
State Laws Governing School Board Ethics

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“You're damn right we only hire by nepotism in this district.
But there are two kinds of nepotism:

1. Good nepotism is when this Board you and I were elected to is smart enough to hire my son or daughter, and
2. Bad nepotism is when this Board is dumb enough to hire your son or daughter.”

--Minutes of New Castle, Pennsylvania School Board Meeting,
as reported in the *New Castle Gazette*.

I. Introduction

Increasingly, the public is aware that as many as two of three million classroom teachers will have to be replaced within the next ten years. Moreover, public concern over the quality of new teachers was heightened by the difficulties encountered in Massachusetts last summer by prospective teachers reaching higher standardized test scores needed to achieve teacher certification. While most researchers interested in teacher quality issues have focused on obstacles to improving the supply of better qualified teachers, several recent papers have demonstrated that many local school districts do not hire the most academically qualified applicants, and many do not utilize professional personnel procedures when selecting among certified applicants¹. There is a small but growing body of literature linking teacher quality to student achievement.² Precisely why school

¹ See Dale Ballou (1996), “Do Public Schools Hire the Best Applicants?” *Quarterly Journal of Economics* 111, 1 (February, 1996), 97-134; Dale Ballou and Michael Podgursky, “Recruiting Smarter Teachers,” *Journal of Human Resources* 30, (Winter, 1995), 326-38; Dale Ballou, and Michael Podgursky. *Teacher Pay and Teacher Quality*. (Upjohn Institute for Employment Research, 1977); Robert P. Strauss, Lori Bowes, Mindy Marks and Mark Plesko. *Teacher Preparation and Selection in Pennsylvania: A Research Report to the Pennsylvania State Board of Education*. (June 4, 1998) ERIC TM029186; and Robert P. Strauss, Lori Bowes, Mindy Marks and Mark Plesko, “Improving Teacher Preparation and Selection: Lessons from the Pennsylvania Experience,” (forthcoming), *Economics of Education Review*

² See Boardman, Anthony E., Otto A. Davis, and Peggy R. Sanday (1977), “A Simultaneous Equations Model of the Educational Process,” *Journal of Public Economics*, 7 (1977), 23-49; Ehrenberg, Ronald G.

boards, which are often responsible for the final hiring decision, are not selective with regard to the academic credentials of applicants is an outstanding question. Elsewhere one of the authors has demonstrated, at least for Pennsylvania school districts, that districts which hire their own high school graduates tend to be districts which generally face higher unemployment rates,³ and these same districts which hire their own graduates also have students who tend to score lower on standardized achievement and competency examinations.

We seek in this paper to explore the legal framework governing school board members' conduct and to review state laws governing board decisions regarding employment and the allocation of resources. This study uses a "legal norms" approach to do comparative analysis of the state laws affecting school board members. This study analyzes the rights, responsibilities and limitations affecting school board directors by comparing and contrasting the state laws that define their conduct. We will analyze the current approaches used by the various states and then suggest the best practice which might be adopted by the various states.

We conclude that the more restrictive approaches adopted in a small minority of the states are the better practice. Reforms to current laws would help assure that our schools are served by local leaders who are, as much as possible, free from the distracting influences of self interest. This can be done by requiring full and complete financial disclosure, full and complete campaign finance disclosure, stopping the practice of allowing relatives of board members to be employed within the district and eliminating

