

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ETHICS AND GOVERNMENT ACCOUNTABILITY



Office of Government Ethics

VIA EMAIL TO:

May 23, 2013

[Name]
[Title], [Ward Number]
State Board of Education
Office of the State Superintendent of Education
[Email Address]

Dear [Name]:

This responds to your request, at our meeting on February 6, 2013, and in your February 28, 2013, email for guidance regarding whether you are permitted to serve as the [Title] of the State Board of Education (“SBOE”) while also employed by [Company Name], a non-profit organization that helps states, including the District of Columbia, raise academic standards and strengthen accountability, given that SBOE receives updates about and discusses various matters on which [Company Name] has worked. You state you initially were appointed to the SBOE by Mayor Adrian Fenty, but since have been re-elected twice. [Company Name] was selected through a competitive bidding process run by the Kentucky Department of Education, but it is funded by a U.S. Department of Education grant and administered by the Florida Department of Education. Your concern is that while serving in your dual roles - - SBOE [Title] and [Company Name] employee - - situations will arise that present conflicts of interest and you seek guidance on the appropriate precautionary measures to take to avoid an ethics violation.

As Project Lead at [Company Name], you helped launch Next Generation Science Standards (“NGSS”) in 2010, but have had minimal involvement since then because the project no longer falls under your purview at [Company Name]. You do, however, hear updates about the project every quarter in [Company Name] Executive Team meetings. You state that the standards will be finalized in Spring 2013 and the Office of the State Superintendent of Education (“OSSE”) has indicated interest in having the SBOE adopt them. Based on your past SBOE experience, OSSE will review the standards, recommend adoption to the SBOE, and the SBOE will vote on the standards. At the very least, this presents the *appearance* of a conflict of interest because you sit on a Board charged with approving standards you helped create and about which you still receive updates. As precautionary measures, you fully have disclosed to the SBOE your

employer's role in the development of standards and avoided participating in SBOE discussions on standards developed by [Company Name] throughout 2012.

You also state that Partnership for the Assessment of College and Careers ("PARCC"), a consortium of 22 states working together to develop a common set of K-12 assessments, also may present a conflict of interest for you in your dual roles as SBOE [Title] and [Company Name] employee. The District of Columbia is a member of the consortium. The consortium is developing assessments for standardized tests for member-states, including the District of Columbia. The PARCC assessments, however, are not funded either by the consortium or the District of Columbia.

Finally, you asked whether you, as part of SBOE, can recommend to OSSE that District of Columbia schools (this designation includes both public and charter schools) immediately update their technology infrastructure, including providing adequate bandwidth and access to the "right" computers, to implement the PARCC standardized tests. You argue that the infrastructure needs to be improved, regardless of whether PARCC assessments are implemented, because it is what is needed to ensure quality education. You want to know if the Board can advocate for the need for technology as an important tool for District of Columbia schools and advise OSSE and District of Columbia schools accordingly. No computer equipment, software, or related items would be purchased from [Company Name].

In 2010, you received an advisory opinion regarding your joint roles from the OSSE General Counsel, but as your duties have changed since then, you have requested a formal opinion. Your dual roles present four issues that are addressed below. As a member of the SBOE, you have responsibilities, codified in Chapter 18, Title 6B of the D.C. Municipal Regulations,¹ to which you must adhere as a District employee.

The first three issues are governed by DPM § 1804, Outside Employment and Other Outside Activities. DPM §1804.1 states:

1804.1 An employee may not engage in any outside employment or other activity which is not compatible with the full and proper discharge of his or her duties and responsibilities as a government employee. Activities or actions which are not compatible with government employment include, but are not limited to, the following:

(a) Engaging in any outside employment, private business activity, or other interest which may interfere with the employee's ability to perform his or her job, or which may impair the efficient operation of the District of Columbia government.

