

August 10, 2010

Deborah S. Delisle
Superintendent of Public Instruction
Ohio Department of Education
25 South Front Street
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SYLLABUS:

2010-020

1. A person may not serve simultaneously as a member of a board of education of a school district and member of the governing authority of a conversion community school sponsored by the school district.
2. A person may serve simultaneously in the positions of superintendent of a school district and superintendent or chief administrative officer of a conversion community school sponsored by the school district, but in his capacity as superintendent of the school district he may not participate, either directly or indirectly, in (1) overseeing, monitoring, or evaluating the administration, management, organization, or operation of the community school as part of the district board of education's oversight of the community school, (2) reviewing or evaluating the finances or financial records of the community school as part of the district board of education's oversight of the community school, or (3) overseeing the provision of technical services to the community school.
3. A person may serve simultaneously in the positions of treasurer of a school district and treasurer or fiscal officer of a conversion community school sponsored by the school district when the position of treasurer or fiscal officer of the community school is a separate and distinct employment position with the community school. In his capacity as treasurer of the school district he may not participate, either directly or indirectly, in (1) reviewing or evaluating the finances or financial records of the community school as part of the district board of education's oversight of the community school or (2) overseeing the provision of technical services to the community school.

4. A superintendent of a school district may perform, as part of his official functions, the duties of a superintendent of a conversion community school sponsored by the school district when the community school has entered into an agreement with the school district for the services of a superintendent, provided the superintendent does not participate, either directly or indirectly, in (1) overseeing, monitoring, or evaluating the administration, management, organization, or operation of the community school as part of the district board of education's oversight of the community school, (2) reviewing or evaluating the finances or financial records of the community school as part of the district board of education's oversight of the community school, or (3) overseeing the provision of technical services to the community school.

5. A treasurer of a school district may perform, as part of his official functions, the duties of a treasurer of a conversion community school sponsored by the school district when the community school has entered into an agreement with the school district for the services of a treasurer, provided the treasurer does not participate, either directly or indirectly, in (1) reviewing or evaluating the finances or financial records of the community school as part of the district board of education's oversight of the community school or (2) overseeing the provision of technical services to the community school.



RICHARD CORDRAY
OHIO ATTORNEY GENERAL

August 10, 2010

OPINION NO. 2010-020

Deborah S. Delisle
Superintendent of Public Instruction
Ohio Department of Education
25 South Front Street
Columbus, Ohio 43215

Dear Superintendent Delisle:

You have requested an opinion concerning the propriety of a member of a board of education, superintendent, or treasurer of a school district either (1) holding a position of employment with a conversion community school or (2) performing services for a conversion community school as part of his official duties for the school district. According to information provided, in the first situation, the member of the board of education, superintendent, or treasurer will hold two separate and distinct positions concurrently. One position will be with the school district, while the other position will be with the conversion community school.

In the second situation, the superintendent or treasurer of the school district will be employed by the school district only. The superintendent or treasurer will not hold an employment position with the conversion community school. Instead, the school district and conversion community school will enter into an agreement whereby the school district's superintendent or treasurer performs certain services for the community school as part of his official duties as superintendent or treasurer and the school district compensates the superintendent or treasurer for performing such additional duties for the community school.

In light of this background, you have asked the following five questions:

1. May a person serve simultaneously as a member of the board of education of a school district and member of the governing authority of a conversion community school sponsored by the school district?
2. May a person serve simultaneously in the positions of superintendent of a school district and superintendent or chief administrative officer of a conversion community school sponsored by the school district?

3. May a person serve simultaneously in the positions of treasurer of a school district and treasurer or fiscal officer of a conversion community school sponsored by the school district?
4. May a superintendent of a school district perform, as part of his official functions, the duties of a superintendent of a conversion community school sponsored by the school district when the community school has entered into an agreement with the school district for the services of a superintendent?
5. May a treasurer of a school district perform, as part of his official functions, the duties of a treasurer of a conversion community school sponsored by the school district when the community school has entered into an agreement with the school district for the services of a treasurer?

Compatibility Analysis

Your first three questions involve a member of a board of education, superintendent, or treasurer of a school district holding a second position of employment with a conversion community school. Resolution of these questions requires us to undertake a common law compatibility analysis. The first step in such an analysis is to determine whether the positions in question are public or private positions. This will enable us to apply the appropriate compatibility test. *See* 2009 Op. Att’y Gen. No. 2009-053 at 2-398 and 2-399 (delineating a five-question test for determining whether a public officer or employee may concurrently serve in a private position); 2009 Op. Att’y Gen. No. 2009-049 at 2-368 (setting forth a seven-question test for determining the compatibility of two public positions).

A person who serves as a member of a board of education, superintendent, or treasurer of a school district holds a public office or employment. *See* R.C. 3311.054; R.C. 3311.19; R.C. 3313.01-.02; R.C. 3313.22; R.C. 3319.01. A person who serves on, or is employed by, the governing board of a conversion community school is in the service of, or employed by, a nonprofit corporation or public benefit corporation. *See* R.C. 3314.01(B); R.C. 3314.02(B); R.C. 3314.025; R.C. 3314.03(A)(1); R.C. 3314.03(A)(17); R.C. 3314.03(B)(1); R.C. 3314.10. Nevertheless, such a person also occupies a public position for purposes of a compatibility analysis. *See generally* 2009 Op. Att’y Gen. No. 2009-005 at 2-23 n.2 (the establishment of a community improvement corporation as a nonprofit corporation is not determinative of its status as a public body or entity for some purposes). Pursuant to R.C. 3314.01(B), a conversion community school “is a public school, independent of any school district, and is part of the state’s program of education.” Moreover, “[a]fter considering Ohio’s statutory and case law, as well as the substantive control that Ohio exerts on its community schools, it is apparent that community schools are political subdivisions of the state.” *Greater Heights Acad. v. Zelman*, 522 F.3d 678, 680 (6th Cir. 2008); *see also State ex rel. Ohio Congress of Parents & Teachers v. State Bd. of Educ.*, 111 Ohio St. 3d 568, 2006-Ohio-5512, 857 N.E.2d 1148, at ¶72 (2006) (“[I]ike traditional schools, community schools are funded by the state, cannot charge tuition,

and are charged with educating Ohio children. As a result, they are not private business corporations the debt of which the state is prohibited from assuming”). A person who serves on, or is employed by, the governing board of a conversion community school thus is in the service of a political subdivision of the state, and, as such, occupies a public position for purposes of a compatibility analysis.