and Dominic J. Brewer (1994), "Do School and Teacher Characteristics Matter? Evidence from High School and Beyond," *Economics of Education Review*, 13 (1): 1-17; Ehrenberg, Ronald G., and Dominic J. Brewer (1995), "Do Teachers' Race, Gender and Ethnicity Matter? Evidence from NELS88", *Industrial and Labor Relations Review*, 48 (3): 547-561; . Ferguson, Ronald (1991). "Paying for Public Education: New Evidence on How and Why Money Matters," *Harvard Journal of Legislation*, 28, (2), Summer, 1991, 465-98.; Hanushek, Eric A. (1970), "The Production of Education, Teacher Quality and Efficiency," in *Do Teachers Make a Difference?* (US Department of Education, GPO); Monk, David H. and Jennifer A. King (1995), "Multilevel Teacher Resource Effects on Pupil Performance in Secondary Mathematics and Science: The Case of Teacher Subject-Matter Preparation," in Ronald Ehrenberg (editor) *Choices and Consequences: Contemporary Policy Issues in Education*, (Cornell University: ILR Press); Strauss, Robert P. and Elizabeth Sawyer(1986), "Some New Evidence on Teacher and Student Competencies," *Economics of Education Review* 5, 1, 41-48;

the ability of board members to enter, directly or indirectly, into contractual relationships with the district. Further, a clear and powerful statement requiring board members to promise to fulfill their duties and conduct all deliberations with the goal of providing the best possible education to the children in their district should be required of each board member upon accepting the office. In return we think that board members should be fairly compensated for the hard work they do. Nominal or non-existent pay should be replaced with a fair salary scheme which adequately reimburses board members for their time.

In support of these conclusions, the paper reviews the basic governance structure of schools. Next it provides an overview of the laws of thirty different states as they affect school board members and make some general observations. We look more closely at two issues: 1) the hiring and supervision of relatives, and 2) whether school board members may enter into business relationships with the district. Through a comparative review of thirty states' statutes, we look at the ways that local school districts are permitted to structure these two sets of relationships and make some observations and recommendations for more effective governance.

II. Research Methodology

State laws and regulations governing school board member conduct was initially elicited by sending a survey to state school board associations. The seventeen returned surveys were then used as a starting point to analyze the relevant state law. After reviewing these seventeen states, we developed a general structure to analyze additional states. Our analysis focused on:

- Structure- state control, size, terms etc.,
- Qualifications- who can be a school board member? Character, age, residence, oath,
- Remuneration-salary and expenses,
- Limitations on employment of self or relatives within the school district,
- Limitations on business relationships with school district,
- Personal and campaign finance disclosure requirements, and
- General ethics and conflict of interest provisions.

³ See Strauss *et al* (forthcoming).

The comparative analysis approach has some inherent limitations. First, it begs the question of what laws should be. We can give an overview of what the laws are, but this approach cannot answer the question of what laws should be.⁴ A resort to theories and normative views about the nature of government and the likely impact of various reforms is always necessary.

Second, the methodology requires some discretionary and subjective analysis. There is great variety in how states implement their education schemes. Each state promulgates its own laws. The laws are focussed on different issues, have a different statutory scheme or structure, and use different language. Each state passes a unique statutory scheme and then develops its own case law and interpretation of its statutes. To some extent a researcher doing comparative analysis of state laws is always comparing apples and oranges.⁵ What does the meaning of the phrase “conflict of interest” have in Pennsylvania as compared to Minnesota? How does the procurement process in Georgia compare to bidding requirements in another state? Throughout this research there was a sorting and classification process in order to make sensible comparisons between states. This process is often more “art” than “science.” Further, a local practitioner admitted to practice in a particular state will be more familiar with the law and its interpretation within that state. Finally, this analysis was done at the state level looking primarily at statutes and their interpretation in state appellate courts. We have not done an analysis of local school board policy, state regulatory schemes or an exhaustive review of case law, ethics commission decisions or state attorney general opinions.

⁴ Thomas F. Burke, “The Concept of Corruption in Campaign Finance Law,” 14 *Const. Commentary* 127, 129, Spring 1997. Burke notes that discussions of corruption in political life take varying approaches including references to legal norms, public opinion and an analysis of the public interest.

⁵ In contrast, research on federal law is at least limited to determining how different federal courts apply the same law or the same concept, so there is a more focussed starting point for analysis. Sorauf, in discussing campaign finance, refers to the fifty states as “unknown experiences” and notes that: “Because their political institutions, history, tradition, and politics differ greatly, the 50 states are the curse of any commentary about American politics.” Frank J. Sorauf, *Money in American Elections*, 260, Scott, Foresman, 1988. While research of state law presents particular challenges and attendant limitations, a review of these laws is essential to an analysis of school governance structures.

