

Ethics For Trustees And Employees of Charter Schools: An Overview of Changes to the Charter School Act

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An Historical Context

- The Charter School Act was originally enacted in 1998 and amended in 2007, the last time the cap was lifted.
- Can be found in Education Law sections 2850 through 2857.



Historical Context: Independence/ Freedom From Regulation

- “[E]ntire thrust of Charter School Act is to provide charter schools with autonomy from the rules and regulations of existing schools and school districts.” *Roosevelt Union Free School District v. SUNY*, 185 Misc. 2d 704, *aff’d*, *as modified*, 282 A.D. 2d 166 (2000).

Historical Context: Independence/Freedom From Regulation

- One result: charter schools did not need to comply with provisions of the NY General Municipal Law, which applies to other public schools.
- Sole requirement in the Act related to GML ethical considerations was that charter schools have “A code of ethics...setting forth for the guidance of trustees, officers and employees the standards of conduct expected of them.” (Section 2851(2)(v)).

A Changing Context

- Twelve years of actual experience with charters-- charter movement growing.
- Legislature/other government officials under pressure from federal government for even more growth, to be eligible for “Race to the Top” funds.
- Countervailing pressure: more growth in exchange for greater accountability/controls similar to traditional public schools.

The Legislature and Governor Act

- On May 28, 2010, the Act was amended again.
- The “cap” on charters was lifted from 200 to 460.
- Numerous other changes, including:
 - Differences in how applications are approved.
 - Additional reporting by schools and authorizers.
 - New grounds for approval, renewal and revocation based on enrollment and retention of SpEd, ELL and poor students.
 - Requirement to have a parent group.
 - Additional steps for co-located schools.
 - But, ***most importantly*** for today...

New Ethics Requirements

- Each school's Code of Ethics must now “include standards with respect to disclosure of conflicts of interest regarding any matter brought before the Board of Trustees”; and
- Charter schools are now subject to General Municipal Law sections 800 through 806 “*to the same extent as such sections apply to school districts.*” See Education Law sections 2851(2)(v) and 2854(f).

Good News

- Because school districts and other municipal entities have been governed by these provisions for years, they have been the “guinea pigs”.
- Court decisions, Decisions of the Commissioner of Education, Opinions of the State Comptroller, Opinions of the Attorney General and Opinions of the Committee on Government Integrity—all provide guidance on how to comply with GML.

The Challenge

- Not an exact science.
- Every situation is unique; every question must be carefully analyzed; every answer turns on the specific, detailed set of facts presented.
- Thus, the guidance is helpful– but not dispositive.



The New GML Provisions

- The main new “buckets” are:
 - Adopting a code of ethics that meets the GML requirements.
 - New rules relating to conflicts of interest for boards and employees that prohibit certain kinds of conflicts.
 - New rules against employees and board members accepting gifts.
 - Other duties concerning compensation and disclosure.

Purpose of GML Rules

- To protect the public from contracts influenced by biased or dishonest officers/employees.
- To protect innocent officials from unwarranted assaults on their integrity.



General Municipal Law

Section 806: Code of Ethics

- Requires school boards to adopt a Code of Ethics for school officers and employees containing guidance on the standards of conduct “reasonably expected of them.”
- Must include standards for: disclosure of interests in matters before the board; holding of investments in conflict with official duties; holding of employment in conflict with duties; future employment that may be in conflict with official duties.

Can A Code of Ethics Be Stricter Than The GML?

- The GML sets the baseline.
- Your school's code may be more restrictive by choice-- but not less restrictive.
- The restrictions imposed in your Code cannot conflict with the GML: the Code cannot allow what GML prohibits and it cannot prohibit what GML expressly allows.
- Code must be distributed by CEO to all employees and filed with OSC. Failure to receive it is **no excuse** for non-compliance.

Conflicts of Interest

- Before the amendments:
 - Charter schools were bound by only:
 - Common law.
 - Not-for-Profit Corporation Law.
 - Your individual charter/authorizer practices.
 - Managing conflicts the old way required only:
 - Disclosure.
 - Fairness.
 - Recusal.

GML: The New Sheriff In Town

- New Rules: Some conflicts are absolutely prohibited.
- Disclosure, fairness, recusal will not cure them.
- Instead, they must be avoided completely, or administrative, civil or criminal penalties may apply.



GML Sec. 801: Conflicts of Interest Are Prohibited

- In general, a school board trustee or employee is prohibited from having an interest in any contract with the school board or school from which he/she benefits financially and over which he/she has control as a result of his/her position with the school.

