



KROKIDAS & BLUESTEIN LLP

CLIENT ALERT

**Charter Schools and Mission Affiliated Organizations:
State Ethics Considerations**

On May 5, 2022, Krokidas and Bluestein attorneys Elka Sachs and Bettina Toner, and AAFCPAs CPA CGMA John R. Buckley, presented the webinar “Charter Schools and their Mission Affiliated Organizations: Organization, Operation & Fundraising.” This Client Alert addresses important questions asked by attendees relating to the impact of the Massachusetts Conflict of Interest Law at G.L. c. 268A (the “State Ethics Statute”) on mission affiliate board composition and service. The questions and our responses are set forth below.

1. Can a charter school trustee serve on the board of a mission affiliate?

a. Current charter school trustees serving on the mission affiliate board.

We generally advise against charter schools and their mission affiliates having shared board members because it can be difficult to comply with both State Ethics Statute requirements that apply to charter school trustees and the duty of care owed by nonprofit corporate board members. Moreover, compliance with both would likely eliminate the expected benefits of overlapping board service.

Charter school trustees are considered special state employees under the State Ethics Statute (assuming they are not compensated). Section 4 of the State Ethics Statute prohibits special state employees from acting as agents or attorneys for anyone other than the charter school in connection with a particular matter in which the charter school is a party or has a direct and substantial interest. Section 6 of the State Ethics Statute prohibits a state employee from participating in any particular matter in which he, she or they, or a “business organization” in which he, she or they is serving as an officer or director, has a financial interest. In many circumstances, the mission affiliate of a charter school, though a tax-exempt nonprofit organization is considered a “business organization” by virtue of its nonprofit “business” activities. Sections 4 and 6 will likely prevent an overlapping board member from engaging in board-level activities that concern both the charter school and mission affiliate, such as lease and financing arrangements.

In addition, if the mission affiliate is a nonprofit entity, it will have a conflict of interest policy which will likely require disclosure of the charter board membership and recusal

from discussion and voting on matters in which the charter school has an interest.

Typically, overlapping board service is seen as a way of keeping charter schools and their mission affiliates aligned. However, when overlapping trustees are required to recuse themselves from any discussion and/or vote relating to joint charter school and mission affiliate matters at board or committee meetings, and may not even participate in such matters outside of such meetings, their ability to ensure alignment of the two organizations is limited.

b. Former charter school board trustees serving on the mission affiliate board.

A former charter school trustee may serve on a mission affiliate's board subject to the "One Year Ban" and the "Forever Ban" that apply to former state employees. These Bans are described below.

One Year Ban: Under Section 5(b) of the State Ethics Statute, for one year after an individual ceases to serve as a charter school trustee, he, she or they may not:

- Appear before the charter school or any court or agency of the Commonwealth as agent or attorney for anyone other than the charter school or Commonwealth,
- Regarding any particular matter in which the charter school or the Commonwealth is a party or has a direct and substantial interest which was under his, her or their official responsibility as a charter school trustee,
- Within two years before the end of his, her or their service on the charter school's board of trustees.

Because charter school trustees are responsible for all of the school's operations, former charter school trustees should refrain from appearing before the charter school in order to speak or act on behalf the mission affiliate regarding any arrangement or contract in which the charter school is a party or has a direct and substantial interest that was in effect or under discussion by the charter school board before the charter school trustee left the school board.

Forever Ban: Under Section 5(a) of the State Ethics Statute, a former charter school trustee must refrain from acting as agent or attorney for anyone other than the charter school on any particular matter in which the charter school has a direct and substantial interest or is a party, and in which the former charter school trustee participated while serving as school trustee. For example, if a former charter school trustee discussed and voted on a service agreement between the charter school and the mission affiliate, and subsequently serves as a member of the mission affiliate's board, this former charter school trustee will not be able to act as a spokesperson or agent for the mission affiliate regarding this service agreement.

c. Charter school officers serving as mission affiliate officers.

We assume that it is not permissible for a charter school officer (charter school board chair or treasurer) to serve as officer of the mission affiliate. DESE has provided informal guidance to charter schools contracting with public school districts that

suggests that, because mission affiliates are separate legal entities from their associated charter schools, their respective boards of trustees must act accordingly. The boards must hold separate meetings, have different officers and operate under different bylaws. This is likely because charter school officers are not able to recuse themselves in matters where both parties have an interest. For example, because the treasurers of each of the charter school and mission affiliate would likely need to be involved in any matter in which both mission affiliate and charter school are parties that concerns finances, leasing or grants, recusal would not appear to be an option in such a situation.