Accordingly, a member of a board of education, superintendent, or treasurer of a school district who holds a second position of employment with a conversion community school serves in two public positions for purposes of a compatibility analysis. The following common law compatibility test is used to determine whether a person may serve simultaneously in two public positions:

1. Is either of the positions a classified employment within the terms of R.C. 124.57?
2. Does a constitutional provision or statute prohibit the holding of both positions at the same time?
3. Is one position subordinate to, or in any way a check upon, the other?
4. Is it physically possible for one person to discharge the duties of both positions?
5. Is there an impermissible conflict of interest between the two positions?
6. Are there local charter provisions, resolutions, or ordinances which are controlling?
7. Is there a federal, state, or local departmental regulation applicable?

2009 Op. Att’y Gen. No. 2009-049 at 2-368.

Membership on a Board of Education and Governing Authority

Let us now apply the foregoing test to each of the situations described in your first three questions. Your first question asks whether a person may serve simultaneously as a member of the board of education of a school district and member of the governing authority of a conversion community school sponsored by the school district. Under the common law compatibility test, two public positions are incompatible when one position is subordinate to, or in any way a check upon, the other. 2006 Op. Att’y Gen. No. 2006-015 at 2-121. As explained by the Ohio Supreme Court in *State ex rel. Hover v. Wolven*, 175 Ohio St. 114, 116-17, 191 N.E.2d 723 (1963):

“* * * One of the most important tests as to whether offices are incompatible is found in the principle that incompatibility is recognized whenever

one office is subordinate to the other in some of its important and principal duties, or is subject to supervision or control by the other * * * or is in any way a check upon the other, or where a contrariety and antagonism would result from an attempt by one person to discharge the duties of both. * * * [”] (Citation omitted.)

A review of the powers, duties, and responsibilities of the respective positions discloses that the board of education of a school district that sponsors a conversion community school oversees or supervises the governing board of the school. Pursuant to R.C. 3314.02 and R.C. 3314.03, when a school district sponsors a conversion community school, the school district’s board of education and the governing authority of the school are required to enter into a contract. The contract is required to specify, among other things, the school’s educational program, academic goals, performance and admission standards, dismissal procedures, the ways in which the school will achieve racial and ethnic balance reflective of the community the school serves, requirements for financial audits, the school’s facilities, teacher qualifications, and procedures for resolving disputes between the board of education and the governing authority of the school. R.C. 3314.03(A).

The contract also must specify that the governing authority of the community school is “responsible for carrying out the provisions of the contract.” R.C. 3314.03(A)(14); *see also* R.C. 3314.072. In addition, the contract must specify the duties of the board of education under the contract and require the board of education to do the following:

- (1) Monitor the community school’s compliance with all laws applicable to the school and with the terms of the contract;
- (2) Monitor and evaluate the academic and fiscal performance and the organization and operation of the community school on at least an annual basis;
- (3) Report on an annual basis the results of the evaluation conducted under division (D)(2) of this section to the department of education and to the parents of students enrolled in the community school;
- (4) Provide technical assistance to the community school in complying with laws applicable to the school and terms of the contract;
- (5) Take steps to intervene in the school’s operation to correct problems in the school’s overall performance, declare the school to be on probationary status pursuant to [R.C. 3314.073], suspend the operation of the school pursuant to [R.C. 3314.072], or terminate the contract of the school pursuant to [R.C. 3314.07] as determined necessary by the sponsor;
- (6) Have in place a plan of action to be undertaken in the event the community school experiences financial difficulties or closes prior to the end of a school year.

R.C. 3314.03(D); *see also* R.C. 3314.023; R.C. 3314.03(C).

Thus, pursuant to R.C. 3314.03(D), the board of education of a school district that sponsors a conversion community school oversees or supervises the governing board of the

community school. And, in some instances, the board of education may intervene in the operation of the community school to correct problems in the school's overall performance or terminate the existence of the community school. *See* R.C. 3314.03(D)(5); R.C. 3314.07; R.C. 3314.072; R.C. 3314.073; *see also* R.C. 3314.03(A)(21).

Because the board of education of a school district that sponsors a conversion community school oversees or supervises the governing authority of the community school, the board of education acts as a check upon the school's governing authority. *See generally State ex rel. Hover v. Wolven*, 175 Ohio St. at 118 (“[t]he statutes make the local board [of education] subordinate to the county board. The latter supervises the former. In some instances the county board takes over entirely the responsibilities and duties of the local board. The county board may even terminate the existence of the local board”); 1960 Op. Att’y Gen. No. 1491, p. 432, at 434-35 (same as the previous parenthetical). Therefore, a person may not serve simultaneously as a member of a board of education of a school district and member of the governing authority of a conversion community school sponsored by the school district.

