



FAIR POLITICAL PRACTICES COMMISSION

P.O. Box 807 • 428 J Street • Sacramento, CA 95812-0807
(916) 322-5660 • Fax (916) 322-0886

March 28, 2000

Deborah E.G. Wilder
Deborah Wilder & Associates
433 Airport Boulevard, Suite 319
Burlingame, California 94010-2010

**Re: Your Request for Advice
Our File No. A-00-018**

Dear Ms. Wilder:

This letter responds to your request on behalf of Barbara Guenther, a member of the Alameda Unified School District ("district") Board of Trustees ("board"), for advice about the Political Reform Act (the "Act").¹ Please note that, by law, we may provide advice only about the Act; other provisions of law, both state and local (for example, Government Code Section 1090) may also apply.

I. QUESTIONS

- (1) To what extent, if any, does Ms. Guenther have a disqualifying conflict of interest in district decisions affecting district contracts with Xanthos?
- (2) To what extent, if any, does Ms. Guenther have a disqualifying conflict of interest in district decisions about the approval of the payment of warrants for contracts with Xanthos?
- (3) To what extent, if any, does Ms. Guenther have a disqualifying conflict of interest in the district's upcoming decision to hire a new superintendent?
- (4) To what extent, if any, does Ms. Guenther have a disqualifying conflict of interest in district decisions about contracts for services similar to those provided to the district by Xanthos?
- (5) To what extent, if any, does Ms. Guenther have a disqualifying conflict of interest in district decisions about the district's preschool programs?

¹ Government Code sections 81000 - 91015. Commission regulations appear at title 2, sections 18109 - 18996, of the California Code of Regulations.

- (6) To what extent, if any, does Ms. Guenther have a disqualifying conflict of interest in district personnel decisions involving district employees who interact with the Head Start staff or the Xanthos staff?
- (7) To what extent, if any, does Ms. Guenther have a disqualifying conflict of interest in district decisions about student discipline matters which may result in counseling?
- (8) To what extent, if any, may Ms. Guenther participate in closed sessions on a matter in which she has a disqualifying conflict of interest?

II. CONCLUSIONS

As to questions (1) and (2), Ms. Guenther has a disqualifying conflict of interest in district decisions about contracts with Xanthos, including the Head Start contract, and the approval of payment of warrants, unless she can show that the decision will have no financial effect at all on Xanthos.

With regard to question (3), based on the information provided by Ms. Guenther, she does not have a disqualifying conflict of interest.

As to questions (4) through (7), we cannot conclusively advise Ms. Guenther at this point. The Act's conflict-of-interest rules are meant to be applied in the context of a *particular* decision. Questions (4) through (7) deal with general categories of decisions that are too vague to permit "blanket" answers. We have provided explanations of the analysis Ms. Guenther must apply as concrete decisions arise in each of the categories.

About question (8), Ms. Guenther may not attend any closed session pertaining to a decision in which she has a disqualifying conflict of interest. We have also provided additional information about other limitations which may apply to Ms. Guenther in district decisions in which she has a disqualifying conflict of interest.

III. FACTS²

Ms. Guenther, in her private capacity, is an employee of Xanthos. Xanthos is a nonprofit corporation which has gross annual receipts of approximately \$3.7 million; approximately

² The Commission does not act as a finder of fact when it renders advice. This advice is applicable and confers immunity (see Section 83114) only to the extent that the facts provided to us are correct and that all of the material facts have been disclosed. (*In re Oglesby* (1975) 1 FPPC Ops. 71, 77.)

We have received correspondence about this advice request from attorneys representing the district. We have not considered it for purposes of responding to Ms. Guenther's request. (Regulation 18329(b)(2)(A).)

\$54,000 of which comes from the district. Ms. Guenther characterizes Xanthos' overall funding as essentially independent of the district.

As a Xanthos employee, Ms. Guenther is the program director for the Head Start Program in the City of Alameda. Head Start provides services to low-income students. Many times, these services are provided in conjunction with the district. The Head Start Program is almost entirely funded (99 percent) by the federal government, none of which "passes through" any state or local government agencies.

In addition to Head Start, Xanthos provides other services to low-income families under contracts with the district, including counseling, psychological assistance, youth services, and high school health clinics. Xanthos also operates a preschool program. The preschool program is not funded by the district, but the district does provide free space for the program.

As Head Start program director, Ms. Guenther is a middle-management employee. She works on the "program side" of Xanthos, with no responsibilities for business development. She has little or no interaction with other Xanthos programs, has no ability to control any policies within Xanthos, and is not a board member of Xanthos. However, Ms. Guenther, as the program director of Head Start, does interact with school district personnel.

