

School Ethics, Board Governance, and the Role of a Board Member

Presented to the Montgomery Township Board of Education

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Agenda

- The Role of a Board Member
- The Code of Ethics
- Free Speech and the School Ethics Act
- Recusal - When it is Necessary?

The Role of a Board Member

What are Boards of Education?

Boards of education are governmental entities empowered to oversee public school districts, with general powers and duties are defined in Title 18A of the New Jersey statutes.

- According to N.J.S.A. 18A:11-1, “General Mandatory Powers and Duties,” the Board is required to, among other things:
 - **Enforce the rules** of the New Jersey State Board of Education;
 - **Make, amend, and repeal rules** for the government and management of the schools and their employees; and
 - Perform all acts and do all things, consistent with law and the rules of the State Board, **necessary for lawful and proper conduct, equipment and maintenance of the school district.**
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What do Boards do?

The State's rules require the Board to do things like:

- **Approve curriculum** that meets the New Jersey Student Learning Standards;
- **Adopt a budget** that provides for a thorough and efficient education;
- **Hire the necessary certified personnel** to educate the District's students (as recommended by the Superintendent); and
- **Develop policies** for the management of the school district.

Note that none of these are actions that the Board takes alone—it acts based upon the **recommendation of the Superintendent of Schools.**

When do Boards act?

Boards of education can only take official action at a **public meeting**.

- The Board functions **only when it is in session**, and a “quorum” of the Board is required to convene a meeting and take action.
- Meetings must comply with the requirements of the Open Public Meetings Act (OPMA).
- Committee meetings (less than a quorum) are not official action—the committees can recommend action to the full Board for a vote.
- Careful with emails and text messages—in theory, using these *could* constitute a “meeting” that could violate the OPMA.

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The Board and Administration

The Board's direct responsibilities are to **make policies, develop plans, and evaluate outcomes**, not manage day-to-day operations.

- Members' roles are “**not to administer the schools**” but to “see that they are well run.” N.J.S.A. 18A:12-24.1(d).
- “No Board member by virtue of his/her office shall exercise any administrative responsibility with respect to the schools or as an individual command the services of any school employee.”
- Board members do not have “all access” to District schools and, in many respects, have no more authority than any other parent or community member.
- **Board Policy No. 0146** explains that Board members visiting the schools for any reason must observe district regulations for all school visitors.

The Board delegates certain responsibilities to administrative officials.

- **Superintendent:** Administers the District, keeps the Board informed of happenings, makes operational recommendations.
- **Business Administrator:** Oversees business and maintenance, prepares the budget, establishes and maintains fiscal plans, serves as general accountant and official purchasing agent.

The Board and Administration

The Board-Administration relationship is intended to be cooperative, not adversarial.

- *Members should share concerns with administration in advance of meetings—assures an effective public response.*
- *Members should be mindful of which matters are appropriate for public discussion versus reserved for private consultation.*

As required by the **Code of Ethics for School Board Members** and **Board Policy No. 0142**, a Board member confronted with a community complaint should withhold comment and instead refer the issue to the Superintendent; the Board may act only at public meeting and after failure of an administrative solution.

The Board and Administration

The Code of Ethics specifically requires Board members to support all District staff, including the administration: “I will support and protect school personnel in proper performance of their duties.”

- A violation of this command occurs when there is evidence that a Board member took **deliberate action** which resulted in undermining, opposing, compromising, or harming school personnel in the proper performance of their duties.
- This **does not mean** that a Board member cannot disagree with a recommendation made by the Superintendent, but it generally requires that Board members support the Superintendent.
- Criticizing the Superintendent, however, could lead to a violation of the Code of Ethics where it undermines or compromises the Superintendent’s ability to do his or her job.