Superintendent or Treasurer of a School District Holding a Similar Position with a Conversion Community School

Your second question asks whether a person may serve simultaneously in the positions of superintendent of a school district and superintendent or chief administrative officer of a conversion community school sponsored by the school district. Your third question asks whether a person may serve simultaneously in the positions of treasurer of a school district and treasurer or fiscal officer of a conversion community school sponsored by the school district. Because the same compatibility analysis is used in answering your second and third questions, we will consider them together.

As explained earlier, for the purpose of your second and third questions, the superintendent or treasurer of the school district will hold two separate and distinct positions concurrently. One position will be with the school district, while the other position will be with the conversion community school. This means that we must apply the seven-question compatibility test to determine whether a superintendent or treasurer of a school district may serve simultaneously in a corresponding position with a conversion community school sponsored by the school district.

Question one of the compatibility test asks whether either of the positions is a classified employment within the terms of R.C. 124.57, which prohibits, except as provided therein, persons in the classified service of “the state, the several counties, cities, and city school districts of the state, or the civil service townships of the state” from holding partisan political positions. Except for positions in the service of city school districts, R.C. 124.57 does not apply to positions in the service of school districts or conversion community schools. In addition, pursuant to R.C. 124.11(A)(7)(a), the positions of superintendent and treasurer are in the unclassified service, and, as such, persons serving in these positions in city school districts are not subject to the strictures of R.C. 124.57. The prohibition of R.C. 124.57 therefore does not

operate to prevent a superintendent or treasurer of a school district from serving in a similar position with a conversion community school.

Question two of the compatibility test asks whether a constitutional provision or statute prohibits a person from holding both positions at the same time. No constitutional provision or statute prohibits a superintendent of a school district from serving simultaneously as a superintendent or chief administrative officer of a conversion community school.

With respect to the position of treasurer of a school district, no constitutional provision bars such a treasurer from holding the position of treasurer or fiscal officer of a conversion community school at the same time. However, R.C. 3313.22(B) states that a treasurer appointed by a board of education of a school district “may not be a member of the board or otherwise regularly employed by the board.”

In the situations presented in your second and third questions, you have informed us that the person will hold two separate and distinct employment positions concurrently. One position will be treasurer of a school district. As school district treasurer, the person will be employed and compensated by, and subject to the control and supervision of, the school district’s board of education. *See* R.C. 3313.22.

The other position will be treasurer or fiscal officer of a conversion community school sponsored by a school district that employs him as the district’s treasurer. *See* R.C. 3314.011 (the governing authority of a conversion community school may designate a person to serve as the community school’s fiscal officer). In his capacity as treasurer or fiscal officer of the community school, the person is employed, compensated, and assigned all his duties by the governing authority of the community school. *See* R.C. 3314.03(A)(16); R.C. 3314.03(A)(17); R.C. 3314.03(B)(3); R.C. 3314.10(A)(1); R.C. 3314.10(A)(4)-(6); R.C. 3314.10(B). The person does not receive any compensation from the board of education of the school district for serving in the position of treasurer or fiscal officer of the community school. The person also does not act on behalf of, or perform duties for, the board of education when serving as the community school’s treasurer or fiscal officer. Thus, for purposes of R.C. 3313.22(B), the regular employer of a treasurer or fiscal officer of a community school is the community school’s governing authority when the treasurer or fiscal officer is employed, compensated, and assigned all his duties by the community school’s governing authority.¹ R.C. 3313.22(B), therefore, does not

¹ In some instances, for purposes of R.C. Chapter 4117 (public employees’ collective bargaining), the board of education of a school district that sponsors a conversion community school may be “regarded ... as the ‘public employer’ of the employees of [the] conversion community school” who are subject to a collective bargaining agreement. R.C. 3314.10(A)(3). Notwithstanding the language of R.C. 3314.10(A)(3), the remaining provisions of R.C. 3314.10 make it clear that for all other purposes the employer of the treasurer or fiscal officer of a conversion community school is the governing board of the community school, rather than the board of education of the school district that sponsors the community school, when the treasurer

prevent a person who is the treasurer of a school district from being employed as the treasurer or fiscal officer of a conversion community school sponsored by the school district when the person, as treasurer or fiscal officer of the community school, is employed, compensated, and assigned all his duties by the community school's governing authority.

The facts of a particular situation may indicate, however, that a person designated as the treasurer or fiscal officer of a conversion community school sponsored by a school district is actually "regularly employed by the board" of education of the school district. For example, if a school district and community school enter into an agreement whereby the school district provides a person to serve as the treasurer or fiscal officer for the community school and employs someone to act in such capacity, *see* R.C. 3313.844; R.C. 3314.03(D); R.C. 3314.08(G), a person who is employed by the school district to serve in the positions of treasurer of the school district and treasurer or fiscal officer of the community school at the same time holds two separate and distinct employment positions with the school district.² The person is not employed by the community school even though the person has been designated as the community school's treasurer or fiscal officer pursuant to R.C. 3314.011. In such a situation, a person who is employed by the school district to serve as the treasurer or fiscal officer of the community school is "regularly employed by the board" of education of the school district for purposes of R.C. 3313.22(B), and, as such, the person is prohibited from holding the position of treasurer of the school district. Accordingly, the second question of the compatibility test may be answered in the negative, provided the position of treasurer or fiscal officer of the conversion community school is a separate and distinct employment position with the community school.

Question three of the compatibility test asks whether one position is subordinate to, or in any way a check upon, the other. Neither position is responsible for appointing or removing a person to or from the other position. *See* R.C. 3313.22; R.C. 3314.10(A)(1); R.C. 3319.01. Also, except as explained later in the conflict of interest analysis, the positions operate independently of each other, and neither is required to assign duties to, or supervise, the other. Accordingly, neither position is subordinate to, or in any way a check upon, the other.