As [Title] of the SBOE, you may be asked to vote to approve the NGSS standards. This is an issue because you, as an [Company Name] employee, helped launch the NGSS standards in 2010 and currently participate in matters involving NGSS standards and implementation during [Company Name] staff meetings, although your participation is non-substantive. As a member of the SBOE, you are prohibited by DPM § 1804.1(d)

¹ Hereinafter, Title 6b of the D.C. Municipal Regulations will be referred to as the District Personnel Manual or DPM.

from voting to approve the NGSS standards.² In addition, DPM § 1804.1(e), prohibits you, as an [Company Name] employee, and [Company Name] itself, from benefitting, from votes taken or decisions made by you as SBOE [Title].³ You must recuse yourself from any votes taken regarding the District's implementation of the NGSS standards, meaning you must disclose the conflict, in writing, to the other SBOE members and fully remove yourself from any NGSS-related discussions and/or votes.

You also are prohibited from participating in any actions leading up to the vote regarding the implementation of NGSS standards. You state that as SBOE [Title], you will question the District of Columbia schools regarding the District's readiness to administer tests that integrate NGSS standards. As stated above, you are prohibited by DPM § 1804.1(e), from benefitting, as an [Company Name] employee, from information you obtain by virtue of serving as SBOE [Title]. In addition, DPM § 1804.1(f) prohibits you from sharing information with other [Company Name] personnel that you obtained as SBOE [Title] and is not publicly available.⁴ During our initial conversation, you suggested that the SBOE create a committee to handle questions related to the District's readiness to implement the NGSS standards to avoid a violation of these provisions. You would not be on the committee, thus, effectively recusing yourself from these questions. We agree that this action is an effective means of recusing yourself from possible conflicts arising from your role as SBOE [Title] as it relates to the District's readiness to implement NGSS standards, thus reducing the opportunity for you to learn non-public information as SBOE [Title] that may be beneficial to you as an [Company Name] employee, to [Company Name] itself, or to other [Company Name] personnel.

The second issue involves the PARCC assessments as they relate to the District of Columbia. You state that the District will be ready to implement the assessments by the start of the 2014-2015 school year. Therefore, PARCC-related issues increasingly will be discussed among SBOE members beginning in August/September 2014. You state that your SBOE term will end December 31, 2014, and you do not plan to seek re-election. Based on the information you have provided to the Office of Government Ethics ("OGE"), you intend to fully recuse yourself from all PARCC-related discussions. Recusal is an appropriate remedy unless such recusal becomes necessary so frequently that it interferes with your ability to perform your duties as SBOE [Title]. In that situation, recusal no longer will be the appropriate remedy and another, more suitable remedy, will have to be found. We note that there is minimal overlap between the majority of the period in which the PARCC assessments will be administered by District of Columbia schools, beginning in August/September 2014, and the end of your SBOE term on December 31, 2014, a period of approximately four months.

The third issue involves District of Columbia schools providing updates to the SBOE about implementation of Common Core standards. You state that between 2009 and 2010, [Company Name] was involved in the development of the Common Core standards for the states, including the District of Columbia. You state that you fully recused

² DPM § 1804.1(d) prohibits District government employees from, "maintaining financial or economic interest in... an outside entity if there is any likelihood that such entity might be involved in an official... decision taken or recommended by the employee."

³ DPM § 1804.1(e) prohibits District government employees from, "engaging in any outside employment... which permits an employee... to capitalize on his or her official title or position."

⁴ DPM § 1804.1(f) prohibits District government employees from, "divulging any official government information to any unauthorized person... or otherwise making use of or permitting others to make use of information not available to the general public."

yourself from any SBOE discussions related to PARCC at the time. In addition, the District's implementation of PARCC assessments is not within the purview of the SBOE. The SBOE does not have any policy-making authority over the assessments, and OSSE, alone, approves the assessments that the District administers. A conflict may arise because the SBOE does, in fact, ask District of Columbia schools to provide updates at hearings from time-to-time. The hearings are public, however, and you, as [Title], are not required to ask for the updates. An effective remedy for this scenario is to have a different member of the SBOE ask the District of Columbia schools for an update regarding PARCC-related matters. Please note, however, that any activity that requires decision-making will require you to fully disclose and recuse yourself immediately.

