



“Operational independence” update: Attorney General issues opinion

September 1, 2010

We have previously reported on the evolving “operational independence” challenges directed against conversion community schools by the Ohio Department of Education’s Office of Community Schools (ODE). As part of ODE’s effort to mandate operational independence, ODE asked Ohio’s Attorney General and Ethics Commission to provide opinions as to whether a conversion community school and its sponsor district could have overlapping board members, superintendents, treasurers, and, in the case of the request to the Ethics Commission, other staff.

The Attorney General issued his Opinion on August 11, 2010. The purpose of this article is to distill portions of the Opinion and provide a preliminary assessment of certain of the Opinion’s implications. As was the case with our other recent articles, the analysis here focuses on superintendents and treasurers who are employed and compensated solely by the school district but who, in their capacity as district employees, also provide services to the district sponsored community school. We are therefore not addressing those portions of the Opinion that evaluated overlapping board members or that considered superintendents and treasurers who are separately employed by both a sponsor district and a conversion community school.

THE OPINION

Two key aspects of the Opinion are discussed in this Alert: first, the Opinion’s lack of support for ODE’s demand that conversion community schools and their school district sponsors be “operationally independent” of one another; and second, the Opinion’s express recognition that the same individual may serve both the sponsor district and the conversion school as superintendent or treasurer but only if the individual does not also participate directly or indirectly in the board of education’s duties, as sponsor of the conversion school, to oversee and evaluate the school.

Because the Opinion is complex and may be subject to differing interpretations, and because every conversion school and sponsor district is unique, entities and individuals who may be affected by the Opinion are urged to consult with legal counsel concerning the significance of the Opinion for them.

The Opinion Does Not Support ODE’s Demands for “Operational Independence”

In what will come as welcome news to many conversion community schools and their sponsors, the Opinion affirms the very broad discretion of a sponsor district to provide services to a sponsored conversion school. In this respect, the Opinion does not support key elements of ODE’s “operational independence” demands, nor does the Opinion reflect any support for the concept generally. The Opinion states as follows:

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. No statute limits the types of administrative services that a school district may provide to a conversion community school.... [I]f 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.

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...

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.¹

We would note that the use of the adjective “administrative” in the first quoted paragraph above (and elsewhere in the Opinion) appears to be a consequence of the fact that the Attorney General, in the quoted paragraphs, is responding to inquiries of ODE that solely questioned the service of a school district superintendent as the superintendent of the conversion school and, likewise, the service of a school district treasurer as the treasurer of the conversion school.²

The Opinion Does Identify Limitations in the Roles of Superintendents and Treasurers

Despite the foregoing, the Attorney General cautions that in some circumstances the provision of superintendent or treasurer services to a conversion school by the sponsor district’s superintendent or treasurer, respectively, may give rise to impermissible conflicts of interest. The conflict identified by the Attorney General exists if the superintendent or treasurer also participates directly or indirectly in the board of education’s oversight, monitoring, or evaluation of the conversion school or oversees the provision of technical services to the school.

Specifically, the Attorney General states the limitations as follows:

[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.³

The Attorney General suggests that a board of education may be able to avoid the conflict by taking steps to eliminate the participation of the superintendent and/or treasurer in the board of education’s performance of its duties, as sponsor, to monitor, oversee, and evaluate the conversion school, and to oversee the technical services provided to the

school.⁴

As a practical matter, however, it may be difficult for a board of education to perform its sponsor obligations without at least the indirect participation of the district's superintendent and treasurer.⁵ Therefore, boards of education might instead consider shifting to other district personnel, or to outside sources, the board's duty to provide services to the conversion school.⁶ This would be the converse of what the Attorney General has suggested.

We do not know, because the Opinion does not tell us, how the Attorney General might view the assignment of district personnel in this manner. But the fact that these particular questions of ODE, and the Attorney General's answers to the same, focus solely on superintendents and treasurers seems to reflect the unique stature of these individuals as the chief executive officer and the chief financial officer, respectively, of the district, each having a unique relationship to the board of education. Assigning the duty to provide conversion school superintendent/treasurer services to board employees other than the district superintendent or treasurer enables the latter individuals to function solely in an oversight capacity with regard to the conversion school – overseeing those who personally provide administrative services to the conversion school (and who, as board of education employees, report to the superintendent or treasurer), as well as participating in the oversight obligations of the board as sponsor of the school.⁷

It is possible that the Attorney General would still object to this arrangement on the ground that the superintendent and treasurer, by virtue of their oversight of the district employees who provide superintendent/ treasurer services to the conversion school, are thereby “indirectly” involved in the delivery of services to the school. But, for the reasons just stated – that in these circumstances the superintendent and treasurer each only have oversight functions vis-à-vis the conversion school – it would seem that such indirect involvement would not be deemed to give rise to the kinds of conflicts perceived by the Attorney General when a superintendent and treasurer, as employees of the board of education, personally provide services to, and also oversee the performance of or the provision of services to, the conversion school.

