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OHIO ETHICS COMMISSION  
8 East Long Street, 10<sup>th</sup> Floor  
Columbus, Ohio 43215  
Telephone: (614) 466-7090  
Fax: (614) 466-8368

[www.ethics.ohio.gov](http://www.ethics.ohio.gov)

October 2, 2008

Informal Opinion 2008-INF-1002-2

Brad Adams  
[REDACTED]

Dear Mr. Adams:

In a letter received by the Ohio Ethics Commission on October 18, 2007, you asked if the Ethics Law and related statutes prohibit you from contracting with the Cleveland Metropolitan School District (District) to provide supplemental education services (SES) if you are employed by the District.

You stated that the District has employed you for seventeen years. In a telephone conversation with Ohio Ethics Commission staff, you stated that you are a teacher in the District. You had been an SES provider, leasing space from the District, for District students in the 2006-07 school year.

As an SES provider, you operated a business and hired other teachers to tutor students before and after school hours. Your business billed the District \$67.00 an hour for tutoring services totaling over \$100,000 for the 2006-07 school year. You would like to renew your SES contract with the District, but the District has raised concerns about conflicts of interest and declined to renew the contract.

### **Brief Answer**

As explained below, R.C. 2921.42(A)(4) prohibits you, as an employee of the District, from contracting with the District to serve as an SES provider unless you can meet the exception in R.C. 2921.42(C). One important requirement is that you demonstrate that the District cannot acquire the services you are providing from any other source for the same or lower cost. Even if you can show that you meet the requirements in the exception, the District is not required or obligated to enter into a contract for SES with you.

### **Purpose of an Advisory Opinion**

The purpose of an Ethics Commission advisory opinion is to provide guidance to a public official upon which he can rely before engaging in an action that may be prohibited by the law. The Commission has explained that its function in rendering an advisory opinion is not a fact-finding process. Ohio Ethics Commission Advisory Opinion No. 94-002. The Commission can render an advisory opinion only in response to a question that involves the prospective conduct of the person who requests the opinion. Adv. Ops. No. 75-037 and 94-002. Therefore, this advisory opinion addresses only the prospective matters you have described and does not reach any conclusions with respect to matters that have already occurred.

### **Supplemental Educational Services**

The federal No Child Left Behind Act (NCLB) provides funds for free tutoring and other supplemental academic enrichment services for eligible students in schools that have not met the state targets for increasing school achievement. Pub. L. No. 107-110, 115 Stat. 1425 (2001) (codified as amended in scattered sections of 20 U.S.C.). School districts receive Federal Title I funds to operate their SES programs, which includes paying the provider of services. Districts receive a per pupil allocation, based on the district's need for SES, which is determined by the United States Department of Education using a formula established in 20 U.S.C. § 6316(e)(6)(A) (2002). If a district is required to provide SES, it must pay, for each child receiving services, the lesser of the actual cost of services or the maximum per-child expenditure. 20 U.S.C. § 6316(e)(6). The maximum per-child expenditure for SES in the Cleveland Municipal School District for the 2007-08 school year was \$1,925.79.

The state approves which public or private providers are eligible to deliver the tutoring and other services. 20 U.S.C. § 6316(e)(4). The school district enters into a contract with a number of different providers who are approved by the state. 20 U.S.C. § 6316(e)(3). However, a provider is not paid by the district unless and until parents of eligible students choose the provider, from a list supplied by the state, to provide services to their child. 20 U.S.C. § 6316(e)(4)(c). School districts are required upon request to help parents determine the provider that will best fit their child's needs. 20 U.S.C. § 6316(e)(2)(B). When a parent selects a provider, the district pays the provider as services are rendered and billed by the provider.

### **Public Contract Restriction—R.C. 2921.42(A)(4)**

A teacher in a school district is a public official subject to R.C. 2921.42(A)(4), which states that no public official shall knowingly:

Have 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.

See R.C. 2921.01(A); Adv. Op. No. 93-017.

R.C. 2921.42(I)(1)(a) defines the term “public contract” to include the purchase or acquisition, or a contract for the purchase or acquisition, of property or services by or for the use of a school district. Adv. Op. No. 2001-05. An interest that is prohibited under R.C. 2921.42 must be definite and direct and can either be financial or fiduciary in nature. Adv. Op. No. 81-008.

In most cases, a public contract exists when a public agency buys goods or services directly from a provider. Adv. Ops. No. 93-007 and 93-009. However, a public agency can acquire goods or services in other ways. In Advisory Opinion No. 93-007 the Commission explained:

The key factor in determining whether a contract is a “public contract” is whether the governmental entity is acquiring, either through purchase, grant, tax abatement, donation, loan, or other method, property or services.

Under NCLB, when a school district contracts with SES providers, it purchases or acquires supplemental educational services for its students.<sup>1</sup> The district uses federal funds provided for the purpose of meeting the NCLB mandates. The acquisition of SES by the school district is a “public contract.”

You would have a definite and direct interest in a contract under which you are paid to provide SES. Therefore, R.C. 2921.42(A)(4) prohibits you from having a contract with the District to be an SES provider, unless you can meet the exception discussed below.