2. Can a charter school employee serve on the mission affiliate board?

Charter school employees may serve on the board of a mission affiliate, so long as certain steps are taken to address State Ethics Statute considerations. If the charter school has a distinct institutional interest in requiring that a charter school employee serve on the mission affiliate board, the employee's appointing authority should document its interest and the requirement in writing, as part of the employee's job description. The employee's appointing authority should also make a written determination that the financial interest of the employee and the mission affiliate is not so substantial as to be deemed likely to impact the integrity of the services that the charter school might expect from the employee, and should file that determination with the State Ethics Commission. It should be noted that although the State Ethics Statute indicates that an appointing authority is entitled to make a determination of integrity, the State Ethics Commission expressly reserves the right to make its own determination as to whether the charter school has a distinct institutional interest in having a particular state employee serve on the board of the mission affiliate. Certainty that the appointing authority's interest will be respected can only be obtained by requesting an advisory opinion from the State Ethics Commission.

3. Does the State Ethics Statute restrict a charter school trustee's spouse from serving on the board of the mission affiliate as a voting or non-voting director?

Nothing in the State Ethics Statute seems to prohibit or limit the spouse of a charter school trustee or employee from serving as a voting or non-voting director of a mission affiliate. However, the parties involved should be familiar with the conflict of interest policies of the mission affiliate and the charter school, and the charter school trustee should consider whether disclosure to the charter school's appointing authority (the Commissioner of DESE) is required under Section 23(b)(3) of the State Ethics Statute in order to avoid the appearance of a conflict of interest.

4. Are there any considerations that should be taken into account if fundraising staff are on the payroll of the mission affiliate? Can a mission affiliate employee report to the charter school leader?

It is typical for mission affiliates to have fundraising as a primary purpose or activity, and it is reasonable for the mission affiliate to employ fundraising staff. However, the mission affiliate might not have sufficient need for, or be in a position to retain, senior

management to oversee the fundraising staff. It is also likely that the charter school will have a distinct institutional interest in having its senior management team oversee the mission affiliate's fundraising staff to ensure that fundraising is undertaken in a manner that aligns with the charter school's mission and needs. For this reason, the mission affiliate and charter school might enter into an agreement pursuant to which the charter school management team would oversee the mission affiliate's fundraising staff for fair market consideration. Pursuant to that agreement, the fundraising staff would report to the charter school management team.

5. Are there any board membership criteria affecting whether a mission affiliate remains a private entity rather than a governmental entity?

One of the factors that determines whether a mission affiliate is a private entity or a governmental entity is control by the charter school. If a majority of the mission affiliate board members are appointed by and/or consist of charter school employees and/or trustees, the control factor will be met and the mission affiliate will be deemed a governmental entity. For this reason, we encourage mission affiliates that seek to remain private to ensure that at least a majority of their board members are not appointed by or comprised of charter school trustees or employees. To ensure mission alignment, the mission affiliate might look to former charter school trustees, employees or parents, and to donors, to fill board seats.

6. What steps should charter schools take when their employees serve on the board of their mission affiliate or otherwise engage in mission affiliate activities?

a. Job Description – Any charter school employee who serves on the mission affiliate's board should ensure that his, her or their appointing authority has approved a job description that includes providing services to the mission affiliate or serving on the mission affiliate's board, and specifies the distinct institutional interest that the charter school has in the fulfillment of such duties.

b. Consider Requesting an Advisory Opinion from the State Ethics Commission – A charter school employee who serves on the mission affiliate's board should consider obtaining an advisory opinion from the State Ethics Commission confirming that the school has a distinct institutional interest in such activities. Since the appointing authority's determination is not dispositive, the advisory opinion will provide assurance that Section 4 of the State Ethics Statute is not violated.

c. Section 6 Integrity Determination – Any charter school employee who will serve on the mission affiliate's board should obtain an "integrity determination" from his, her or their appointing authority, stating that the interest of the school employee in the mission affiliate is not so substantial as to be deemed likely to affect the integrity of the services that the school may expect from him, her or them. The Section 6 integrity determination is filed with the State Ethics Commission. If a Section 6 integrity determination is obtained for a school

employee, the Section 23(b)(3) Disclosure is not required for that employee.

d. Section 23(b)(3) Disclosure – If the charter school employee will be engaged in mission affiliate activities, but will not serve on the mission affiliate’s board, a Section 6 determination is not necessary, but a Section 23(b)(3) Disclosure should be filed with the school employee’s appointing authority. This disclosure can protect the school employee from the appearance of a conflict of interest.

For more information and to view the webinar slides, please go to: <https://kb-law.com/articles/webinar20220505.php>. If you need any assistance with state ethics compliance, or have any questions about charter schools and their mission affiliates, please contact Elka Sachs (esachs@kb-law.com) or Bettina Toner (btoner@kb-law.com).