In the future, the board will make decisions about the award, administration, amendment, or termination of certain contracts, which include:

- Contracts which have been awarded to Xanthos, or on which Xanthos is a bidder or prospective bidder, including the contracts for the Head Start program;
- Contracts for services similar to the services that Xanthos provides, or services relative to ancillary activities, i.e. mentoring, tutoring, parent support, counseling referrals, health screenings, special education services, transportation and after school programs.

The board will also make decisions about the district's preschool program, and about non-district programs that provide the same or similar services as Head Start or other Xanthos programs including preschool and mental health clinics.

The district also will make personnel decisions about various district employees who interact with Head Start or Xanthos staff, and concerning the increased authorization or reduction of such positions.

Student discipline matters often involve a recommendation for counseling. You inquire about whether Ms. Guenther has a conflict of interest in student discipline matters under the reasoning that Xanthos provides counseling to low-income families who cannot otherwise afford counseling services. You tell us that Ms. Guenther has no relationship, special knowledge or

control over this aspect of Xanthos' operations, and that the student and his/her parent are always allowed to seek counseling elsewhere. However, as Xanthos does provide the service at a fairly low cost, there is a high tendency for students to use Xanthos' services.

The district's superintendent has resigned, and the board will eventually decide on a successor. In her role as a Xanthos employee and Head Start program director, Ms. Guenther does not report to, or receive tasking from the superintendent. Xanthos' primary interaction with the superintendent is through its executive director. Ms. Guenther asserts that, given Xanthos' long-term presence in the community and the long-term relationship between Xanthos and the district, the selection of the superintendent is unlikely to have a significant financial effect on Xanthos.

In the event that Ms. Guenther has a disqualifying conflict of interest in any of these decisions, she would like to know to what extent, if any, she may be present during closed sessions of the board related to those decisions.

IV. ANALYSIS

The Act's conflict-of-interest provisions ensure that public officials will perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of persons who have supported them. (Section 81001(b).) Specifically, Section 87100 prohibits any public official from making, participating in making, or otherwise using his or her official position to influence a governmental decision in which the official has a *financial interest*.

A public official has a "financial interest" in a governmental decision, within the meaning of the Act, if it is reasonably foreseeable that the governmental decision will have a material financial effect on one or more of the public official's economic interests. (Section 87103; Regulation 18700(a).) The Commission has adopted a standard, eight-step analysis for deciding whether an individual has a disqualifying conflict of interest in a given governmental decision.³ (Regulation 18700(b)(1)-(8).) The following advice applies that standard analysis.

The Act's conflict-of-interest provisions apply only to "public officials." (Sections 87100, 87103; Regulation 18700(b)(1).) As a member of the board, Ms. Guenther is a "public official," for purposes of the Act (see Sections 82048, 82041), and the conflict-of-interest rules apply to her.

³ The eighth step, which pertains to the "legally required participation" rule (see Regulation 18708), typically applies only in rare cases where several public officials in the same agency are simultaneously disqualified. It is not relevant to this advice request, and is not mentioned further.

The Act's conflict-of-interest provisions apply only where a public official "make[s], participate[s] in making, or in any way attempts to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest." (Section 87100.) These terms are defined in the Commission's regulations (Regulations 18702-18702.4).

By voting and deliberating on the board decisions about which you inquire, Ms. Guenther would be making, participating in making, or influencing governmental decisions, and thus these matters are covered by the Act's conflicts rules.

The Act's conflict-of-interest provisions apply only to conflicts arising from *economic interests*. The economic interests from which conflicts of interest may arise are defined in Section 87103 and Regulations 18703-18703.5. Identifying which, if any, of these economic interests are held by a public official is the third step in analyzing a potential conflict of interest under the Act. (See Regulation 18700(b)(3).) There are five kinds of such economic interests:

- A public official has an economic interest in a *business entity* in which he or she has a direct or indirect *investment*⁴ of \$1,000 or more (Section 87103(a); Regulation 18703.1(a)); or in which he or she is a *director, officer, partner, trustee, employee, or holds any position of management* (Section 87103(d); Regulation 18703.1(b));
- A public official has an economic interest in *real property* in which he or she has a direct or indirect interest of \$1,000 or more (Section 87103(b); Regulation 18703.2);
- A public official has an economic interest in any *source of income*, including *promised* income, which aggregates to \$250 or more within 12 months prior to the decision (Section 87103(c); Regulation 18703.3);
- A public official has an economic interest in any *source of gifts* to him or her if the gifts aggregate to \$300 or more within 12 months prior to the decision (Section 87103(e); Regulation 18703.4);
- A public official has an economic interest in his or her personal expenses, income, assets, or liabilities, as well as those of his or her immediate family—this is sometimes known as the "personal financial effects" rule (Section 87103; Regulation 18703.5).