What About the “Official Capacity Exception”?

There is an important and long-standing exception to certain common law conflict of interest prohibitions known as the “official capacity exception.” When the exception's four-part test⁸ is satisfied, a public employee may, without violating conflict of interest prohibitions, additionally serve a non-profit entity that contracts with the individual's public employer. The four-part test originated with the Ohio Ethics Commission, and in 1991 the test was fully endorsed by the Attorney General in an Opinion that stated as follows:

The Ohio Ethics Commission has, in essence, concluded that an individual does not have a prohibited personal interest in a contract by virtue of serving a nonprofit corporation when his service to the nonprofit corporation is performed in his official capacity, as a formal representative of a governmental entity – for then his interest in the nonprofit corporation is public and official, rather than private; he represents and serves the governmental entity and not his own interests. This conclusion is eminently reasonable and a valid statement of general ethical principles governing participation by public servants in the affairs of nonprofit corporations, and I embrace it wholeheartedly.⁹

The “official capacity exception” would seem to encompass a school district superintendent's or treasurer's service to a district-sponsored conversion school performed solely as an employee of, and at the direction of, the sponsor district board of education.

Yet the Opinion neither references nor expressly addresses this exception.

Instead, the Attorney General's analysis seems to end with the determination that a conflict exists in the described circumstances – that is, when a district superintendent or treasurer, as an employee of the sponsor district board of education, both (a) provides superintendent or treasurer services to the board sponsored conversion school, and (b) participates directly or indirectly in the board's statutory oversight and evaluation duties with respect to the conversion school or oversees the provision of technical services to the school. The nature of the conflict is described by the Attorney General as follows:

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 [services] agreement between the school district and conversion community school.¹⁰

But the purpose of applying the “official capacity exception” is to determine whether the conflicting interests to which a person may be subject are in fact “public and official, rather than private.”¹¹ Accordingly, in situations where the exception might apply, the identification of conflicting interests may provide a starting point for the analysis, but it is not the end of the analysis. Rather, consideration of the four-part test is necessary.

Here, we do not know why the Attorney General chose not to include in the Opinion express consideration of the “official capacity exception” and its four-part test. In particular, we do not know whether the Attorney General intentionally or unintentionally left open for future consideration the applicability of the exception to the circumstances that are the subject of this Alert or whether the Attorney General intended to convey a rejection of the exception in this context – and if the latter, we do not know for what reason.¹²

Nonetheless, whatever his intent with respect to the exception, what is apparent in the Opinion is the Attorney General's perception of an inherent impropriety in a superintendent or treasurer, on behalf of an employing board of education, both providing superintendent or treasurer services to a conversion community school and overseeing and evaluating the performance or finances of the school (or the provision of technical services to the school). And this is so despite the Attorney General's apparent recognition that all of these duties ultimately are the responsibility not of the individuals who perform them but of the board of education itself.¹³

OPTIONS GOING FORWARD

Operational Independence

As a general matter, the Opinion is consistent with the collaborative approach of many conversion schools and sponsors with respect to the sponsor district's participation in the operation of the school. Inasmuch as the Opinion was issued by the Attorney General to State Superintendent of Public Instruction Deborah Delisle, we would hope that the Opinion would lay to rest ODE's objections to such collaborations (with the possible noted exceptions concerning school district superintendents and treasurers), at least insofar as ODE's objections are premised upon state law subject to interpretation by the Attorney General.

Superintendents and Treasurers

As discussed, the significance of the Opinion for sponsor district superintendents and treasurers who would rely upon the “official capacity exception” is not clear. Nevertheless, because we cannot rule out the possibility that the Attorney General intends the Opinion to reject the use of the exception in the circumstances relevant here, and in light of the overall tenor of the Attorney General's concerns, we believe that sponsor district boards of education should carefully review, and should seriously consider restructuring, the roles of their superintendents and treasurers with respect to

the board's conversion community schools.

Given the ambiguities, each conversion school and sponsor district will need to decide for itself how to respond to the Opinion. Examples of response options are described in the list that appears at the end of this article.

Sponsor boards that opt to transfer from their superintendents and treasurers the duty to provide services to the conversion school may find it a relatively simple matter to identify other personnel who can provide superintendent type services to the conversion school. Many boards already utilize assistant superintendents, curriculum directors, or others for this purpose. Alternatively, the sponsor board could acquire services for the conversion school from outside sources (or the conversion school could directly acquire such services from other sources).