The Board as an Entity

- The Board is a **unit**, not a collection of individuals.
 - Members are expected to share opinions, but the Board elects a *single course of action* by majority vote.
 - In open meetings, to preserve decorum and ensure the Board expresses a single, consistent position, *the President alone speaks on the Board's behalf*, but may request another member's contribution.
- The powers of the Board and the authority of a Board member are not coextensive.
- As Board Policy No. 0146 explains: “No Board member by virtue of their office shall exercise any administrative responsibility with respect to the schools or as an individual command the services of any school district employee.”
- Board members on their own have no supervisory authority.

Confidentiality

- Board members have an obligation to preserve the confidentiality of information learned in their role as members of the Board.
 - This expectation exists regardless of the impact the matter has on the Board member's own children or friends.
 - This is particularly important when it concerns:
 - Personnel matters (personnel matters are exempt from disclosure pursuant to the Open Public Records Act, with few exceptions).
 - Student matters (student information protected by NJ law and FERPA).
 - Negotiations (depending upon the ground rules established by the parties).

The Code of Ethics

The Code of Ethics (Overview)

- One of the main limits on the role of Board members is the **Code of Ethics for School Board Members**.
- Enacted in 2001 (N.J.S.A. 18A:12-24.1), it sets clear standards that all Board of Education members must follow.
- If there is a violation, any member of the public can file a complaint with the School Ethics Commission.
- The School Ethics Commission has the power to recommend that the Commissioner of Education reprimand, censure, suspend, or remove a Board member who violated the Code.
- **Policy No. 0142** identifies both the prohibited acts and the Code of Ethics included in the School Ethics Act. The distinction between these provisions is significant, in that when a complaint contains allegations of prohibited acts and the SEC finds probable cause that a violation has occurred, the prosecution is through a Deputy Attorney General, whereas a complaint alleging violations of only the Code of Ethics is prosecuted by the complainant.
- When allegations arising under the School Ethics Act are based on private action, outside the performance of one's duties as a Board member, the Board member is not entitled to indemnification for the fees and costs of their defense.

The Code of Ethics Itself, pt. 1

N.J.S.A. 18A:12-24.1 sets forth the following requirements:

- a. I will uphold and enforce all laws, rules and regulations of the State Board of Education, and court orders pertaining to schools. Desired changes shall be brought about only through legal and ethical procedures.
- b. I will make decisions in terms of the educational welfare of children and will seek to develop and maintain public schools that meet the individual needs of all children regardless of their ability, race, creed, sex, or social standing.
- c. I will confine my board action to policy making, planning, and appraisal, and I will help to frame policies and plans only after the board has consulted those who will be affected by them.
- d. I will carry out my responsibility, not to administer the schools, but, together with my fellow board members, to see that they are well run.
- e. I will recognize that authority rests with the board of education and will make no personal promises nor take any private action that may compromise the board.

The Code of Ethics Itself, pt. 2

N.J.S.A. 18A:12-24.1 sets forth the following requirements:

- f. I will refuse to surrender my independent judgment to special interest or partisan political groups or to use the schools for personal gain or for the gain of friends.
- g. I will hold confidential all matters pertaining to the schools which, if disclosed, would needlessly injure individuals or the schools. In all other matters, I will provide accurate information and, in concert with my fellow board members, interpret to the staff the aspirations of the community for its school.
- h. I will vote to appoint the best qualified personnel available after consideration of the recommendation of the chief administrative officer.
- i. I will support and protect school personnel in proper performance of their duties.
- j. I will refer all complaints to the chief administrative officer and will act on the complaints at public meetings only after failure of an administrative solution

The Code of Ethics in Practice

The limits imposed by the Code of Ethics are clearly seen in the limited involvement Board members have in personnel decisions.

- The Board member's role in hiring is to vote to appoint the best qualified personnel available after consideration of the recommendation of the Superintendent.
- The Board cannot withhold its approval for the hiring of a candidate recommended by the Superintendent for **arbitrary or capricious reasons**.
- The Board should generally, as a best practice, limit its involvement in hiring to hiring the Superintendent of Schools and then only considering the Superintendent's recommendations for all other positions to avoid interference with the Superintendent's power to recommend candidates to the Board.