III. Overview of State Laws

A. Basic Structure

The laws of each of the states set out a basic governance structure for education. Education is generally viewed as a state responsibility.⁶ In some states the educational obligations of the state are set forth in the Constitution,⁷ while in others they are established by statute. The most common structure is one where the State legislature commits supervisory and administrative power to a state board of education that promulgates standards, rules and curriculum to be implemented by the local school district.⁸ The local school district is governed by an elected local school board which sets general district policy within the guidelines established by the state board, and hires and supervises the superintendent⁹, principals, teachers and other key management staff.

Although the local board is given wide discretion within its area of authority, the state boards of education generally provide significant oversight and limitations on the local control exercised by the local board. For example, Florida's statute provides that the actions of the "district school officials shall be consistent and in harmony with state laws and with rules and minimum standards of the state board and the commissioner. District school officials, however, shall have the authority to provide additional educational opportunities, as desired, which are authorized, but not required, by law or by the district school board."¹⁰ For example, a local board might set the local school calendar within the

⁶ There is no federal Constitutional right to an education. For a discussion of this issue, see, Susan H. Bitensky, "Theoretical Foundations for a Right to Education under the U.S. Constitution: A Beginning to the End of the National Education Crisis," 86 *Northwestern University Law Rev.* 550, 552-53, Spring 1992. Biretsky notes "Reform efforts could be freed from the hobbling strictures of state and local governments' piecemeal and often resource-poor responses, as the federal government would bring its uniquely national perspective, powers, and resources to bear upon what has become, in scope and consequence, a truly national problem. Recognition of the right would work the kind of systemic change without which progress in ameliorating the crisis may be needlessly retarded or altogether frustrated." We observe that these same comments could apply to the piecemeal approach to ethics provisions for local and state officials.

⁷ See, e.g., Pa. Const. Art. 3, § 14, which states "The General Assembly shall provide for the maintenance and support of a thorough and efficient system of public education to serve the needs of the Commonwealth. "

⁸ Vermont is an example of a state that provides virtually no state control and as the survey respondent noted, "(s)ince we hold 'local control' somewhat as a religious mantra, it is not surprising."

⁹ Occasionally, superintendents are elected officials.

¹⁰ Fla. Stat. 230.03

state requirement of a certain number of hours or days of instruction.¹¹ As another example, a local school may hire teachers, but any teacher hired must meet requirements set by a state certification agency.¹²

B. The tension between local and state control

The dual control over the local school district by the local school board and the state through the state board of education, or other agency, is a fundamental tension in the school governance structure. While there is often reference to “local control,” the oversight by the state board is a significant limitation on local control. Further, the increasing number of federal funds and programs targeted at local schools also come with attendant restrictions and requirements. With the increasing call for national curriculum standards, the amount of state and federal control may increase. On the other hand, “local control” is a concept, which continues to resonate with voters. The Republican agenda for the 106th Congress claims that “local control” is the key to solving the nation’s education problems and that this is an issue of bi-partisan agreement. Christopher Cox, Chairman of the House Policy Committee states, “If we want progress, we must think anew. What are the principles upon which Democrats and Republicans can agree? The most obvious is local control. ‘The day of the Washington dictation style setting is over,’ said pollster Lou Harris at a November 18 National Press Club news conference analyzing education as an election issue. ‘The day of innovation at the local level is beginning.’”¹³ Despite these optimistic statements, it is likely that the fundamental tension over federal, state and local control of schools will not resolve itself soon.

In our review of state statutes and case law, we observed two sources of tension underlying the issue of local control of education. The first we label as questions of “educational competency” and the second as questions of “political competency.” Educational competency includes those questions and doubts about the ability of locally

¹¹ See, e.g., Pennsylvania statute at 24 P.S. § 15-1502 which allows the board to set the schedule, but eliminates certain days and holidays from the schedule.

