

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



Office of Government Ethics

MEMORANDUM

**TO: Robert J. Spagnoletti
Chairman, Board of Ethics and Government Accountability (Ethics Board)**

**Deborah Lathen
Ethics Board Member**

THROUGH: Darrin P. Sobin 
Director of Government Ethics

**FROM: Cristina Patzelt
Attorney Advisor**

DATE: September 30, 2015

**RE: 1390-001 Office of the State Superintendent for Education (“OSSE”) Request
for Opinion Regarding Potential Conflict and Request for Waiver of Any
Potential Conflict**

This responds to the September 2, 2015 Memorandum of Antoinette Mitchell, Superintendent for Postsecondary and Career Education at OSSE, in which she requests a determination with regard to whether a conflict of interest exists under DC Official Code § 1-1162.23(a), as to an OSSE employee’s wife taking a position as a Board Member of a Public Charter School within the District over which the employee has some authority. And, if so determined, to request a waiver of any potential conflict of interest.

Based upon the information provided in Ms. Mitchell’s Memorandum, I conclude that the OSSE employee would be participating in a particular matter which is likely to have a direct and predictable effect on the financial interests of a person closely affiliated with the employee, but that the interest is not so substantial as to be deemed likely to affect the integrity of the services that the government may expect from the employee. I recommend that the Board grant the waiver requested.

Background

The Memorandum states that as the Deputy Assistant Superintendent for Postsecondary and Career Education, the OSSE employee in question has oversight over the application and designation process for “alternative” schools in the District. Alternative schools receive a higher per pupil funding rate than conventional high schools or adult schools. The OSSE employee has drafted proposed regulations that would update the definition of what types of schools qualify for the alternative school designation and would update the reapplication process after designation. The OSSE employee has also begun work on a set of accountability metrics for alternative schools. However, though this OSSE employee led a working group that created and proposed many of these policies related to alternative schools, the policy proposals would have to be approved by the OSSE employee’s supervisor, OSSE’s General Counsel, the State Superintendent of Education, the Deputy Mayor for Education, and the Mayor’s Office of Policy and Legislative Affairs. Additionally, alternative school designations are determined by the composition of the student body, with strict requirements that certain portions meet various risk factors. The analysis associated with a school’s accountability classification and designation as an alternative school will be conducted by OSSE’s Office of Data, Accountability, and Research; an office that does not report to the OSSE employee or his supervisor.

The Next Step Public Charter School (“Next Step”) is a charter school within the District that is designated as an alternative school. Next Step currently receives the alternative uniform per student funding formula weight (“UPSFF”) for all of its students. However, once new regulations created by the OSSE employee take effect, Next Step will likely only receive the alternative UPSFF rate for its full-time day program students, which is 38% lower than what they are currently receiving. Next Step has extended an offer to the OSSE employee’s wife, a former employee of the District’s Deputy Mayor for Education, to serve as a volunteer member of Next Step’s Board. Due to her experience working to improve outcomes for former high school dropouts, the OSSE employee’s wife is interested in pursuing the offer.

The OSSE employee has disclosed the potential conflict to OSSE, through the employee’s immediate supervisor, in a written statement. Based on these facts, OSSE concluded that no government ethics conflict of interest exists because the OSSE employee’s involvement in the alternative school designation process is not at all likely to have any direct and predictable effect on his financial interests, his wife’s financial interests, or Next Step’s financial interests. Finally, OSSE requests that if the Board finds a conflict of interest, that it waive the conflict in accordance with D.C. Official Code § 1-1162.23(b).

Discussion

Section 223(a) 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 19-24; D.C. Official Code § 1-1161.23(a), provides that:

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, in a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or 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*. (Emphasis added).