Examples of Violations

The administrative code gives examples of what evidence is required to substantiate a violation of the Code of Ethics:

- Section (d): giving a direct order to school personnel or becoming directly involved in activities or functions that are the responsibility of school personnel or the day-to-day administration of the school district. N.J.A.C. 6A:28-6.4(a)(4).
- Section (i): taking deliberate action which resulted in undermining, opposing, compromising, or harming school personnel in the proper performance of their duties. N.J.A.C. 6A:28-6.4(a)(9).
- Section (j): acting on or attempting to resolve a complaint or conducting an investigation or inquiry related to a complaint prior to referral to the Superintendent or outside of a public meeting prior to the failure of an administrative solution. N.J.A.C. 6A:28-6.4(a)(10).

Advisory Opinions, pt. 1

The School Ethics Commission releases advisory opinions from time to time that Board members can review to understand what may or may not be an ethics violation. Notable important opinions include:

- **Advisory Opinion A15-10:** The School Ethics Commission advised against Board members engaging in exit interviews of staff members to determine causes of staff turnover, explaining that it would violate sections of the Code, specifically Section (c) (participation would be board action outside of policy making, planning, and appraisal duties), and Section (d) (participation would be engaging in administrative functions left to school personnel).

Advisory Opinions, pt. 2

- **Advisory Opinion A31-15:** Board members' involvement in interviewing personnel: The Commission explained that one or two board members may sit on an interview committee when established by the Superintendent but must be strictly limited to functioning in an advisory role to the Superintendent.
 - *The Board members may not conduct the interview; they only offer observations and assessments while knowing that the final recommendation is the Superintendent's decision. The Board cannot usurp the Superintendent's authority to recommend hires.*
 - *The Commission noted its position that it does not support Board members conducting interviews for positions below that of the Superintendent of Schools. It explained that "interviewing is generally an administrative function not within the authority of the Board or its members."*

Advisory Opinions, pt. 3

- **Advisory Opinion A32-14:** Cannot volunteer for school theatrical productions by assisting with casting, rehearsals, and lighting, as it would violate sections (c) and (d) of the Code of Ethics (**role would require the Board member to give direct orders to school personnel and students**, engaging in responsibilities that were the exclusive domain of school personnel.)
- **Advisory Opinion A10-15:** Cannot volunteer to be the leader of a school club that meets on school grounds. Being in a position of oversight and authority over students is beyond the scope of policy making, planning, and appraisal (the role required too much contact with students, parents and administrators), and would violate the sections (c) and (d) of the Code of Ethics. Having a constant presence in the school would blur the line between the role of a Board member and as a volunteer by taking on day-to-day administration tasks.
- **Advisory Opinion A17-15:** Can volunteer by merely constructing sets for the school musicals/plays was fine (limited interaction with students and staff). Also fine: assisting the marching band by building props, repairing equipment, and loading/unloading equipment (not be the lead volunteer).
- **Advisory Opinion A24-15:** Can serve as the trustee of a local educational foundation (subject to recusal).
- **Advisory Opinion A17-21:** Can “work the chains” as a volunteer at high school football games (passive).

