



STATE OF CALIFORNIA  
FAIR POLITICAL PRACTICES COMMISSION  
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October 12, 2018

Kyle W. Holmes  
Schools Legal Service  
1300 17th Street, 7<sup>th</sup> Floor  
Bakersfield, CA 93301

Dean Markham  
P.O. Box 924  
Tehachapi, CA 93581

Re: Your Request for Advice  
**Our File Nos. A-18-180; A-18-181**

Dear Mr. Holmes and Mr. Markham:

This letter responds to your requests<sup>1</sup> for advice on behalf of the Board of Trustees for the Tehachapi Unified School District (the "District") and Trustee Dean Markham regarding the conflict of interest provisions of the Political Reform Act (the "Act")<sup>2</sup> and Section 1090. Please note that we are not a finder of fact when rendering advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), and any advice we provide assumes your facts are complete and accurate. If this is not the case, or if the facts underlying these decisions should change, you should contact us for additional advice.

Regarding our advice on Section 1090, we are required to forward your request and all pertinent facts relating to the request to the Attorney General's Office and the Kern County District Attorney's Office, which we have done. (Section 1097.1(c)(3).) We did not receive a written response from either entity. (Section 1097.1(c)(4).) We are also required to advise you that, for purposes of Section 1090, the following advice "is not admissible in a criminal proceeding against any individual other than the requestor." (See Section 1097.1(c)(5).)

### QUESTION

Under the Act and Section 1090, may the District and the Markhams, on behalf of their child, enter into settlement agreements with the District regarding educational services and support, and attorney's fees, in order to settle federal district court and administrative due process cases?

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<sup>1</sup> We received separate requests for advice from Tehachapi Unified School District Board of Trustees member, Dean Markham, as well as District counsel, Kyle Holmes, on behalf of the Board. We have combined our response to both requests as both requests address the same underlying facts.

<sup>2</sup> The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

## CONCLUSION

Subject to the remote interest provisions of Section 1091(b)(15), the Markhams and the District may only enter into agreements that are part of a settlement of litigation in which the District is represented by legal counsel, a court of competent jurisdiction finds that the agreements serve the public interest, and Trustee Markham recuses himself from all participation, direct or indirect, in the making of the agreements in his official capacity on behalf of the District. In addition to the abstention requirements for remote interests, the Act requires Trustee Markham to leave the room during any Board decisions related to settlement agreements with the District.

## FACTS

In August 2017, Mr. Holmes initially sought formal advice on behalf of the District and provided the following information: Dean and Brenda Markham are legally married and reside together in the same household. Beginning in 2015, the Markhams disagreed with the District regarding the District's special education programming offered to their dependent minor child. As a result, in March 2015, the Markhams filed a request for a due process hearing with the office of administrative hearings pursuant to the Individuals with Disabilities Education Act of 2004 ("IDEA") (20 U.S.C. § 1415 & Cal. Ed. Code § 56505). On December 1, 2016, after conducting an administrative due process hearing, the presiding Administrative Law Judge ("ALJ") ruled against the District, and required the District to reimburse Ms. Markham for her costs incurred in obtaining a private reading program. The District appealed the ALJ's decision to the federal district court for the Eastern District of California, which was still pending at the time of the initial request.

After the ALJ Decision was issued, Trustee Markham was sworn in as a newly elected member of the District's Board of Trustees of the Tehachapi Unified School District.

Approximately 90 days after the ALJ Decision was issued, the California Department of Education ("CDE") initiated a compliance review of the District. Mr. Holmes indicated that a compliance review is standard practice after an administrative finding of non-compliance with IDEA and its implementing regulations. District counsel also stated that CDE directed the District to make the reimbursement payment, plus interest through the date of the payment, to the Markhams directly.

We concluded in 2017 that the CDE and ALJ reimbursement orders were payments mandated by law, which are not based on negotiation, mutual consent, and mutual consideration and, therefore, did not implicate Section 1090. (*Holmes* Advice Letter, No. A-17-200.)

In August 2018, Trustee Markham requested additional advice. He indicated that the Markhams' attorney filed a case in the federal district court seeking payment of attorney's fees and costs. In a telephone conversation on September 20, 2018, Trustee Markham stated that the case was still pending. The Markhams are interested in engaging in settlement discussions regarding the District's supports and services for their child, as well as their attorney's fees.

Also in August 2018, Mr. Holmes requested additional advice. He stated that the Markhams have initiated another special education due process complaint and federal civil complaint under IDEA. The Board is exploring options to settle these matters. Trustee Markham remains a sitting Board member.

### ANALYSIS

Generally, Section 1090 prohibits public officers, while acting in their official capacities, from making contracts in which they are financially interested. The prohibition applies to virtually all state and local officers, employees, and multi-member bodies, whether elected or appointed, at both the state and local level. The purpose of Section 1090 is to make certain that “every public officer be guided solely by the public interest, rather than by personal interest, when dealing with contracts in an official capacity.” (*Thomson v. Call* (1985) 38 Cal.3d 633, 650.)

When Section 1090 is applicable to one member of a governing body of a public entity, the prohibition cannot be avoided by having the interested board member abstain. Instead, the entire governing body is precluded from entering into the contract. (*Thomson, supra*, at pp. 647- 649; *Stigall v. City of Taft* (1962) 58 Cal.2d 565, 569.) Under Section 1090, officials are deemed to have a financial interest in a contract if they might profit from it in any way. (*People v. Honig* (1996) 48 Cal.App.4th 289, 333.) A contract that violates Section 1090 is void. (*Thomson, supra*, at p. 646.)