¹² See, e.g., 24 P.S. § 25-2518 which imposes sanctions on districts that fail to hire properly certificated teachers.

¹³ “Thinking Anew: The Agenda for the 106th Congress,” Christopher Cox, Chairman, House Policy Committee, <http://policy.house.gov/agenda/106/rollcall.htm>

elected officials to manage schools. State laws suggest that legislators are often not certain that local school board members are capable of making important decisions about local schools. An explicit distrust in the professional competence of the local school board member creeps into the statutes and case law. For example, the teacher tenure provisions adopted in Minnesota place severe limitations on the local school board's ability to terminate a teacher. These changes were explicitly advocated as necessary to limit the power of the school board to commit "abusive employment practices" and to prevent the "arbitrary and capricious" exercise of power by the local school board.¹⁴

The question of political competency is more fundamental to the role of the school board member *as an elected official*. Here, we observe in state laws either a question of whether the state legislature can trust the local school board to act in the best interests of the children, or an ambiguity about whether or not a state wishes to raise a question about the nature of the stewardship compulsory attendance laws creates.. Can we count on them to fulfill their duties of supervision with only, or at least primarily, the motive of improving the quality of education in the local school? This second tension is fundamental to all elected offices in our democracy and is discussed more fully in the second portion of this paper. We look more closely at the issue of school board member self-interest and various laws designed to limit acting in pursuit of a personal, rather than a public, interest.

¹⁴See, *Goodwin v Board of Education*, 82 Mich App 559, 267 NW2d (1978)
142, *Andersen v Board of Education*, 73 Mich App 33, 250 NW2d 786 (1976).

C. The organization of school districts

There is variety in how states structure school districts as organizational units. In most instances, the school district is a separate corporate and political entity with independent taxing authority. Most states are divided into geographic districts for public education purposes. Sometimes these districts follow outlines of other political subdivisions such as cities, townships or counties, but other times they do not. School districts may cross other local political boundaries. The geographic size and district student population can vary widely.

Many states provide for the consolidation of districts or cooperation between districts. For example, in Pennsylvania the provision of certain special education services have historically been accomplished, on a mandatory or voluntary basis, through through “intermediate units” which can encompass several districts. The Maine and New Hampshire state statutes even provide for cooperative services across state lines.

The size of the local school board can also vary widely within and between states. The majority of states appear to have between five and nine member school boards. Districts with five and seven members were the most common. The largest reported size was thirteen members and the smallest size was three. Hawaii has a provision for converting to a “student centered” school governed by a board consisting of principals, instructional staff, support staff, parents of students attending the school, student body representatives, and representatives from the community at-large.¹⁵

Some states outlined a process for changing, usually increasing, the number of local board members. This may reflect the change from numerous small school districts supervised by a few members, perhaps three, to larger consolidated districts requiring more members to allow broader representation. Generally, the size of the school board increased with the size of the district. Some states have geographic district elections while others have a combination of both geographic district election as well as members

¹⁵ HRS § 302A-1123

elected “at large” from the whole district. In conclusion, the basic structure of the local school district governing board varied widely between states and even within states.

D. Requirements and Qualifications for Election

Local school board members are usually elected officials.¹⁶ While the structure of local districts varied widely within states, the requirements and qualifications are set on a statewide basis by the legislature. It is generally unlawful or unconstitutional for a local district to exclude a candidate for school district office by adding to these requirements.