Boards of education that wish to do likewise with respect to the provision of fiscal services to a conversion school may face a more difficult task. This is because the fiscal officer of the community school must be licensed as a school treasurer or business manager, or must have completed the training otherwise required by statute.¹⁴ Not all districts employ a second individual (in addition to the treasurer) who is qualified to perform such services for the conversion school. Boards that do not have other qualified employees could seek to acquire such services for the conversion school from outside sources (or the conversion school could directly acquire such services from other sources).

ADDITIONAL THOUGHTS REGARDING THE OPINION

After countless readings of the Opinion, and extensive analyses, discussions, white-board diagrams, and research, we continue to return time and again to several very fundamental aspects of the Opinion which we cannot reconcile either with prior established authority or with other inferences that may reasonably be drawn from this same Opinion.¹⁵ We have therefore tried to take a cautious approach, advising conformance even with positions we cannot say for certain the Attorney General has taken. This is the case with respect to the potential unavailability of the official capacity exception.

But the line between a cautious approach and an overly cautious approach, while exceedingly consequential, is difficult to discern. We have struggled, and continue to struggle, with the possibility that we are cautioning against activities that the Attorney General did not intend to inhibit – specifically, service by treasurers and superintendents to conversion schools in conformance with the four criteria for the “official capacity exception” – just as we struggle with the possibility that we have overlooked risks that the Attorney General did intend to convey.

Additionally, we would reiterate what have said in prior articles: An opinion of the Attorney General is just that – an opinion. As such, it may carry considerable weight to the extent that it is well reasoned, but it does not carry the force of law in and of itself. Sometimes courts defer to conclusions reached by the Attorney General; other times courts do not. Sometimes Attorney General opinions are overturned by later opinions of the Office of the Attorney General itself. As we urged at the beginning, each sponsor district and conversion school, and potentially affected superintendents and treasurers, should assess for themselves, in consultation with legal counsel, the risks as applicable to them and their options in light of those risks.

It also bears repeating that we are still awaiting the opinion requested by ODE of the Ethics Commission on these and other questions.

Finally, given the remaining uncertainties, sponsor districts and conversion schools may wish to seek legislation that confirms the ability of sponsor district boards of education to assign to their superintendents and treasurers the performance of any of the functions of the board of education related to a sponsored conversion school, including both

Footnotes

1. Opinion at 14-15 (internal citations omitted).
2. A newly promulgated rule, OAC 3301-102-02, defines the “chief administrative officer” of a community school as follows:
(E) “Chief Administrative Officer” means the individual designated by the governing authority as the person in charge of the community school’s daily operation and assigned the role of superintendent in the Ohio educational directory system - redesign (OEDS-R) or its successor system.

The same rule defines “administrative services” in the context of community schools as follows:

- (B) “Administrative services” means services designed to accomplish reasonably expected functions of a public school’s daily operations, including, but not limited to, services provided by a superintendent, principal, treasurer, school psychologist, or data coordinator.
3. Opinion at 16. The Attorney General also indicates that, under certain circumstances, a given individual may perform both functions through separate employment with the district’s board of education and the board sponsored conversion school. In this event, as in the single-employer model, the same limitations are applicable – meaning that the board of education must find other means of carrying out its oversight responsibilities with respect to the community school. However, for a number of reasons, we continue to believe that it is preferable for a school district superintendent or treasurer who provides services to a conversion school to do so in his or her official capacity, solely as an employee of, and as directed by, the district’s board of education.
4. Opinion at 15-16.
5. Even if other board personnel performed the services for the conversion school, the superintendent would seem to have at least indirect involvement as the chief executive officer of the district. As the Opinion itself states,
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.

Opinion at 10.

6. The Opinion does not comment upon or appear to discourage a sponsor district’s provision of either of the following to a conversion school: administrative services through district personnel other than the district’s superintendent or treasurer; or, non-administrative services through any of the district’s personnel, including the district’s superintendent or treasurer.
7. We would hope, but cannot be certain, that in such circumstances the Attorney General would still recognize the ability of school district treasurers to deliver routine services to the conversion school regarding such things as payroll, benefits, and record-keeping related to the staff of the school. Although the Attorney General would appear to differ (see Opinion fn. 1 and associated text), it seems to us that, in the first instance, the statutes contemplate that the sponsor school district board of education (rather than the governing authority of the conversion school) will perform the duties and responsibility of an employer with respect to the staff of the conversion school. See R.C. 3314.03(A)(17). Performance of these functions would thus seem to be an element solely of the treasurer’s service to the board of education and not a service provided by the treasurer to the conversion school. Moreover, while often performed by a treasurer these are not quintessential treasurer duties, and they are often performed by persons who lack such title, licensure, or training.