Question four of the compatibility test asks whether it is physically possible for one person to perform the duties of both positions. This is a question of fact that must be addressed at the local level by the board of education of the school district and the governing authority of

or fiscal officer of the community school is employed, compensated, and assigned all his duties by the community school's governing authority. *See also* R.C. 3314.101.

² Unlike the situation presented in your fourth and fifth questions, the superintendent or treasurer of the school district is not required by the school district's board of education to perform, as part of his official functions, the duties of superintendent or treasurer, respectively, of a conversion community school sponsored by the school district. Rather, the board of education has established a second employment position that is responsible for serving as the superintendent or treasurer of the conversion community school.

the conversion community school. *See* 2009 Op. Att’y Gen. No. 2009-049 at 2-368 and 2-369. If it is determined at the local level that it is physically possible for a person to perform the duties of both positions, a person may hold both positions at the same time.

While we cannot state definitively whether a superintendent or treasurer of a school district is physically able to hold a corresponding employment position with a conversion community school, such dual service appears questionable when both positions are full-time. The working hours of both positions appear to overlap since the duties of each position are generally performed during normal school hours, which typically are 7:00 AM to 4:00 PM Monday through Friday.

Further, even if there is no direct conflict in the working hours of the two positions, a superintendent or treasurer of a school district who holds a similar position with a conversion community school may not perform any of his duties on behalf of the community school during his regular work hours as superintendent or treasurer of the school district. If a superintendent or treasurer of a school district who holds a corresponding position with a community school is required to perform duties on behalf of the community school during his regular work hours as superintendent or treasurer of the school district, the superintendent or treasurer of the school district must take approved vacation, personal, or compensatory leave or leave without pay for the time he is absent from his duties as superintendent or treasurer of the school district.

Question five of the compatibility test asks whether there is a conflict of interest between the two positions. A person may not serve simultaneously in two public positions if the “responsibilities in one position are such as to influence the performance of his duties in the other position, thereby subjecting him to influences which may prevent his decisions from being completely objective.” 1980 Op. Att’y Gen. No. 80-035 at 2-149.

A comparison of the general powers, duties, and responsibilities of the positions of superintendent of a school district and superintendent or chief administrative officer of a conversion community school discloses no conflicts of interests between the two positions. A similar examination of the general powers, duties, and responsibilities of the positions of treasurer of a school district and treasurer or fiscal officer of a conversion community school also discloses no conflicts of interests between these positions.

However, as explained above, a board of education of a school district that sponsors a conversion community school is required to oversee, monitor, and evaluate the administration, management, organization, and operation of the community school. R.C. 3314.03(D). In addition, the board of education is required to review and evaluate the finances and financial records of the community school. R.C. 3314.023; R.C. 3314.03(D). The board of education also provides technical assistance to the community school. *See* R.C. 3314.03(D)(4); *see also* R.C. 3313.844; R.C. 3314.03(D); R.C. 3314.08(G). To fulfill these duties, the board of education may direct the superintendent of the school district to participate in overseeing, monitoring, or evaluating the administration, management, organization, or operation of the community school, *see* R.C. 3319.01; *see also* R.C. 3311.19(D), or direct the superintendent or treasurer of the

school district to participate in (1) reviewing or evaluating the finances or financial records of the community school or (2) overseeing the provision of technical services to the community school, *see* R.C. 3313.22; R.C. 3313.31; *see also* R.C. 3311.19(E).³ *See generally* 1986 Op. Att’y Gen. No. 86-046 at 2-245 (the authority granted to a state university to negotiate and enter into contracts of employment with faculty members “includes the power to negotiate and set the terms and conditions of faculty members’ employment contracts”).

If a superintendent of a school district were directed by the school district’s board of education to participate in overseeing, monitoring, or evaluating the administration, management, organization, or operation of a conversion community school that employs him, it might be difficult for the superintendent to perform his duties in a completely objective and disinterested manner because of his position with the school. *See* 1961 Op. Att’y Gen. No. 2468, p. 504, at 506. Such a situation creates a conflict of interest between the positions of superintendent of a school district and superintendent or chief administrative officer of a conversion community school sponsored by the school district. *See* 1981 Op. Att’y Gen. No. 81-092 at 2-352 and 2-353.

Similarly, if a superintendent or treasurer of a school district were directed by the school district’s board of education to participate in (1) reviewing or evaluating the finances or financial records of a conversion community school that employs him or (2) overseeing the provision of technical services to such community school, it might be difficult for the superintendent or treasurer to perform his duties in an unbiased manner. *See* 1961 Op. Att’y Gen. No. 2468, p. 504, at 506. This situation produces a conflict of interest between the positions of superintendent and superintendent or chief administrative officer of a conversion community school sponsored by the school district and between the positions of treasurer of a school district and treasurer or fiscal officer of a conversion community school sponsored by the school district. *See* 1981 Op. Att’y Gen. No. 81-092 at 2-352 and 2-353.

A conflict of interest between two positions is impermissible and renders the positions incompatible when the conflict cannot be eliminated or avoided. *See* 2008 Op. Att’y Gen. No. 2008-020 at 2-220 and 2-221; 2003 Op. Att’y Gen. No. 2003-006 at 2-36. A superintendent of a school district who serves in a similar position with a conversion community school sponsored by the school district cannot eliminate or avoid the conflicts described above if the school district’s board of education directs the superintendent to participate in (1) overseeing, monitoring, or evaluating the administration, management, organization, or operation of the community school as part of the district board of education’s oversight of the community school, (2) reviewing or evaluating the finances or financial records of the community school as part of the district board of education’s oversight of the community school, or (3) overseeing the provision of technical services to the community school. Accordingly, a person who serves

³ R.C. 3313.22 sets forth specific instances in which the superintendent of a school district acts as, or performs the duties of, the treasurer of the school district.

simultaneously in the positions of superintendent of a school district and superintendent or chief administrative officer of a conversion community school sponsored by the school district is subject to an impermissible conflict of interest when he is directed by the school district's board of education to participate in (1) overseeing, monitoring, or evaluating the administration, management, organization, or operation of the community school as part of the district board of education's oversight of the community school, (2) reviewing or evaluating the finances or financial records of the community school as part of the district board of education's oversight of the community school, or (3) overseeing the provision of technical services to the community school.