Requirements for the office of school board are minimal.¹⁷ In many of the states surveyed, the fundamental requirement was that the candidate be a registered voter. Since voting requirements generally include being 18 and establishing residency in the district (often a 30-day requirement) these provide the bare minimum qualifications. Some states had a one-year residency requirement.¹⁸ Many states prohibit holding “incompatible offices” or “dual offices.”¹⁹ These provisions prohibit a person from holding two elected or public offices if the duties of the two offices would be in conflict. Many states require financial disclosure and campaign finance disclosure of all candidates for elected office. Only three of the states surveyed had any requirement related to basic competencies—and these were quite basic. New York and New Jersey require that school board members be able to read and write, and Alabama required a “fair elementary education.”^{20 21}

¹⁶ Most school boards are elected, although three percent — mostly in big cities — are appointed by city councils or mayors. *The School Reform Handbook: How to Improve Your Schools*, Section II, Chapter 6. Available online at <http://www.edreform.com/info/srhch6.htm>

Note that in a number of recent instances, authority over previously politically and fiscally independent schools was ceded to an elected mayor and from elected local school boards in: Boston, Cleveland, Detroit, and Washington, D.C.. In Chicago, the schools were more completely integrated into the administrative control of the City through state legislation.

¹⁷ See Table of Results, columns 1-3

¹⁸ See, e.g., Colorado, Florida, Illinois, Indiana, New Jersey, New York and Virginia

¹⁹ See, e.g., Va. Code Ann. § 2.1-37.01 which prohibits holding dual offices, or HRS § 13-2 and discussion of “incompatible offices” in applicable Attorney General Opinions. See, also, MSA § 15.1120(123) (1998) The state of Michigan incorporates the principle of incompatible offices in its statute. The general interpretative test is whether the two entities will negotiate or contract with one another. If yes, then the offices are incompatible.

²⁰ N.J. Stat. § 18A:12-1, NY CLS Educ § 2102, Code of Ala. § 16-8-1

A few states limit school board membership based on the commission of certain crimes. In some states, convicted felons are unable to vote or stand for election until the applicable fine or incarceration is completed. A few states specifically mention convicted felons as being unqualified to serve as school board directors.²² Georgia excludes persons convicted of crimes involving “moral turpitude,”²³ and Iowa excludes felons or persons convicted of “other infamous crimes.”²⁴

Only three of the thirty states reviewed had a requirement related to the morals of the candidate. Pennsylvania requires persons to be “of good moral character.”²⁵ North Carolina states that persons may be removed if guilty of “immoral or disreputable conduct.”²⁶ Alabama requires that its candidates “shall be persons of good moral character, with at least a fair elementary education, of good standing in their respective communities and known for their honesty, business ability, public spirit and interest in the good of public education.”²⁷ In contrast, it is not unusual for states to place some type of moral requirement on teaching candidates. For example, in Florida the qualifications for any position in a school system include good moral character.²⁸ These types of “morality requirements” are deemed essential for teachers. A North Carolina court stated:

“Teachers who are entrusted with the care of small children and adolescents are intended by parents, citizenry and lawmakers alike to serve as good examples for

²¹ Additionally, a state may refer to a “mental competency” requirement for public service and would exclude candidates unable to serve due to mental illness or incapacity.

²² See, e.g., Iowa, Indiana, Georgia and Texas.

²³ Black's Law Dictionary, Revised, Fourth Edition, defines moral turpitude as: “An act of baseness, vileness, or depravity in the private and social duties which man owes to his fellow men, or to society in general, contrary to the accepted and customary rule of right and duty between man and man.”

²⁴ At common law a person convicted of an “infamous crime” was not even permitted to testify. See 2 Wigmore on Evidence, §§ 519-520 (3d ed.); McCormick on Evidence, § 43 at 89 (1954).

²⁵ A disqualified candidate might make an argument based on “vagueness.” Further, it is not clear how a local election official would determine whether to strike a candidacy for failing to meet this provision.

²⁶ N.C. Gen. Stat. § 115C-39 (1997). Although grounds for removal and not a requirement for election, it is included here as one of the few states reviewed which had any mention of moral conduct requirements.

Other states may have provisions for removal for certain “misconduct” which could be “moral” in nature.

²⁷ Code of Ala. § 16-8-1.