Notable Decisions

- *I/M/O S.J. and Englewood Cliffs*, SEC Dkt. No. C09-20. Board member **censured** when she participated in discussions during executive session on four different occasions involving matters about her child. The Commission stated that this violated N.J.S.A. 18A:12-24(b) and N.J.S.A. 18A:12-24.1(e):
 - She “should have known that she was not permitted to listen to confidential discussions about a matter in which she had a direct conflict”; “It should be obvious to any Board member who has ever undergone ethics training that a matter involving an immediate family member is a conflict and Board members cannot be present for confidential discussions in those matters for which they have a conflict”; and “The fact that the other Board members were not aware that the matter involved [S.J.’s] family member does not excuse [S.J.’s] behavior, nor is it a mitigating circumstance.”
- *Tietjen v. Rodgers, Stella, and DiFranco*, SEC Dkt. No. C59-20. Board member **reprimanded** for using her board email to plan a “Unity Walk” on school grounds that was not district-sponsored or approved by the Board, but implied that it was board sponsored, potentially compromising the Board. The email sought funding and to schedule speakers. Commission found that an email to a political entity that said, “Just between you and me...” was a clear indication that she was hiding information and/or attempting to hide information regarding the purpose of the rally. This was private action that had the potential to compromise the Board.

Notable Decisions

- ***Giannakis v Boyle***, SEC Dkt. No. C86-21. Board member **censured** for violating 24.1(e) when she made accusations against the Superintendent that she was acting disingenuously and that the Superintendent changed the time of graduation for personal reasons, which had the potential to compromise the Board. Also violated 24.1(d) and 24.1(e) by contacting staff directly via text message and questioning the decision of a building principal, which was an inappropriate attempt to administer the schools and constituted private action that could harm the Board. It also violated 24.1(i) insofar as it challenged the teacher's direct supervisor and failed to support and protect school personnel in the proper performance of their duties. Finally, failing to ask the Superintendent and instead reaching out to the chorus teacher was tantamount to an investigation prior to referring it to the Superintendent violating 24.1(j).
- ***Tarver v. Wingfield***, SEC Dkt. No. C98-21. Board member **reprimanded** for violating 24.1(e) and 24.1(g) when he shared confidential information prior to the Board voting on a facilities request involving the NFL, which was pre-decisional and deliberative, and disclosed information revealing information about a suggested Board action.

Free Speech and the Act

- *Martin v. Pedersen and Pontillo*, SEC Dkt. No. C106-22. Board members who used a general disclaimer on their Facebook pages did not violate the code of ethics and were not required to put the disclaimer on every post or every reply. However, the Commission cautioned that the social media pages established during their campaigns (e.g., “Michael Pontillo for WWRSD BOE” are misleading and they should change the names).
- *Donnerstag v. Koenig*, SEC Dkt. No. C19-22 and *Donnerstag v. Borawski*, SEC Dkt. No. C20-22. Board members who had controversial and inflammatory statements (calling the governor a “Tyrannical POS,” encouraged teachers to leave the NJEA, memes about unmasking in schools, calling discussions about gender identity a “sick war on children”) without disclaimers were **not** found to have violated the Code of Ethics. Although the ALJ found a violation in both cases, the Commission dismissed them. Interestingly, these were *personal* Facebook pages that had no information about their membership on the Board, and the Commission found that there was “no factual evidence that the statements/posts on her Facebook account were made in her capacity as a member of the Board, or had the appearance of being representative of, or attributable to the Board.” Also found that just because people know she is a Board member “does not result in her private posts becoming in her official capacity.” The Commission **did** indicate that the statements “runs counter to the level of decorum expected from a publicly elected school official who is charged with serving New Jersey’s student population.”

Free Speech and the Act

- The School Ethics Commission has explained that “[B]oard members do not surrender the rights that they have as citizens, such as freedom of speech, when they become members of a School Board. However, in exercising those rights, Board members must comply with the School Ethics Act.”
 - This balance must be kept in mind whenever a Board member expresses his/her opinion publicly; whether through a letter to the editor of the local newspaper, a social media post, an email, or any other public statement or comment (see decisions noted in the prior slide).
 - There are two provisions of the Code that often come into play when reviewing Board member speech: 24.1(e) and 24.1(g). The first (e) requires Board members to recognize that authority rests with the Board and avoid making any personal promises or taking any private action that could compromise the Board, while the second (g) requires Board members to maintain the confidentiality of information that would needlessly injure individuals or the schools if disclosed.
- **Even if information is accurate and, technically speaking, not confidential, it should not be included in a public statement, such as a letter to the editor or a social media post, if it has the potential to compromise the Board.**