8. The four part test was described by the Attorney General as follows:

(1) The governmental entity must create or be a participant in the non-profit corporation; (2) any public official or employee connected with the jurisdiction, including a council member, may be designated to serve on the nonprofit corporation, but the elected legislative authority or the appointing governing body must formally designate the office or position to represent the governmental entity; (3) the public official or employee must be formally instructed to represent the governmental entity and its interests; and (4) there must be no other conflict of interest on the part of the designated representative.

Op. Att’y Gen. No. 91-007 at 2-36 through 2-38.

9. *Id.*

10. Opinion at 15.

11. See Op. Att’y Gen. No. 91-007, excerpted in text associated with fn. 8 of this article.

12. Whether the Attorney General implicitly considered the exception and intends the Opinion to signal a rejection of the exception’s availability in this context is unclear. ODE’s questions to the Attorney General, and the resulting Opinion, describe situations in which the service of district superintendents and treasurers to conversion schools occurs as part of their official duties to the district board of education. But this alone is not sufficient to trigger the “official capacity exception.” Neither ODE nor the Attorney General described facts that would satisfy all four elements of the “official capacity exception” test.

13. Opinion at 10. The impropriety perceived by the Attorney General is difficult to reconcile with the Attorney General’s express acknowledgement of all of the following:

- ultimate responsibility for a sponsor’s oversight of a conversion school rests with the board of education (*id.*);
- a board of education “may establish any reasonable manner for accomplishing these tasks” (*id.*);
- 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” (*id.* at 14);
- the board “has the authority to require the superintendent of the school district to be the person who performs the duties of superintendent for the conversion school” and likewise to require the treasurer “to be the person who performs the duties of treasurer for a conversion community school” (*id.* at 15); and
- “a superintendent and treasurer of a school district are subject to the direction of the board of education when performing their respective duties” (*id.* at 11)

Considering all of the foregoing together, it seems to us that to the extent that there exists a “conflict” in the dual roles described by the Attorney General, the “conflict” inheres not in the performance of those roles by superintendents and treasurers but in the multiple roles of their employing boards of education. These multiple roles have been authorized by the General Assembly – including, among others, the board’s simultaneous roles as conversion school authorizer, overseer, evaluator, and service provider.?

14. R.C. 3314.011.

15. See, e.g., fn. 13 of this article.

Examples of Options in Response to Opinion

How a given conversion school and sponsor district respond to the Opinion will depend upon the circumstances and preferences of these entities and the communities they serve.

The following list, which is not exhaustive, identifies potential options. Most are not analyzed in the Opinion itself. But for reasons discussed in the Community School Alert, those at the top of the list are likely permissible under the Opinion, while those lower down are riskier under the Opinion.

- The conversion school could close. In this event, the sponsor district could seek to incorporate all or portions of the conversion school's program into the schools of the district. Careful consideration should be given to requirements concerning the timing and manner of the school's closure.
- As suggested in the Opinion, the sponsor district board of education could seek to exercise its oversight and evaluation of the conversion school in a manner that does not, even indirectly, involve the superintendent or treasurer. For example, the board of education might establish a committee to exercise this oversight, or the board could contract out for these services – in either case, without any participation whatsoever from the superintendent and treasurer.
- The sponsor district could cease the provision of services to the conversion school by any board employee (subject to the terms of the services agreement with the conversion school or by other agreement with the school). The conversion school could then contract for these services from other entities (for example, other school districts, community schools, school consortia, etc.) or could employ such personnel directly. If the school employs personnel directly, consideration should be given to the implications of those statutes that assign to sponsoring school district boards of education the primary responsibility to act as the employer of the conversion community school's staff (with such staff included in the appropriate collective bargaining units of the district). See R.C. §§ 3314.03(A)(17); 3314.10.
- The sponsor district board of education could cease just the provision of superintendent and treasurer type services to the conversion school, subject to the same caveats noted in the bullet above.
- The sponsor district board of education could fulfill its contractual duty to provide superintendent and treasurer services to the conversion school by requiring board personnel other than the district superintendent and treasurer to provide these services to the conversion school. For example, an assistant superintendent or building principal might be required to provide superintendent type services to the conversion school, while the district's business manager might be required to perform fiscal services for the school.
- The sponsor district, and the sponsor district's superintendent and treasurer, could choose, notwithstanding the Opinion, to rely upon the "official capacity exception" for the proposition that the district's board of education may direct its superintendent and treasurer to both oversee the conversion school on behalf of the board and to personally provide services to the conversion school in a manner consistent with the four-part official capacity exception test. For reasons stated in the Alert, we believe that this would carry a high level of risk, even though the Attorney General did not expressly discuss or reject the use of the exception in these circumstances.

Before implementing these or other options, sponsor boards of education and conversion schools should confer with their legal counsel.

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