²⁸ Fla. Stat. 231.10, 231.17(3)(c) (6).

their young charges. Their character and conduct may be expected to be above those of the average individual not working in so sensitive a relationship as that of teacher to pupil.”²⁹

While North Carolina extended its expectations to its school board members also, most states did not. In summary, many states have only voting and residency requirements while the remaining states have a variety of minimal qualifications. None of the thirty states reviewed excluded candidates from the elected office of school board based on qualities or competencies necessary for school supervision. Generally, it is assumed that voters are in the best position to evaluate the qualifications of candidates for elected office.

E. School Board Service and Salary

Once elected, school board members are required to take an oath of office. This oath of office is usually generic to all elected officials within the state and requires “the faithful performance of all duties” or some similar statement, and a promise to uphold the state and federal constitution and laws. School board members may be removed from office for various reasons including failure to attend meetings or misconduct.³⁰

Some states require new school board members to attend mandatory training,³¹ while other states provide for a voluntary program of training.³² Many states provide for membership in state and national school boards associations and refer to these organizations for school board member training.³³

²⁹ *Faulkner v. New Bern-Craven County Bd. of Educ.*, 311 N.C. 42, 316 S.E.2d 281 (1984) ruling on dismissal of teacher for excessive and habitual use of alcohol.

³⁰ For example, Illinois allows removal for a “willful failure” to perform their duties. See § 105 ILCS 5/3-15.5. For a review of removal of candidates from office, see, Dolores M. Nagy, “An analysis of court decisions involving the election, title to office, performance and removal of local public school directors.” University of Pittsburgh, 1981. Taking bribes or other clearly unethical conduct would likely constitute grounds for removal from office.

³¹ See, e.g., Georgia which requires mandatory training within first year. O.C.G.A. § 20-2-230

³² See, e.g., Ala. Code § 16-1-6 School board member training may also be required or implemented on the local level even if it is not specifically authorized or required by state statute. Generally, a training program would be well within the general governance authority of a local government unit.

³³ See, e.g. Utah Code Ann. § 53A-5-101

Of the thirty states reviewed, only four states provided more than a nominal salary and twelve states did not provide any type of payment for the services of school board members.³⁴ Some states specifically prohibited the payment of a salary, while others left it up to local district practice. In those states allowing payment, usually the payment was nominal. For example, a payment of \$25.00-\$50.00 per meeting or \$50.00-\$100.00 per day was allowed in some states.³⁵ Given that meetings and days are several hours long, and no provision is made for preparation time, the resulting pay is low.

Of the states surveyed, only Indiana, Florida, Utah and Virginia provided significant payment for services. Indiana permitted a payment of \$2,000 plus a per diem set by local practice.³⁶ Virginia and Florida provide salary ranges tied to the size of the school districts. In Virginia, the lower range amounts are comparable to Indiana and many districts pay less than \$5,000. However, a number of districts provided payments in the \$5,000-10,000 range with salaries reaching as high as \$12,500.³⁷ Florida's base range is from \$5,00-10,000 and up.³⁸ The salary ranges may be increased periodically.

Most states specifically allowed members to be reimbursed for expenses, although local practice determined the type of reimbursement permitted. In those states that did not include a specific provision permitting expenses, it was never prohibited by statute and it is likely that these items could be included in the local district budget.

In conclusion, requirements for election are minimal and mirror those of other elected officials within the state. Generally, school board members are expected to serve for nominal or no pay, although expenses are reimbursed. In some states, various provisions

³⁴ See Table of Results, column 6

³⁵ For example, Maine allows \$25.00-\$50.00 per meeting depending on local practice, Georgia allows \$50.00 per day while \$100.00 per day is permitted in Hawaii. In South Carolina the local district sets the per diem allowance. Vermont allows a small sum, for example \$500, for each entire year's service depending on local practice.

³⁶ Ind. Code 20-5-3-6.

³⁷ See Va. Code 22.1-32.

³⁸ Fla. Stat. 230.202.

require financial disclosure, campaign finance disclosure and adherence to ethical standards.

IV. Limitations on Relationships with the School District

A. General

While the first portion of this paper focussed on the general organizational structure and the requirements for school board service, the remainder of this paper will focus on the more problematic issue of how state laws attempt to supervise and limit the conduct of school board members to assure that they govern the district fairly.