Similarly, a treasurer of a school district who serves in a corresponding position with a conversion community school sponsored by the school district cannot eliminate or avoid the aforementioned conflict if the school district's board of education directs the treasurer to participate in (1) reviewing or evaluating the finances or financial records of the community school as part of the district board of education's oversight of the community school or (2) overseeing the provision of technical services to the community school. In such a situation, a person who serves simultaneously in the positions of treasurer of a school district and treasurer or fiscal officer of a conversion community school sponsored by the school district is subject to an impermissible conflict of interest when he is directed by the school district's board of education to participate in (1) reviewing or evaluating the finances or financial records of the community school as part of the district board of education's oversight of the community school or (2) overseeing the provision of technical services to the community school.

We caution, however, that the participation of a superintendent or treasurer of a school district in matters involving a conversion community school sponsored by the school district may arise even though the school district has not directed the superintendent or treasurer to participate in such matters. Under Ohio law, the duties and responsibilities of superintendents and treasurers of school districts are many and varied. R.C. 3319.01 makes the superintendent the executive officer for the board of education and requires the superintendent to direct and assign the employees of the board of education. Similarly, R.C. 3313.31 makes the treasurer the chief fiscal officer of the school district and requires the treasurer to direct and assign employees directly engaged in the day-to-day fiscal operations of the school district. Thus, given the breadth of the duties and responsibilities of superintendents and treasurers, it is also possible that a superintendent or treasurer could participate indirectly in matters involving a conversion community school that employs him in a similar capacity.

Nevertheless, as explained above, the board of education of a school district, rather than the superintendent or treasurer, is ultimately responsible for (1) overseeing, monitoring, and evaluating the administration, management, organization, and operation of a conversion community school sponsored by the school district, (2) reviewing and evaluating the finances or financial records of such a community school, and (3) overseeing the provision of technical services to such a community school. As such, a board of education may establish any reasonable manner for accomplishing these tasks. *See generally Jewett v. Valley Ry. Co.*, 34 Ohio St. 601, 608 (1878) (“[w]here authority is given to do a specified thing, but the precise

mode of performing it is not prescribed, the presumption is that the legislature intended the party might perform it in a reasonable manner”). The specific manner utilized by a board of education in performing these tasks may eliminate the instances in which the superintendent or treasurer of the school district participates indirectly in matters involving a conversion community school that employs the superintendent or treasurer in a similar capacity.

Moreover, a superintendent and treasurer of a school district are subject to the direction of the board of education when performing their respective duties. *See* R.C. 3313.22; R.C. 3313.31; R.C. 3319.01. This means that a superintendent or treasurer is under the control and supervision of the board of education when directing and assigning the employees of the school district. A superintendent or treasurer of a school district also is not required to be involved in evaluating, disciplining, or terminating the employees of the school district directed and assigned to participate in matters involving a conversion community school sponsored by the school district. *See, e.g.,* R.C. 124.34; R.C. 3319.02; R.C. 3319.081; R.C. 3319.171. Thus, it is possible for a board of education of a school district to eliminate any undue influence that a superintendent or treasurer who is employed by a conversion community school in a similar position could exert over employees of the school district directed and assigned to participate in (1) overseeing, monitoring, or evaluating the administration, management, organization, or operation of the community school, (2) reviewing or evaluating the finances or financial records of the community school, or (3) overseeing the provision of technical services to the community school.

Whether, in a given situation, the board of education of a school district has taken reasonable measures to substantially eliminate the likelihood that the superintendent or treasurer of the school district will indirectly participate in matters involving a conversion community school that employs the superintendent or treasurer in a corresponding position is a question of fact. Because questions of fact are best answered at the local level, we cannot determine in any given situation whether a superintendent or treasurer who serves in a similar position with a conversion community school can avoid participating indirectly in matters involving the community school. *See* 1987 Op. Att’y Gen. No. 87-039 at 2-264.

To sum up the conflict of interest analysis, no conflict renders the positions of superintendent of a school district and superintendent or chief administrative officer of a conversion community school sponsored by the school district incompatible unless the superintendent of the school district participates, either directly or indirectly, in (1) overseeing, monitoring, or evaluating the administration, management, organization, or operation of the community school as part of the district board of education’s oversight of the community school, (2) reviewing or evaluating the finances or financial records of the community school as part of the district board of education’s oversight of the community school, or (3) overseeing the provision of technical services to the community school. Also, no conflict renders the positions of treasurer of a school district and treasurer or fiscal officer of a conversion community school sponsored by the school district incompatible unless the treasurer of the school district participates, either directly or indirectly, in (1) reviewing or evaluating the finances or financial

records of the community school as part of the district board of education's oversight of the community school or (2) overseeing the provision of technical services to the community school.

The final two questions of the compatibility test concern the applicability of charter provisions, resolutions, or ordinances, and federal, state, and local regulations. No local charter provision, resolution, or ordinance, or federal or state regulation prohibits a superintendent or treasurer of a school district from serving in a similar position with a conversion community school.⁴ Whether an applicable local departmental regulation prohibits such a practice is a question that must be answered by the board of education of the school district and the governing authority of the conversion community school. Accordingly, absent a local departmental regulation prohibiting a superintendent or treasurer of a school district from serving simultaneously in a similar position with a conversion community school, the positions are compatible, subject to the limitations stated in this opinion.