⁴ An indirect investment or interest means any investment or interest owned by the spouse or dependent child of a public official, by an agent on behalf of a public official, or by a business entity or trust in which the official, the official's agents, spouse, and dependent children own directly, indirectly, or beneficially a 10-percent interest or greater. (Section 87103.)

As a salaried employee of Xanthos, Ms. Guenther has an economic interest in the nonprofit because it is a source of income to her. (Section 87103(c); Regulation 18703.3.) Ms. Guenther also has an economic interest in her personal finances, including her income from Xanthos. (Section 87103; Regulation 18703.5.) Please note that these are distinct economic interests: Ms. Guenther has an economic interest in Xanthos, as an entity, and also a separate economic interest in the income she receives from Xanthos.

Knowing what her relevant economic interests are, Ms. Guenther must determine whether it is “reasonably foreseeable” that the decisions in question will have a material financial effect on those interests. Under the Commission’s standard analysis of conflicts issues (Regulation 18700(b)), she must decide whether her economic interests are directly or indirectly involved in the decisions. (Regulation 18700(b)(4).) Having established the degree of involvement, she can identify the materiality standard appropriate to the circumstances. (Regulation 18700(b)(5).) Ms. Guenther then knows what amount of financial effect would be considered “material” under the Act. Finally, Ms. Guenther must decide whether such a material financial effect is a “reasonably foreseeable” consequence of the decision(s) at issue. (Regulation 18700(b)(6).) (Each of these steps is explained below.)

You inquire about a number of governmental decisions, or categories of decisions, which will be before the board. We are able to provide concrete advice about some of these decisions. However, because the Act’s conflicts provisions are meant to be applied in the context of a *particular* governmental decision, we are unable to answer conclusively some of your more general questions. For example, as explained in more detail below, it is not possible to say *generally* whether Ms. Guenther has a conflict of interest in “district decisions about preschool programs.” She may or may not have a conflict in a *particular* “decision about preschool programs” depending on the particular nature of the decision, and its likely financial effect on her economic interests. We trust that the concrete answers we can provide, along with the explanations of the law we provide, will guide Ms. Guenther as other particular decisions arise.

The following analysis focuses on Ms. Guenther’s economic interest in Xanthos, as a source of income to her. Ms. Guenther’s economic interest in her personal finances, which in this case means her income as an employee of Xanthos, does not appear to create a conflict of interest in the decisions about which you inquire. This is because almost all (99 percent) of the funding for the Head Start program, including presumably the funding for her position as its Program Director, comes from the federal government, and does not “pass through” the district.

1. District decisions about contracts with Xanthos.

A source of income (which Xanthos is to Ms. Guenther) is *directly involved* in a decision when it:

- Initiates the proceeding in which the decision will be made by filing an application, claim, appeal, or similar request (Regulation 18704.1(a)(1));
- Is a named party in, or is the subject of, the proceeding concerning the decision before the official or the official's agency. A source of income is the subject of a proceeding if a decision involves the issuance, renewal, approval, denial, or revocation of any license, permit, or other entitlement to, or contract with, the subject person or business entity. (Regulation 18704.1(a)(2).)

Your first question is about board decisions concerning contracts with Xanthos, including the Head Start program. Xanthos will be considered directly involved in such decisions because it will be the "subject of the proceeding" under Regulation 18704.1(a)(2). When a source of income is directly involved in a governmental decision, the materiality standard is strict: If it is reasonably foreseeable that the decision will have *any* financial effect on Xanthos, that effect is deemed material. (Regulation 18705.3(a).)

It seems reasonably foreseeable that a district decision about a contract with Xanthos will have at least some financial effect on Xanthos. Therefore, Ms. Guenther has a disqualifying conflict of interest in such a decision, unless she can show that the decision will have no financial effect at all on Xanthos.⁵ (Regulations 18706, 18705(c)(2).) This conclusion applies both to decisions about existing contracts with Xanthos, as well as contracts on which Xanthos is a bidder, or on which Xanthos is preparing to bid. (*In re Thorner* (1975) 1 FPPC Ops. 198.)