Analyzing the Conflict

Ask three questions:

1. Is there a contract or agreement in place? If not, there is no conflict of interest. If yes...
2. Does the board member, officer or employee receive a direct or indirect pecuniary benefit from the contract? If not, there is no conflict of interest. If yes...
3. Is the board member or employee authorized to exercise any of his powers or duties with respect to the contract, or does he or she have authority over someone who is so authorized? If not, there is no conflict of interest. If yes...

There is a prohibited conflict of interest, which CANNOT be cured by disclosure or recusal.

Breaking It Down: “Pecuniary Benefit”

- If the contract results in a “direct” or “indirect” “pecuniary benefit” to you as trustee/employee, you have an “interest” in it.
- Opinion State Comptroller 87-23 (member of city board of education has a prohibited interest in a real property contract between the district and a family member **only if** he stands to receive a direct or indirect pecuniary benefit as a result of the contract).
- Opinion State Comptroller 81-66 (school district clerk does not have a prohibited interest in the district’s contract with his brother-in-law for accounting services where district clerk derives no direct or indirect pecuniary benefit from the contract).

Breaking It Down: Do You Have “Authority”?

- Do **you** have the power, **or** you can **appoint someone who has the power**, to either: negotiate, authorize, approve, prepare, make payment or audit bills/claims under the contract?



But What Would A “Rule” Be Without Exceptions?

- An employment contract between the school and your spouse, minor children or dependents.
- A contract between the school and your adult children (from which you derive no pecuniary benefit).
- A contract between the school and a corporation of which you are neither a director nor own less than 5% of the outstanding stock. *See Appeal of Golden*, 32 Ed Dep Rep 202 (if you are a director or own more than 5% of the stock, you have an interest).
- A contract between the school and an entity that employs you, where your compensation is not directly affected by the contract, and you have no duties of procurement or performance under the contract.

More Exceptions

- A collective bargaining agreement.
- A contract with a membership corporation/ association or other non-profit corporation or association.
- A contract to purchase real property provided purchase is approved by order of the supreme court upon petition of the board or through condemnation proceedings.
- A contract where the total consideration paid does not exceed \$750 during the fiscal year when added to the aggregate amount of consideration payable under all contracts in which that employee has an interest.

And More Exceptions

- Designation of a bank or trust company as a depository , **as long as** the school's CFO, treasurer or deputy treasurer **specifically** does not have an interest in the bank or trust company (i.e., other employees **can** have an interest without violating rule).
- Designation of a newspaper for publication of notice.
- A contract entered into prior to the time that the board member or employee was elected or appointed BUT not the renewal of that contract. Opinion State Comptroller 86-58 (no conflict found where the contract in question was entered into prior to election to the board; however, contract cannot be renewed).

GML Section 805-b: Exception For Solemnization of Marriages

- If you are authorized under the domestic relations law to perform marriages you **can** accept a fee or compensation **not more than** \$100 for performing a marriage ceremony at a time and place **other than** at your normal place of business during normal business hours.



Familial Conflicts: Nepotism

- Nepotism, in and of itself, is not necessarily a violation of the GML.
- Remember: employment contracts between the school board and the spouse, minor children or dependents of an officer or employee are not prohibited.
- Other contracts with the relatives of school board members, officers or employees must be analyzed against the same 3 questions/criteria as contracts with non-relatives.

Hypothetical

- The Board awards a contract to a company owned by the School Principal's daughter-in-law. The Principal recommended the company to the Board. Prohibited conflict under GML? What actions are appropriate? Is the answer different if the Principal alone has the authority to enter into the contract without Board action? What if it is the Principal's husband's company and the Principal can award the contract?

Hypothetical

- A not-for-profit corporation leases a building to a charter school. A member of the school board who votes in favor of the lease is also a member of the landlord not-for-profit board. Prohibited conflict? What actions are appropriate?



Hypothetical

- The sole owner of an advertising agency also serves on the board of a charter school. The charter school board votes to retain the agency to create and design marketing material for the school for a fee. Prohibited conflict ? What actions are appropriate?



Hypothetical

- A school board appoints one of its own teachers to serve on the board. Prohibited conflict? If so, is there an exception that applies? What actions are appropriate?



Two Most Common Conflicts To Avoid

- Board contracting with a trustee or trustee-owned business to do work for the school.
- Board contracting with a spouse of a trustee to do work for the school (other than an employment contract).