Therefore, in response to your second and third questions, a person may serve simultaneously in the positions of superintendent of a school district and superintendent or chief administrative officer of a conversion community school sponsored by the school district, but in his capacity as superintendent of the school district he may not participate, either directly or indirectly, in (1) overseeing, monitoring, or evaluating the administration, management, organization, or operation of the community school as part of the district board of education's oversight of the community school, (2) reviewing or evaluating the finances or financial records of the community school as part of the district board of education's oversight of the community school, or (3) overseeing the provision of technical services to the community school. Further, a person may serve simultaneously in the positions of treasurer of a school district and treasurer or fiscal officer of a conversion community school sponsored by the school district when the position of treasurer or fiscal officer of the community school is a separate and distinct employment position with the community school. In his capacity as treasurer of the school district he may not participate, either directly or indirectly, in (1) reviewing or evaluating the finances or financial records of the community school as part of the district board of education's oversight of the community school or (2) overseeing the provision of technical services to the community school.

⁴ Our research has not located a specific federal law prohibiting a superintendent or treasurer of a school district from serving in a similar position with a conversion community school. Insofar as conversion community schools receive financial assistance from the United States government, *see* R.C. 3314.08; R.C. 3314.081, a school district and conversion community school should scrutinize carefully whether the employment of a person by both the school district and the community school jeopardizes the community school's eligibility for that federal assistance.

Superintendent or Treasurer of a School District Performing Services for a Conversion Community School as Part of His Official Duties

Let us now turn to your fourth and fifth questions. Because the resolution of your fourth question requires the same analysis needed to answer your fifth question, we will consider your fourth and fifth questions together.

Your fourth question asks whether a superintendent of a school district may perform, as part of his official functions, the duties of a superintendent of a conversion community school sponsored by the school district when the community school has entered into an agreement with the school district for the services of a superintendent. Similarly, your fifth question asks whether a treasurer of a school district may perform, as part of his official functions, the duties of a treasurer of a conversion community school sponsored by the school district when the community school has entered into an agreement with the school district for the services of a treasurer.⁵

⁵ Under common law principles, a superintendent or treasurer of a school district may not have a prohibited personal interest in a public contract. *See* 2008 Op. Att’y Gen. No. 2008-003 at 2-29 and 2-30. A prohibited personal interest in a public contract exists when, among other things, the contract creates a conflict of interest for the superintendent or treasurer. *Id.* at 2-30.

A superintendent of a school district who performs, as part of his official functions, the duties of a superintendent of a conversion community school sponsored by the school district is subject to an impermissible conflict of interest when he is directly required by the board of education of the school district to participate in (1) overseeing, monitoring, or evaluating the administration, management, organization, or operation of the community school for the board of education of the school district as part of the district board of education’s oversight of the community school, (2) reviewing or evaluating the finances or financial records of the community school for the board of education of the school district as part of the district board of education’s oversight of the community school, or (3) overseeing the provision of technical services to the community school. *See* 1981 Op. Att’y Gen. No. 81-092 at 2-352. Similarly, a treasurer of a school district who performs, as part of his official functions, the duties of a treasurer of a conversion community school sponsored by the school district is subject to an impermissible conflict of interest when he is directly required by the board of education of the school district to participate in (1) reviewing or evaluating the finances or financial records of the community school for the board of education of the school district as part of the district board of education’s oversight of the community school or (2) overseeing the provision of technical services to the community school. *Id.*

Therefore, in addressing your fourth and fifth questions, it is assumed that a superintendent of a school district who performs, as part of his official functions, the duties of a superintendent of a conversion community school sponsored by the school district is not directly

As stated above, for the purpose of these questions, the superintendent or treasurer will be employed by the school district only. The superintendent or treasurer will not hold a second employment position with the conversion community school. Instead, the school district and conversion community school will enter into an agreement whereby the school district's superintendent or treasurer performs services for the community school as part of his official functions as superintendent or treasurer and the school district compensates the superintendent or treasurer for providing such services to the community school.⁶

Because the superintendent or treasurer of the school district will not be holding two employment positions at the same time, there is no need to perform a common law compatibility analysis. We must instead determine whether a board of education of a school district may direct the school district's superintendent or treasurer to perform, as part of his official functions, duties for a conversion community school sponsored by the school district.

A board of education of a school district that sponsors a conversion community school has statutory authority to enter into an agreement with the community school whereby the school district agrees to provide administrative services to the community school. *See* R.C. 3313.844; R.C. 3314.03(D); R.C. 3314.08(G). No statute limits the types of administrative services that a school district may provide to a conversion community school. Absent such a limitation, the board of education of a school district that sponsors a conversion community school may exercise its discretion in determining the types of administrative services the school district will provide to the community school. *See generally State ex rel. Kahle v. Rupert*, 99 Ohio St. 17,

required by the board of education of the school district to participate in (1) overseeing, monitoring, or evaluating the administration, management, organization, or operation of the community school for the board of education of the school district as part of the district board of education's oversight of the community school, (2) reviewing or evaluating the finances or financial records of the community school for the board of education of the school district as part of the district board of education's oversight of the community school, or (3) overseeing the provision of technical services to the community school. It is also assumed that a treasurer of a school district who performs, as part of his official functions, the duties of a treasurer of a conversion community school sponsored by the school district is not directly required by the board of education of the school district to participate in (1) reviewing or evaluating the finances or financial records of the community school for the board of education of the school district as part of the district board of education's oversight of the community school or (2) overseeing the provision of technical services to the community school.