"Person closely affiliated with the employee" is defined to include a spouse, dependent child, general partner, a member of the employee's household, or an affiliated organization.¹ A spouse is included as a member of the employee's household, and an "affiliated organization" includes "[a]n organization or entity...[i]n which the employee or member of the employee's household is a director, officer, owner, employee, or holder of stock worth \$1,000 or more at fair market value."² Therefore, Next Step would be an organization closely affiliated with the OSSE employee, were his wife to take the position on Next Step's Board, because a member of his household, his wife, would be an officer of Next Step, as a volunteer Board Member. Because Next Step's financial interests are imputed to its board members, the OSSE employee's wife would have a financial interest in the school and anything that might affect the financial interests of the school.

For purposes of the conflict of interest analysis, the question is whether the OSSE employee's involvement in the designation of schools as "alternative" and in the determination of accountability metrics for such schools, is likely to have a direct and predictable effect on the financial interests of (1) the employee, (2) the employee's wife, or (3) Next Step (an organization closely affiliated with the employee through the employee's wife).

"Direct and predictable effect" means there is:

- (A) A close causal link between any decision or action to be taken in the matter and any expected effect of the matter on the financial interest;
- (B) A real, as opposed to a speculative possibility, that the matter will affect the financial interest; and
- (C) The effect is more than *de minimis*.³

The Memorandum indicates that the OSSE employee, in his official District position, personally and substantially participated and will continue to participate in the overall application and designation process for alternative schools, in defining which programs qualify for the alternative school designation, and in the determination of accountability criteria for alternative schools. Given that the Memorandum also states that alternative schools receive more per pupil funding than conventional schools, whether Next Step is designated as an alternative school has a direct and predictable effect on its financial interests. I believe the OSSE employee's involvement in the alternative school designation process would affect the financial interests of Next Step if the changes or updates he proposes to the process result in Next Step being guaranteed or losing its alternative school designation, or change the amount of funding it receives from the District.⁴

¹ D.C. Official Code § 1-1161.01(43).

² D.C. Official Code § 1-1161.01(3)(A)(ii), (25), and (26).

³ D.C. Official Code § 1-1161.01(11).

⁴ It is also possible that the financial interests of the wife may present an appearance of lack of impartiality on the part of the OSSE employee and disqualify the employee's wife from joining Next Step's Board on that basis. *See, e.g.,* DPM § 1810.3 ("no employee shall ... have any direct or indirect financial interest that conflicts or would appear to conflict with the fair, impartial, and objective performance of officially assigned duties and responsibilities.").

A particular matter will not have a direct effect on a financial interest, “if the chain of causation is attenuated or is contingent upon the occurrence of events that are speculative or that are independent of, and unrelated to, the matter.”⁵ However, in the instance at hand, Next Step is currently designated as an alternative school and the overall application and designation process for alternative schools falls under the OSSE employee’s purview. A particular matter will have a predictable effect if there is a real, as opposed to a speculative possibility that the matter will affect the financial interest. It is not necessary, however, that the magnitude of the gain or loss be known, and the dollar amount of the gain or loss is immaterial.⁶ Again, because Next Step is currently designated as an alternative school and because alternative schools receive additional funding due to their designation as “alternative”, there would be a direct and predictable effect on Next Step if it is or is not designated as an alternative school. This conclusion is reinforced by OSSE’s determination that the regulations as currently drafted would result in a 38% reduction in Next Step’s District funding.

Waivers issued pursuant to D.C. Official Code § 1-1162.23

Despite the finding that a person affiliated with the OSSE employee, in this instance his wife, likely would have a financial interest in a particular matter on which the employee will act, the Ethics Act permits the Ethics Board to grant a waiver of the conflict under specific circumstances. An employee other than an elected official may seek a waiver, and the prohibition in subsection (a) of this section (prohibiting employee from participating), shall not apply, if the employee:

- (1) Advises the employee's supervisor and the Ethics Board of the nature and circumstances of the particular matter;
- (2) Makes full disclosure of the financial interest; and
- (3) Receives in advance a written determination made by both the supervisor and the Ethics Board that:
 - (A) The interest is not so substantial as to be deemed likely to affect the integrity of the services that the government may expect from the employee; or
 - (B) Another legally cognizable basis for waiver exists.⁷