Proof That The “Old Way” of Resolving Conflicts Won’t Work Under GML New Rules

- Op. State Compt. 00-7: Member of board of fire commissioners of a fire district within a county of more than 200,000 who is an officer and owner of 1/3 of the stock of a corporation has a prohibited conflict of interest in a contract for snow plowing and lawn maintenance between the fire district and the corporation, even if the fire district solicits bids for the work, the corporation is the sole bidder, the commissioner recuses himself from discussions about the contract and abstains from voting on matters related to it.

GML Sec. 805-a: Look A Gift Horse In the Mouth

- 805-a(1) prohibits *soliciting or accepting* any gift worth more than \$75, where it could *reasonably be inferred* that the gift was intended to influence or reward official action.

\$75 Gift Threshold

- Includes money, tangible gifts, services, loans, travel, entertainment or hospitality.
- Measured by fair market value.
- Unit of measurement is a single gift or cumulative gifts over a 12 month period.
- A school's Code of Ethics can set a lower threshold (Atty. Gen. Opinion 99-16 (Inf. 1999)).



Standard: Actual Intent or Reasonable Inference of Intent

- Prohibits gifts *actually* intended to influence or reward, *OR*
- Even if there is no *actual* intent, prohibits gifts if it could be *reasonably inferred under the circumstances* that it was intended to influence or reward (i.e., “appearance of impropriety”).



Appeal of Dashefsky, 46 Ed Dep Rep 219 (2006)

- Law firm invited current school board member clients to annual dinner celebration where value of food and drink was between \$200-\$300 per board member.
- Commissioner held that, even though there was no evidence of *actual* intent to reward, it could *reasonably be inferred* that dinner was held to reward school board clients for their past business.

State Ethics Commission Opinion 94-16: Examples of Acceptable Gifts

- Where a pre-existing personal relationship exists.
- Unsolicited promotional materials of little intrinsic value (pads, pens, etc.).
- Gifts customarily given on occasions like retirement, marriage, etc.
- Meals, when a board member/employee is a participant in a job-related educational program, and meals are available to all participants.
- A free seminar that is job related, as long as the board member/employee did not solicit the invitation and it is open to a broad audience.

GML Sec. 805-a(1)(b): Disclosure of Confidential Information

- An officer or employee may not disclose confidential information acquired by him/her during the course of his official duties **or** use such info to further his/her own interests.



Appeal of Nett, 45 Ed Dept Rep 259 (2005)

- Commissioner held that a board member could not disclose confidential information learned in a properly convened executive session of the board.
- Disclosure violates GML and common law duty of loyalty.
- Disclosure interferes with the Board's proper functioning by chilling free discussion in executive session.
- Since decision to go into executive session must be made by board as corporate body, only board as a corporate body can waive executive session privileges—individual board member cannot do so.

GML Sec. 805-a(1)(c): Limits on Receipt of Compensation

- If you are an officer, board member or employee of the school, you cannot represent clients for compensation before the board or school.
- *Exs:* The attorney for a town planning board may not represent clients before the board. (Op. Atty. Gen. Inf. 92-54); Where a village prepares its own assessment roll, the village comptroller may maintain a private tax certiorari practice **if** it is limited to representing owners of properties located *outside* the village. (Op. State Comp. 92-22).

GML Sec. 805-a(1)(d): Limits on Receipt of Contingent Compensation

- If you are an officer, board member or employee of the school, you cannot enter into any contingency arrangements with clients for compensation in any matter before the school board or school.



GML Section 803 – Required Disclosure

- If a trustee, officer or employee has, will have, or later acquires, an interest in any actual or proposed contract with the school, he must disclose the interest in writing.
- **Caveat:** disclosure does not cure a prohibited interest.
- Good practice to disclose any appearance of a conflict, even if Code of Ethics does not appear to require it.
- Recuse yourself from involvement with the contract or transaction to avoid even the **appearance** of impropriety. (Ex.: A member of a board of assessment who owns property before the board for review should recuse himself from participating in the board proceedings with respect to the property to preserve the validity of the action and maintain public confidence. Op. Atty. Gen. (Inf.) 99-42.)

GML Sections 804 and 805: Consequences For GML Violations

- Contract willfully entered into that creates a prohibited interest is null and void.
- A “knowing” violation of law is a misdemeanor.
- Other penalties may include fine, suspension, removal from office or removal from employment.



Closing Thoughts

- Your reputation is priceless—once damaged, difficult to repair.
- Questions raised about the propriety of behavior by board members, officers or school employees puts at risk the school and its mission.
- Be wary! The old rules don't apply!
- Be conservative. Err on the side of caution. Avoid the headlines.
- When in doubt, ask Counsel's advice.