⁶ Insofar as the superintendent or treasurer of the school district will not hold a second employment position with the school district, R.C. 3313.22(B) does not apply to prevent the superintendent or treasurer from performing, as part of his official functions, the duties of superintendent or treasurer, respectively, of a conversion community school sponsored by the school district.

19, 122 N.E. 39 (1918) (“[e]very officer of this state or any subdivision thereof not only has the authority but is required to exercise an intelligent discretion in the performance of his official duty”). Accordingly, if a board of education of a school district that sponsors a conversion community school deems it appropriate, the board may enter into an agreement with the community school whereby the school district agrees to provide a person to perform the duties of superintendent or treasurer for the community school. *See generally* 2005 Op. Att’y Gen. No. 2005-013 at 2-128 (“the general rule [is] that the power to enter into an agreement necessarily includes the authority to insert reasonable terms within the agreement”).

In addition, a board of education of a school district has the authority to require the superintendent of the school district to be the person who performs the duties of superintendent for a conversion community school. *See* R.C. 3319.01; *see also* R.C. 3311.19(D). This means that a board of education of a school district may require the superintendent of the school district to perform, as part of his official functions, the duties of superintendent of a conversion community school when an agreement requires the school district to provide the services of a superintendent to the community school.

Similarly, a board of education of a school district also has the authority to require the treasurer of the school district to be the person who performs the duties of treasurer for a conversion community school. *See* R.C. 3313.22; *see also* R.C. 3311.19(E); R.C. 3313.31; 2005 Op. Att’y Gen. No. 2005-033 at 2-350; 1986 Op. Att’y Gen. No. 86-046 at 2-245. Under this authority, a board of education of a school district may require the treasurer of the school district to perform, as part of his official functions, the duties of treasurer of a conversion community school when an agreement requires the school district to provide the services of a treasurer to the community school.

When a board of education of a school district requires the superintendent or treasurer of the school district to perform, as part of his official functions, the duties of a superintendent or treasurer, respectively, of a conversion community school, the superintendent or treasurer may face conflicts of interest. As explained earlier, a superintendent could participate indirectly in (1) overseeing, monitoring, or evaluating the administration, management, organization, or operation of the community school as part of the district board of education’s oversight of the community school, (2) reviewing or evaluating the finances or financial records of the community school as part of the district board of education’s oversight of the community school, or (3) overseeing the provision of technical services to the community school. Similarly, a treasurer could participate indirectly in (1) reviewing or evaluating the finances or financial records of the community school as part of the district board of education’s oversight of the community school or (2) overseeing the provision of technical services to the community school. In such situations, it might be difficult for the superintendent or treasurer to perform his duties and exercise his discretion in a completely objective and disinterested manner because of his personal interest in the agreement between the school district and conversion community school.

However, for the reasons previously articulated, it is possible for a board of education of a school district to eliminate the instances in which the superintendent or treasurer of the school

district confronts such conflicts of interest. Whether, in a given situation, the board of education of a school district has taken reasonable measures to substantially eliminate the likelihood that the superintendent or treasurer of the school district will indirectly participate in matters involving a conversion community school that has entered into an agreement with the school district for the services of a superintendent or treasurer is a question of fact that must be determined at the local level. We cannot determine in any given situation whether a superintendent or treasurer who performs, as part of his official functions, the duties of a superintendent or treasurer, respectively, of a conversion community school sponsored by the school district can avoid participating indirectly in matters involving the community school. *See* 1987 Op. Att’y Gen. No. 87-039 at 2-264.

Therefore, in response to your fourth and fifth questions, a superintendent of a school district may perform, as part of his official functions, the duties of a superintendent of a conversion community school sponsored by the school district when the community school has entered into an agreement with the school district for the services of a superintendent, provided the superintendent does not participate, either directly or indirectly, in (1) overseeing, monitoring, or evaluating the administration, management, organization, or operation of the community school as part of the district board of education’s oversight of the community school, (2) reviewing or evaluating the finances or financial records of the community school as part of the district board of education’s oversight of the community school, or (3) overseeing the provision of technical services to the community school. In addition, a treasurer of a school district may perform, as part of his official functions, the duties of a treasurer of a conversion community school sponsored by the school district when the community school has entered into an agreement with the school district for the services of a treasurer, provided the treasurer does not participate, either directly or indirectly, in (1) reviewing or evaluating the finances or financial records of the community school as part of the district board of education’s oversight of the community school or (2) overseeing the provision of technical services to the community school.⁷

Ethical Considerations

As a final matter, we note that a superintendent or treasurer of a school district who either (1) holds a position of employment with a conversion community school or (2) performs services for a conversion community school as part of his official duties with the school district must abide by the ethics and conflict of interest provisions of R.C. Chapter 102 and R.C. 2921.42-43. *See* R.C. 2921.01(A); R.C. 2921.01(B); R.C. 3314.03(A)(11)(e); Ohio Ethics Comm’n, Advisory Op. No. 2010-01. One such provision that may have a direct bearing upon the specific situations

⁷ A school district and conversion community school that have entered into an agreement whereby the school district provides the community school with the services of a superintendent or treasurer should consider carefully whether such an agreement jeopardizes the community school’s eligibility for federal assistance. *See* note 4, *supra*.

you have posed is R.C. 2921.42(A)(4). This provision states, in pertinent part, that “[n]o public official shall knowingly ... [h]ave an interest in the profits or benefits of a public contract entered into by or for the use of the political subdivision or governmental agency or instrumentality with which the public official is connected.” For purposes of R.C. 2921.42, the term “public contract” means “[t]he purchase or acquisition, or a contract for the purchase or acquisition, of property or services by or for the use of the state, any of its political subdivisions, or any agency or instrumentality of either, including the employment of an individual by the state, any of its political subdivisions, or any agency or instrumentality of either.” R.C. 2921.42(I)(1)(a).