Moreover, if Ms. Guenther receives income from Xanthos to achieve a particular goal or purpose which will be achieved, defeated, aided, or hindered by a board decision, then Ms. Guenther will have a conflict of interest if it is reasonably foreseeable that the board decision will have *any* financial effect on Xanthos. (Regulation 18705.3(c).) This is known as the "nexus" test. For example, if Ms. Guenther's job duties at Xanthos included developing new contracts with entities such as the district, then a district decision about such a contract would create a conflict of interest for her if it would have a reasonably foreseeable material financial effect on Xanthos. However, Ms. Guenther tells us she has no responsibilities for business or contract development—her responsibilities are programmatic. Thus, it appears that the "nexus" test is not relevant; however, Ms. Guenther should keep it in mind if circumstances change.

⁵ Under the Act, even if a governmental decision will have a reasonably foreseeable material financial effect on a public official's economic interest, the public official does not have a conflict if that material financial effect is indistinguishable from the decision's effect on the public generally. (Section 87103.) The Commission has interpreted this to mean that a "significant segment" of the jurisdiction must be affected in "substantially the same manner" as is the public official's economic interest. (Regulation 18707.) Here, it is quite unlikely that a significant segment of the jurisdiction of the district will be affected by board decisions about contracts with Xanthos in substantially the same manner as will Xanthos itself. Therefore, the exception does not apply.

2. Approval of payment of warrants to Xanthos.

Xanthos is directly involved in board decisions involving review and approval of the payment of warrants to Xanthos. (Regulation 18704.1(a).) Thus, again, the strict "any financial effect" materiality standard will apply: If it is reasonably foreseeable that the decision will have *any* financial effect on Xanthos, that effect is deemed material. (Regulation 18705.3(a).)

It is reasonably foreseeable that a board decision to make a payment to Xanthos will have at least some financial effect on Xanthos; therefore, Ms. Guenther has a disqualifying conflict of interest in that decision. (Regulation 18706.) This is true even if the decision involves the review and approval of payment of warrants to Xanthos. (*Kohn* Advice Letter, No. A-93-052.)

3. Decisions about hiring a new superintendent.

Xanthos is indirectly involved in the board's decisions about hiring a new superintendent (i.e., the criteria in Regulation 18704.1(a) explained above are not satisfied when it comes to this decision). When a nonprofit of Xanthos' size (gross annual receipts of approximately \$3.7 million) is indirectly involved in a governmental decision, the materiality standard is expressed in terms of the decision's effect on the nonprofit's gross annual receipts, or expenses, or assets and liabilities. Specifically, the financial effect on Xanthos of a board decision about hiring a new superintendent will be material if it is reasonably foreseeable that:

- ▶ The decision will result in an increase or decrease of Xanthos' gross annual receipts for a fiscal year in the amount of \$100,000 or more.
 - ▶ The decision will cause Xanthos to incur or avoid additional expenses or to reduce or eliminate existing expenses for a fiscal year in the amount of \$25,000 or more.
 - ▶ The decision will result in an increase or decrease in the value of Xanthos' assets or liabilities in the amount of \$100,000 or more.
- (Regulation 18705.3(b)(2)(D).)

The important question is whether it is reasonably foreseeable that a decision about hiring a new superintendent will have such a financial effect on Xanthos. (Regulation 18706.) Based on the facts Ms. Guenther has provided, we advise that such a financial effect is not reasonably foreseeable. While the superintendent may have input into decisions about Xanthos contracts with the district, the final decisionmaker is the board. Very little of Xanthos' overall funding, and virtually none of the Head Start funding, come from the district. Even if the superintendent were able to affect conclusively all of Xanthos' funding from the district, this \$54,000 amount is less than the materiality standard in Regulation 18705.3(b)(2)(D). In reaching this conclusion, we also give weight to Ms. Guenther's assertion that Xanthos' long-term presence in the community and its long-term relationship with the district make it unlikely that the selection of the new superintendent will have significant financial impact on Xanthos.

4. The other decisions about which you inquire.

As already mentioned above, the Act's conflict-of-interest provisions are meant to be applied in the context of particular governmental decisions. No one has a conflict of interest under the Act "on general principles;" a conflict arises only if it is reasonably foreseeable that a particular governmental decision will have a material financial effect on a public official's particular economic interest(s), and if that financial effect is distinguishable from the financial effect on the public generally. (Section 87103.) Thus, it is usually not possible to give "generalized" advice about whether a public official has a conflict.

For these reasons, it is impossible at this point to advise Ms. Guenther whether she generally has a conflict of interest in the categories of decisions described in questions (4) through (7). It is entirely possible that Ms. Guenther will have a conflict in some such decisions, but not in others. This is a determination which must be made on a decision-by-decision basis. We provide the following general information to guide Ms. Guenther in making these determinations. To the same end, we have also enclosed copies of "Can I Vote?" and "Holding Two Positions," pamphlets which explain the Act's conflict-of-interest rules.