**Exception to the Prohibition—R.C. 2921.42(C)**

R.C. 2921.42(C) provides that R.C. 2921.42(A)(4) does not apply to a public official who can meet all four requirements in the exception. The criteria are strictly construed against the public official who must show compliance with them. Adv. Ops. No. 83-004 and 84-011. R.C. 2921.42(C) provides:

- (1) The subject of the public contract is necessary supplies or services for the political subdivision or governmental agency or instrumentality involved;
- (2) The supplies or services are unobtainable elsewhere for the same or lower cost, or are being furnished to the political subdivision or governmental agency or instrumentality as part of a continuing course of dealing established prior to the public official’s becoming associated with the political subdivision or governmental agency or instrumentality involved;

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<sup>1</sup> Pursuant to R.C. 3319.08(A), a school district must enter into an employment contract with each teacher. If the district authorizes additional compensation for the teacher for duties in addition to the core duties of the teacher, the district shall enter into a “supplemental written contract” with each teacher. *Id.* These contracts are permissible as part of the established employment relationship. SES contracts, such as the one you have described, would not fall under this authority.

- (3) The treatment accorded the political subdivision or governmental agency or instrumentality is either preferential to or the same as that accorded other customers or clients in similar transactions;
- (4) The entire transaction is conducted at arm's length, with full knowledge by the political subdivision or governmental agency or instrumentality involved, of the interest of the public official, member of the public official's family, or business associate, and the public official takes no part in the deliberations or decision of the political subdivision or governmental agency or instrumentality with respect to the public contract.

Because SES are mandated services under NCLB, the services are "necessary" for the District, and you can meet the requirement in Division (C)(1).

R.C. 2921.42(C)(2) requires that the services you provide to the District are unobtainable elsewhere for the same or lower cost.<sup>2</sup> You must be able to show through appropriate documentation that there is no other SES provider who can offer the same services for the same or lower cost. If you sell SES to the District for less than any other provider, you can meet the requirement. The District must make every reasonable effort to open the process of identifying SES providers to all interested and qualified parties. Adv. Ops. No. 83-004 and 89-004.

The third requirement in R.C. 2921.42(C) is that the treatment you provide to the District's students is the same as, or better than, the treatment you provide to other students. You must be able to show that the SES you provide to District students are at least as good as the services you would provide to any other students.

Finally, R.C. 2921.42(C)(4) requires that the entire transaction is conducted at arm's length, that the District has full knowledge that you have an interest in the SES contracts, and that you take no part in the decision of the District regarding the contracts. In an arm's length transaction: (1) both you and the District act voluntarily, without compulsion or duress; (2) the transaction occurs in an open market; and (3) both you and the District act in your own self-interest. *Walters v. Knox Cty. Bd. of Rev.* (1989), 47 Ohio St.3d 23, 25. An "open market" is a market in which any buyer or seller can trade, and the prices and product availability are determined by free competition. *Mildred Hine Trust v. Buster*, Franklin App. No. 07AP-277, 2007-Ohio-6999, ¶ 21.

The District must make reasonable efforts to demonstrate that all interested and qualified providers of SES can provide services to the District's students, and that parents are informed of all options for providers, in order for you to demonstrate that the transaction is at arm's length. Further, it must be clear that you have not recommended yourself as a service provider to students or parents while in the exercise of your public role.

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<sup>2</sup> R.C. 2921.42(C)(2) can also be met by showing that services were provided by the public official as part of a "continuing course" of dealing established before he or she was hired by the agency. However, because you were employed by the District *before* you began selling SES, you cannot meet this requirement.

For example, you stated that, when students or parents ask about tutoring, you disclose that you are a vendor, that they have a choice of vendors, and that they should contact you before or after school hours. Because there is no contract between the SES provider and the parent or parents of a student receiving services, R.C. 2921.42(A)(4) would not prohibit you, if the District were to decide to contract with you, from merely informing students or parents that you are a provider. However, you would be unable to demonstrate that the transaction was arm's length if you were to use your position of authority over students or parents to suggest that they were obligated to use your private tutoring services. In a situation such as the one you described, you would be required to direct parents to the District for additional information on selecting available providers. See also R.C. 102.03(D) (prohibiting a public employee from using his position to secure anything of value that could have a substantial and improper influence upon him in the performance of his public duties<sup>3</sup>); Adv. Op. No. 96-004.

Provided that you may be able to meet the exception in Division (C), R.C. 2921.42(A)(4) does not prohibit you from entering into SES contracts with the District. However, the District is under no requirement or obligation to enter into a contract for SES with you. If you cannot meet the exception, R.C. 2921.42(A)(4) prohibits you from selling SES services under a contract with the District.

### Conclusion

As explained above, R.C. 2921.42(A)(4) prohibits you, as an employee of the District, from contracting with the District to serve as an SES provider unless you can meet the exception in R.C. 2921.42(C). One important requirement is that you demonstrate that the District cannot acquire the services you are providing from any other source for the same or lower cost. Even if you can show that you meet the requirements in the exception, the District is not required or obligated to enter into a contract for SES with you.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on October 2, 2008. The opinion is based on the facts presented. It is limited to questions arising under Chapter 102. and Sections 2921.42 and 2921.43 of the Revised Code and does not purport to interpret other laws or rules. If you have any questions or desire additional information, please feel free to contact this Office again.

Sincerely,



Jennifer A. Hardin  
Chief Advisory Attorney

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<sup>3</sup> Teachers who do not perform or have the authority to perform administrative or supervisory functions are not subject to R.C. 102.03(D). See R.C. 102.01(B) and Adv. Ops. No. 93-017 and 2000-04.