R.C. 2921.42(A)(4) thus prohibits a superintendent or treasurer of a school district from having an interest in the profits or benefits of any public contract entered into by the school district, including employment contracts. *See* Ohio Ethics Comm’n, Advisory Op. No. 2000-04 (syllabus, paragraph 2) (R.C. 2921.(A)(4) “prohibits public school teachers, administrators, and other public school officials and employees from having a definite and direct personal financial or fiduciary interest in a contract entered into by or for the use of their school district”); Ohio Ethics Comm’n, Advisory Op. No. 99-002, slip op. at 3 (“[t]he Ethics Commission has held that R.C. 2921.42(A)(4) prohibits an elected officer of a political subdivision from simultaneously holding compensated employment with his own political subdivision because an employment relationship between a political subdivision and a public employee is a ‘public contract’ for purposes of R.C. 2921.42”); Ohio Ethics Comm’n, Advisory Op. No. 91-002 (a city council member is prohibited from holding compensated employment with the city’s fire department); *see also* Ohio Ethics Comm’n, Advisory Op. No. 92-012, slip op. at 2 (“[t]he Ethics Commission has consistently held that an employment relationship between a political subdivision and an employee is a ‘public contract’ for purposes of R.C. 2921.42 since the political subdivision is purchasing or acquiring the services of the employee”).

Additionally, R.C. 2921.43(A)(1), which sets forth Ohio’s supplemental compensation law, provides that no public servant shall knowingly solicit or accept and no person shall knowingly promise or give a public servant

[a]ny compensation, other than as allowed by divisions (G), (H), and (I) of [R.C. 102.03] or other provisions of law, to perform the public servant’s official duties, to perform any other act or service in the public servant’s public capacity, for the general performance of the duties of the public servant’s public office or public employment, or as a supplement to the public servant’s public compensation[.]

R.C. 2921.43(A)(1) thus prohibits a superintendent or treasurer of a school district from receiving additional or supplemental compensation for the performance of his public duties from another entity. *See* Ohio Ethics Comm’n, Advisory Op. No. 2008-01, slip op. at 5-6 (R.C. 2921.43(A)(1) “prohibits a booster club, school support organization, or any other source from providing compensation directly to school district employees for the performance of coaching duties. The district is the only lawful source of compensation, for coaching duties, to officials

and employees engaged to perform those duties.” ... R.C. 2921.43(A)(1) also “prohibits the school district from using funds donated to the district by any source to compensate district employees for the performance of any duties related to sports or other school-related activities if the giver requires that the district use the funds for the purpose of compensating employees or positions”); Ohio Ethics Comm’n, Advisory Op. No. 2000-04 (R.C. 2921.43(A)(1) prohibits a private tour company from giving any additional compensation, either directly or through the district, to a school district employee who is accompanying students on a school-related trip as a part of his employment).

The authority to issue advisory opinions concerning these and other ethics and conflict of interest provisions of R.C. Chapter 102 and R.C. 2921.42-.43 is conferred upon the Ohio Ethics Commission pursuant to R.C. 102.08. In light of this specific grant of authority, we will refrain in this instance from interpreting and applying the ethics and conflict of interest provisions of R.C. Chapter 102 and R.C. 2921.42-.43 by way of a formal opinion. Instead, questions concerning the interpretation and application of these provisions should be directed to the Ohio Ethics Commission.

Conclusions

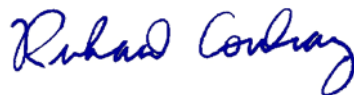
In sum, it is my opinion, and you are hereby advised as follows:

1. A person may not serve simultaneously as a member of a board of education of a school district and member of the governing authority of a conversion community school sponsored by the school district.
2. A person may serve simultaneously in the positions of superintendent of a school district and superintendent or chief administrative officer of a conversion community school sponsored by the school district, but in his capacity as superintendent of the school district he may not participate, either directly or indirectly, in (1) overseeing, monitoring, or evaluating the administration, management, organization, or operation of the community school as part of the district board of education’s oversight of the community school, (2) reviewing or evaluating the finances or financial records of the community school as part of the district board of education’s oversight of the community school, or (3) overseeing the provision of technical services to the community school.
3. A person may serve simultaneously in the positions of treasurer of a school district and treasurer or fiscal officer of a conversion community school sponsored by the school district when the position of treasurer or fiscal officer of the community school is a separate and distinct employment position with the community school. In his capacity as treasurer of the school district he may not participate, either directly or indirectly, in (1) reviewing or evaluating the finances or financial records of the community school as part of the district board of education’s

oversight of the community school or (2) overseeing the provision of technical services to the community school.

4. A superintendent of a school district may perform, as part of his official functions, the duties of a superintendent of a conversion community school sponsored by the school district when the community school has entered into an agreement with the school district for the services of a superintendent, provided the superintendent does not participate, either directly or indirectly, in (1) overseeing, monitoring, or evaluating the administration, management, organization, or operation of the community school as part of the district board of education's oversight of the community school, (2) reviewing or evaluating the finances or financial records of the community school as part of the district board of education's oversight of the community school, or (3) overseeing the provision of technical services to the community school.
5. A treasurer of a school district may perform, as part of his official functions, the duties of a treasurer of a conversion community school sponsored by the school district when the community school has entered into an agreement with the school district for the services of a treasurer, provided the treasurer does not participate, either directly or indirectly, in (1) reviewing or evaluating the finances or financial records of the community school as part of the district board of education's oversight of the community school or (2) overseeing the provision of technical services to the community school.

Respectfully,



RICHARD CORDRAY
Ohio Attorney General