As each decision arises, Ms. Guenther must decide if Xanthos is directly involved or indirectly involved in the decision, using the rules from Regulation 18704.1(a) which were explained above. If Xanthos is directly involved in the decision, then the analysis will proceed along the lines explained in the analysis of decisions about contracts with Xanthos, above. If Xanthos is directly involved, the important question is whether it is reasonably foreseeable that the decision will have any financial effect on Xanthos. (Regulations 18705.3(a), 18706.) If so, Ms. Guenther will have a disqualifying conflict of interest, unless she can show that the decision will have no financial effect on Xanthos (see Regulation 18705(c)(2)), or unless the public generally exception applies (see below).

If Xanthos does not initiate the proceedings leading up to the decision (Regulation 18704.1(a)(1)), and is not a named party in or otherwise the subject of the proceedings (Regulation 18704.1(a)(2)), then Xanthos will be considered indirectly involved in the decision. (Regulation 18704.2(b).) The analysis in those cases will proceed similarly to the analysis of decisions about hiring a new superintendent. The important question will be whether it is reasonably foreseeable that the financial effect of the decision-in-question on Xanthos will meet or exceed the thresholds in Regulation 18705.3(b)(2)(D). (Regulation 18706.) This is a factual determination that depends on the particular circumstances of each decision.

If Ms. Guenther concludes that any board decision is indeed reasonably foreseeable to have a material financial effect on Xanthos, then she must decide whether the "public generally exception" applies. (Regulations 18700(b)(7), 18707 *et seq.*) If the reasonably foreseeable material financial effect of a governmental decision on Xanthos is *indistinguishable* "from its effect on the public generally," then Ms. Guenther does not have a conflict. (Section 87103;

Regulations 18700(b)(7), 18707(a).) This exception exists because a public official is less likely to be biased by a financial impact on his or her economic interests when a significant part of the community is substantially likely to feel essentially the same impact from the governmental decision.

Given the unique nature of Xanthos as a nonprofit providing the kinds of services it provides, and given its funding sources, it seems unlikely that a significant segment of the jurisdiction of the district will be affected in substantially the same manner as Xanthos by the board decisions about which you inquire. Therefore, we advise that the public generally exception will not apply in these decisions, and Ms. Guenther will be disqualified if indeed a given decision is reasonably foreseeable to have a material financial effect on Xanthos.

5. Ms. Guenther's obligations when she is disqualified.

In the event Ms. Guenther is disqualified from a particular district decision according to the law explained above, she has certain obligations under the Act. First, she may not make, participate in making, or influence the decision. (Section 87100.) This prohibition extends to service on committees and subcommittees. The meaning of the terms "making," "participating in making," and "influencing" are explained in detail in Regulations 18702.1-18702.4, which are enclosed.

In your advice request, you inquired about what kinds of contact with district personnel Ms. Guenther could have as a board member, given her employment with Xanthos. As mentioned above, Ms. Guenther may not influence any decision in which she has a disqualifying conflict of interest. Such influencing of a decision before a public official's own agency includes any communication with an agency employee *for the purpose of influencing the decision*. (Regulation 18702.3(a).) Thus, the Act prohibits Ms. Guenther's contacts with district personnel only to the extent the contact is with regard to a decision in which she has a disqualifying conflict of interest, and to the extent the contact is for the purpose of influencing the decision.

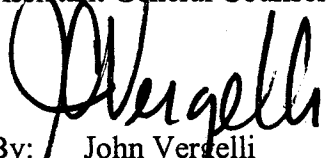
You also asked about closed sessions. Ms. Guenther may not attend a closed session pertaining to a decision in which she has a disqualifying conflict of interest, nor may she obtain a recording of the meeting, or any confidential documents prepared for the closed session. (*Cosgrove* Advice Letter, No. A-98-145.) She may attend open sessions pertaining to decisions in which she has a disqualifying conflict of interest, and obtain any nonconfidential documents.

You have asked whether Ms. Guenther may engage in public discussions about certain district issues. Again, Ms. Guenther may not influence any decision in which she has a disqualifying conflict of interest. However, the definition of "influencing," as that term is used in the Act, expressly excludes "[c]ommunicat[i]ons with the general public or the press." (Regulation 18702.4(b)(2).) Thus, even if she has a disqualifying conflict of interest in a given decision, she may communicate with the general public or the press about the issue.

If you have any other questions regarding this matter, please contact me at
(916) 322-5660.

Sincerely,

Luisa Menchaca
Assistant General Counsel


By: John Vergelli
Staff Counsel, Legal Division

LM:JV:tls
Enclosures