a board member's First Amendment rights. Rather, the standards provide the Commission with guidance in balancing a board member's rights as a private citizen with the interest of the Legislature in ensuring that a board member preserves public confidence and avoids conduct that would violate the public trust or create a justifiable impression among the public that such trust is being violated. See, N.J.S.A. 18A:12-22(a). Therefore, in exercising their

rights as private citizens, board members must ensure that such activity does not violate these standards.

Your question turns on the application of N.J.S.A. 18A:12-24.1(e), which provides:

I will recognize that authority rests with the board of education and will make no personal promises nor take any private action that may compromise the board.

In expressing your opinion by writing a letter to the editor about the budget, you must remain mindful that authority rests with the board. In *A02-06*, the Commission advised that, to avoid a violation of N.J.S.A. 18A:12-24.1(e) when writing a letter to the editor, a board member must not hold her or himself out as a board member. *Id.* page 1. The Commission gave this advice to ensure that the public would be notified that the board member's letter was written in the board member's role as a private citizen. Upon further review, the Commission believes that it would be more accurate if the board member identified them self as a board member, but also indicated that they are writing the letter in their role as a private citizen and that the letter is neither authorized by nor written on behalf of the board. The Commission takes note that it is normal practice for most newspapers to identify board members who write letters to the editor. The Commission also believes that the public will be better informed if a board member identifies them self as a board member when they write a letter to the editor. Thus, to avoid a violation of N.J.S.A. 18A:12-24.1(e), if you write a letter to the editor, you must indicate that you are a board member and that the letter is neither authorized by nor written on behalf of the board. The Commission believes that these necessary precautions will not impinge on your First Amendment rights and will also fulfill the Legislature's intent that board members preserve public confidence and avoid conduct that would violate the public trust or create a justifiable impression among the public that such trust is being violated.

In *A02-06*, the Commission also advised that, in order to avoid a violation of N.J.S.A. 18A:12-24.1(e) when writing a letter to the editor, a board member must not take private action that compromises the board. In your advisory opinion request, you have noted that "private action" should be interpreted to mean the opposite of "public action." However, because of the nature of the Act, the Commission believes that a more appropriate analysis would be that "private action" is something that is not "board action." In Marc Sovelove v. Paul Breda, C49-05, (September 26, 2006) the Commission found that once a board member's action is deemed to be "board action," it cannot also be deemed "private action" because such a finding would be contradictory. Thus, "private action" cannot be "board action." Further, in I/M/O Bruch Freilich, C18-04 & C19-04, (April 4, 2005), the Commission found that a board member violated N.J.S.A. 18A:12-24.1(e) when he sent an unauthorized letter to a private donor. Even though the board member signed the letter in his capacity as chair of the technology committee, he took private action because the board member did not have authorization to send the letter. *Id.*, page 8. Thus, in taking private action to write a letter to the editor regarding

the board's budget, you must ensure that your private action does not compromise the board.

The phrase "compromise the board" can only be clarified on a case by case basis. However, the Commission notes that in Freilich, supra, it found that a board member's private action may have compromised the board because a letter that the board member sent to a private donor included information regarding a short-range technology plan that had not been approved by the board for implementation. Also, as noted in Quinn, supra, the Commission found that a board member's private action had compromised the board because a flyer she distributed prior to the vote on the budget contained inaccurate information on the tax increase giving the impression that the tax increase was greater than it actually was, thus compromising the board's ability to pass its budget. Also, in Long Branch Employees Association, supra, even though the Commission found that the board member took private action by picketing a meeting in the district, the Commission found no evidence that such picketing compromised the board. Thus, a determination that private action compromises a board is fact sensitive and must be decided on a case-by-case basis.

Your inquiry also turns on the application of N.J.S.A. 18A:12-24.1(g), which provides:

N.J.S.A. 18A:12-24.1(g) provides:

I will hold confidential all matters pertaining to the schools which, if disclosed, would needlessly injure individuals or the schools. In all other matters, I will provide accurate information and, in concert with my fellow board members, interpret to the staff the aspirations of the community for its school.

In *A02-06*, the Commission also advised that, in expressing an opinion in writing or verbally, a board member must provide accurate information and must maintain the confidentiality of all matters pertaining to the schools which, if disclosed, would needlessly injure individuals or the schools. Thus, you must remain mindful that in writing a letter to the editor regarding the board's budget, you must not reveal confidential information and all of the information in the letter must be accurate.

In summary, the Commission advises that you would not violate the Act by sending a letter to the editor expressing your opinion about the budget as long as, in the letter, you identify yourself as a board member and indicate that the letter is not authorized by nor written on behalf of the board, and you provide accurate information that is not confidential, and you ensure that your private action does not compromise the board.

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/MET/advisory opinions/A03-07