Finally, with regard to the fourth issue, advocating for an updated technology infrastructure, you state that, regardless of whether the PARCC assessments are implemented by District of Columbia Schools, adequate technology is necessary for the District of Columbia schools to deliver quality education to its students. The Conflicts of Interest provision in the Ethics Act may be implicated here. The provision states:

D.C. Official Code § 1-1162.23 (a) No employee shall use his or her official position or title, or personally and substantially participate, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise . . . request for a ruling or other determination . . . other particular matter, or attempt to influence the outcome of a particular matter, in a manner that the employee knows is likely to have a direct and predictable effect on the employee's financial interests or the financial interests of a person closely affiliated with the employee.

Here, neither you nor [Company Name] are supplying District of Columbia schools with the extra computers or the updates to the bandwidth or other aspects of the technology infrastructure. You will not benefit financially, either directly or indirectly, if all of the District of Columbia schools update their technology infrastructure. In addition, it is likely that the District of Columbia schools will need to update their technology infrastructure if they select other standardized tests to administer to students. An update to the District of Columbia schools technology infrastructure would be beneficial to District of Columbia schools and all students regardless of whether District of Columbia schools implement the PARCC assessments. Accordingly, you are not prohibited by D.C. Official Code § 1-1162.23(a) from advocating for an updated technology infrastructure as part of SBOE. I caution you to limit your discussion of the PARCC assessments while advocating for an updated technology infrastructure as it may be perceived as advocating for the PARCC assessments.

As general guidance, you must not devote District government time or resources to work that you perform for [Company Name] (See, DPM § 1804.1(b)) and you cannot order other SBOE members or subordinate staff to work on matters related to your responsibilities at [Company Name]. (See, DPM § 1804.1(c)).

Based upon the information you provided, your proposed outside activity is permissible if you adhere to the remedial measures discussed herein. With regard to issues one and two, disclosure and recusal serves as an effective remedy for potential conflicts. Again, you are prohibited from engaging in any NGSS-related discussions and/or votes. With regard to issue three, having a different member of the SBOE ask OSSE and/or the District of Columbia schools for updates regarding PARCC-related matters will suffice

unless SBOE is required to make a decision, in which case you will again be required to fully disclose and recuse yourself immediately. With respect to issue four, you are not prohibited from advocating for an updated technology infrastructure, but are cautioned to limit your discussion of the PARCC assessments so that you are not perceived as advocating for them. Finally, it is important to note, however, that recusal is not the appropriate remedy for every conflict that may arise during your tenure as the SBOE [Title], and it may be necessary for you to seek additional guidance in the future as new issues arise.

Please be advised that this advice is provided to you pursuant to section 219 of the Board of Ethics and Government Accountability Establishment and Comprehensive Ethics Reform Amendment Act of 2011 (“Ethics Act”), effective April 27, 2012, D.C. Law 19-124, D.C. Official Code § 1-1161.01 *et seq.*, which empowers me to provide such guidance. As a result, no enforcement action for violation of the District’s Code of Conduct may be taken against you in this context, provided that you have made full and accurate disclosure of all relevant circumstances and information in seeking this advisory opinion. It must be stressed that this advisory opinion only provides protection for prospective conduct, not past conduct.

Finally, you are advised that the Ethics Act requires this opinion to be published in the District of Columbia Register within 30 days of its issuance, but that identifying information will not be disclosed unless and until you consent to such disclosure in writing, should you wish to do so.

Please let me know if you have any questions or wish to discuss this matter further. I may be reached at (202) 481-3411, or by email at darrin.sobin@dc.gov.

Sincerely,

_____/s/_____
DARRIN P. SOBIN
Director of Government Ethics
Board of Ethics and Government Accountability

AA-016-13