In this instance, the employee has notified his supervisor, OSSE’s interim General Counsel, OSSE’s ethics officer, the Deputy Chief of Staff at OSSE, and the Ethics Board. In doing so, the employee has also made full disclosure of the financial interest and has received a written determination from his supervisor that the financial interest is not so substantial as to likely affect the integrity of the services provided to the government. Notwithstanding the potentially disqualifying financial interest, I concur with the supervisor’s determination and recommend that the Board grant the waiver to permit the OSSE employee’s wife to volunteer as a Board Member for Next Step.⁸ In making the determination that the financial interest is not so substantial as to

⁵ 5 CFR §2635.402(b)(i).

⁶ 5 CFR §2635.402(b)(ii).

⁷ D.C. Official Code § 1-1161.23(b). A similar waiver procedure exists under the federal conflict of interest statute. See, 18 U.S.C. 208(b)(1).

⁸ DPM § 1805.9, also requires either a waiver or recusal where an employee has a disqualifying financial interest:

A District government employee who is called upon to act for or on behalf of the District government in a matter relating to or involving a non-governmental entity in which the employee or a member of the employee's immediate family has a financial interest, shall make this fact known to his or her immediate supervisor and a person designated by the agency head, in writing, at the earliest possible moment. Unless a waiver of the conflict of interest is granted by BEGA

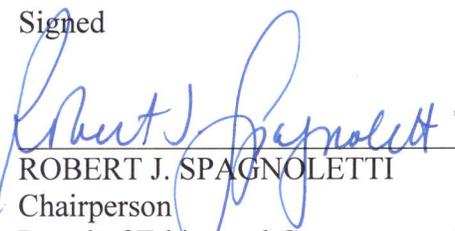
be deemed likely to affect the integrity of the services that the government may expect from the employee, I have considered the following factors:

1. The disqualifying interest, that has been fully disclosed, is that of the OSSE employee's wife as a Board Member of only one public charter school, Next Step, among the many in the District that the OSSE employee has oversight over.
2. There is nothing to indicate the OSSE employee will be acting in a way that affects only Next Step rather than all public charter schools or alternative schools in the District, making the OSSE employee's decisions ancillary to the actual designation of a school as alternative.
3. The rules changing the designation of an alternative school must also be approved by the OSSE employee's supervisor, OSSE's General Counsel, the State Superintendent of Education, the Deputy Mayor for Education, and the Mayor's Office of Policy and Legislative Affairs, ensuring that additional independent determinations beyond that of the OSSE employee will be made.
4. The OSSE employee will not be doing the actual analysis regarding which schools qualify for the alternative school designation based on specific criteria; instead that analysis will be conducted by OSSE's Office of Data, Accountability, and Research, an office which does not report to the OSSE employee or his supervisor.
5. The implementation of the new designation regulations that the OSSE employee helped create will most likely have an adverse effect on Next Step's funding, causing it to receive a per pupil funding rate 38% lower than they are currently receive.
6. OSSE, through the employee's supervisor, has determined that the interest is not so substantial as to be deemed likely to affect the integrity of the services that the government may expect from the employee.

If you have any questions or wish to discuss this matter further, I can be reached at 202-481-3411, or by email at darrin.sobin@dc.gov.

Agreed:

Signed



ROBERT J. SPAGNOLETTI
Chairperson
Board of Ethics and Government Accountability



DEBORAH LATHEN
Member
Board of Ethics and Government Accountability

pursuant to D.C. Official Code § 1-1162.23(b), the head of the employing District government agency subsequently shall determine whether or not the employee must divest him or herself of such interest, or merely disqualify him or herself from taking part in any official decision or action involving the matter.

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DS/BF/CP