An agreement to settle a lawsuit is generally treated as a contract. (*See T.M. Cobb Co. v. Superior Court* (1984) 36 Cal.3d 273, 280.) Nonetheless, the Legislature has created various statutory exceptions to Section 1090’s prohibition where the financial interest involved is deemed a “remote interest” or a “noninterest.” (See Sections 1091 and 1091.5.) Relevant to the facts provided, the remote interest found in Section 1091(b)(15) includes:

“That of a party<sup>3</sup> to litigation involving the body or board of which the officer is a member in connection with an agreement in which all of the following apply:

“(A) The agreement is entered into as part of a settlement of litigation in which the body or board is represented by legal counsel.

“(B) After a review of the merits of the agreement and other relevant facts and circumstances, a court of competent jurisdiction finds that the agreement serves the public interest.

“(C) The interested member has recused himself or herself from all participation, direct or indirect, in the making of the agreement on behalf of the body or board.”

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<sup>3</sup> Even though Trustee Markham is only a party to the litigation in a representative capacity, that fact should not preclude the remote interest from applying to this situation. It is clear from the legislative intent relating to Section 1091(b)(15) that as long as the three specified factors are satisfied, a settlement agreement in which an official has a financial interest should be allowed. (See Assem. Bill No. 2801 (2007-2008 Reg. Sess.) as amended Mar. 25, 2008 [stating key issue is whether “existing conflict of interest rules that prohibit public bodies from making contracts in which members have an interest (should) be modified to permit certain narrowly defined settlement agreements”].)

Mr. Holmes noted that courts have characterized stipulated judgments or consent judgments as having the attributes of contracts. (91 Ops.Cal.Atty.Gen. 1.) In that cited opinion, the Attorney General's office concluded that a court could invalidate a city's compromise settlement for a suit brought by a city council member against the city and its employees for alleged misconduct because the council member's financial interest in the settlement would likely be barred by Section 1090. (*Ibid.*) In partial response to the Attorney General's conclusion that a public body or board is likely prohibited from entering into a settlement agreement of a lawsuit brought in a member's individual capacity, the California Legislature expanded the definition of "remote interest" by enacting Section 1091(b)(15). (Sen. Judiciary Com., Analysis of Assem. Bill No. 2801 (2007-2008 Reg. Sess.) as amended May 27, 2008, p. 5.) Specifically, the Legislature acknowledged that public policy favors resolving disputes without the need for protracted litigation or a full-blown trial. (See *Wilson v. Wal-Mart Stores, Inc.* (1999) 72 Cal.App.4th 382, 390-391 ["(O)ur public policy in favor of settlement primarily is intended to reduce the burden on the limited resources of the trial courts. The trial of a lawsuit that should have been resolved through compromise and settlement uses court resources that should be reserved for the resolution of otherwise irreconcilable disputes"].)

Therefore, to the extent that agreements between the District and the Markhams regarding a default judgment to be taken against the District, District supports and services provided to the Markhams' child, providing educational evaluations, and attorney's fees resolve or settle all or part of the corresponding litigation, the agreements would be permissible under Section 1091(b)(15), so long as the factors set forth in subdivisions (A) – (C) are satisfied. The Markhams may engage in settlement negotiations and agreements with the District if the District is represented by legal counsel, a court finds that the agreements serve public interest, and Trustee Markham recuses himself from all participation in making the agreement on behalf of the District.<sup>4</sup>

Additionally, as noted in our previous letter, making payments in response to a CDE sanction order or pursuant to an ALJ order did not constitute a contract for purposes of Section 1090. (*Holmes Advice Letter*, No. A-17-200.) Such payments are not based on negotiation or mutual consent, and do not involve mutual consideration. (*Ibid.*) Similarly, in the event that a federal district court or an ALJ issues a decision containing an order regarding payments for reimbursements, costs, services, or attorney's fees, court-ordered payments will not implicate Section 1090.<sup>5</sup>

### ***The Act***

In addition to Section 1090, the conflict of interest provisions in Section 87100 of the Act prohibit a public official from making, participating in making, or using his or her official position

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<sup>4</sup> Note that Trustee Markham has a remote interest in any settlement negotiations and agreements with the District he participates in under Section 1091(b)(15). The District may make enter the contract only if: (1) the officer in question discloses his or her financial interest in the contract to the public agency, (2) such interest is noted in the entity's official records, and (3) the officer abstains from any participation in the making of the contract except as permitted under Section 1091(b)(15). (Section 1091(a).)

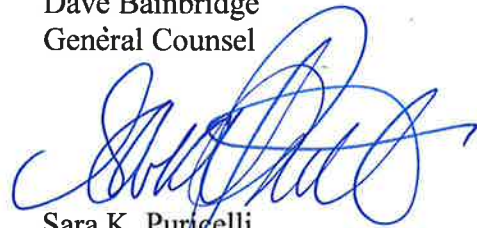
<sup>5</sup> In the event that an order directing the District to issue payments to a third party, such as an independent educational evaluator or the Markhams' attorney, we advise the District pay the third party directly, so long as such a payment is consistent with the order.

to influence a governmental decision in which the official has an interest. Under the facts provided, the decisions at issue potentially implicate Trustee Markham's financial interests in his personal finances. However, by leaving the room during the Board's decisions coupled with the abstention requirements of Section 1091(a), Trustee Markham will also satisfy the Act's recusal provisions under Section 87105 and Regulation 18707. Therefore, we do not analyze the Act's conflict of interest provisions further.

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

Sincerely,

Dave Bainbridge  
General Counsel



By: Sara K. Puricelli  
Counsel, Legal Division

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