Social Media Guidelines

- Use Good Judgment
 - Do not post anything that would violate any of the district's policies for Board members;
 - Avoid making defamatory statements about the Board of Education, the school district, employees, students, or their families.
 - Do not disclose any confidential information about the school district or confidential information obtained as a result of being a Board member.
 - Do not use or refer to their Board of Education title or position when soliciting for a business organization where the Board member or immediate family member has an interest in.
 - Refrain from having communications through social networks with other Board members regarding any Board of Education business to avoid any potential violation of the OPMA.
 - Do not respond to any postings regarding BOE or school district business on any social network--refer any such questions or inquiries to the Superintendent of Schools to address, as appropriate; or
 - Do not post any information on a social network determined by the School Ethics Commission to be a violation of the School Ethics Act.
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Social Media Guidelines

- Use an appropriate disclaimer (assuming the content is fine):
 - “The following statements are made in my capacity as a private citizen, and not in my capacity as a Board Member. These statements are also not representative of the Board or its individual members and solely represent my own personal opinions.”
- Inclusion of a disclaimer is not dispositive of a violation of the Act and neither is the omission of a disclaimer.
 - Determining a violation of the Act always depends on whether, based on the substance of the speech, a reasonable member of the public could perceive that the Board member is speaking in their official capacity or on behalf of the Board.
 - Board members must always consider the lens through which their social media activity will be viewed and whether, despite their intention, it might be viewed as though it is offered in an official capacity.
- **Discontinue use of campaign websites.** Once you are elected to the Board it is no longer prudent to use your campaign web site(s) or social media presence to post statements or comments. (*Martin v. Pedersen and Pontillo*). Continued use causes confusion and may lead to the filing of ethics complaints.

Conflicts of Interest/Recusal

Board Member Recusal

- **Important Definitions**

- **“Immediate family member”**: the Board member’s spouse or dependent child residing in the same household.
- **“Relative”**: the Board member’s spouse, or the Board member’s or *spouse’s*:
 - parent, parent-in-law, or step-parent,
 - child, child-in-law, or step-child,
 - sibling, step-sibling or half-sibling,
 - aunt or uncle,
 - niece or nephew,
 - grandparent, or
 - grandchild,
- whether by blood, marriage, or adoption.

Board Member Recusal

- Even if there is no automatic recusal or *per se* conflict, there may still be **case-by-case conflicts** if a Board member or his/her relative is involved in an out-of-district union.
- Per Commission ***Advisory Opinion A16-15*** (Oct. 28, 2015), a conflict is more likely to exist if the out-of-district relative:
 - is an officer in the NJEA or the local education association;
 - is on his/her district's negotiating team; or
 - has some other leadership role in the union or the district which may influence the outcome of negotiations there.
- ***Opinion A16-15*** discussed only Board members' relatives, but the same factors apply to Board members themselves who are employed out of district.

Board Member Recusal

| Relationship to Board member | May the Board member . . . | | |
|---------------------------------------------|------------------------------|------------------------------|------------------------|
| | participate in negotiations? | vote to ratify the contract? | participate in issues? |
| Self | | | |
| Current member of similar union | No | Yes* | Yes* |
| Spouse | | | |
| Current member of local union | No | No | No |
| Current member of similar union | No | Yes* | Yes* |
| Dependent child | | | |
| Current member of local union | No | No | No |
| Current member of similar union | No | Yes* | Yes* |
| Current student employed part-time by Board | No | No | No |
| Nondependent child | | | |
| Current member of local union | No | No | No |
| Current member of similar union | Yes* | Yes* | Yes* |
| Relative | | | |
| Current member of local union | No | No | No |
| Current member of similar union | Yes* | Yes* | Yes* |

*absent another conflict

Questions?