Fundamental to the role of any elected official is the requirement that they act in the public interest. This notion of elected officials deliberating for the good of the public is at the heart of our democratic system of government. In the Federalist Papers, Madison extolled a form of government with an autonomous public authority that was larger than the sum of the private interests clamoring for power. Although arguably elitist, the Framers envisioned a form of government where thoughtful and caring citizens carefully deliberated about the issues before them. In this view, the public chooses a body of citizens to become a “disinterested and passionate umpire in disputes between different passions and interest in the State.”³⁹ Thomas Burke describes the ideal of the elected body as one which will “refine and enlarge the public views by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations.”⁴⁰

Fundamental to this notion of an elected body which can discern and act upon the “true interest” of the public, is the idea that these officials must be motivated by the good of the public and not their own personal self-interest. The public then, has a clear and

³⁹ Gordon S. Wood, *The Radicalism of the American Revolution*, 253 (Alfred A. Knopf, 1992) (this quote is from a letter to Edmond Radolph, dated April 8, 1787 from the Papers of Madison, IX, 370, 384).

⁴⁰ Thomas F. Burke, “The Concept of Corruption in Campaign Finance Law,” 14 *Const. Commentary* 127, Spring 1997, 143

paramount interest in structuring the relationship of the elected official to the public in a way that protects it from any considerations other than what is best for the public. The public also has an interest in promoting the public acceptance of government decisions by avoiding impropriety and even the appearance of impropriety in decision making.

Another view of the role of the elected official can be described as the representative or pluralist view of government. While the deliberative view of government posits the ideal of a separate and dispassionate group of elected officials who carefully and fairly deliberate among the competing interests brought before them, the pluralistic or representative view sees government as the result of competing interests negotiating for rights and privileges. In this view, democracy is a matter of “preference aggregation,” and elected officials are expected to act as representatives of the interests which enable them to get elected and re-elected. In this view, laws are not viewed as the result of deliberation, “but on the contrary as a kind of commodity, subject to the usual forces of supply and demand.”⁴¹

If government is seen more as “preference aggregation,” then the focus on limitations are ones that assure that there is no unfair advantage in promoting a particular view. This problem usually is thought to be solved by simply requiring officials to abstain from certain votes and requiring that all contracts be let in a competitive bidding process. The effect of influences which hamper an official’s ability to deliberate or the impact of actions on public perceptions of “fairness” are less central. Rather, this view recognizes that different participants in a democracy have different levels of power and influence and that these are inevitably reflected in the political process.

Both of these descriptions are admittedly an over-simplification of a complex process which has been analyzed extensively in the development of American democracy..⁴²

⁴¹ Cass Susstein, *Partial Constitution* at 24-25, as cited in Burke, *infra*, at 148.

⁴² For example, another dichotomy used to describe different views and strategies for organizing government are the “moralist/idealist” views and the “realist” or “proceduralist” view. For a discussion of the limitations of the “moralist/idealist” view, see, Bruce E. Cain, *Moralism and Realism in Campaign Finance Reform*, 1995 *U Chi Legal F* 111. For a discussion of the concept of corruption and governance, see also, Arnold Heidenheimer, Michael Johnston, and Victor T. LeVine, eds, *Political Corruption: A Handbook* (Transaction Publishers, 1989); John G. Peters and Susan Welch, “Political Corruption in

However, we believe that these different ways of viewing government help to understand the wide differences in how states treat the relationship of the school board member to the district. We argue that a deliberative view supports a broad range of limitations targeted at protecting the official from undue influence, but also focused on protecting the public from a loss of confidence in the institution. Limitations are justified based on concerns for the individual and for the institution as a whole.

The pluralist theory points to a narrower range of limitations. First, the public perception of the institution and the “appearance” of impropriety are managed not by trying to control the conduct of the officials, but by mandating full and complete disclosure. Armed with information, the public is then free to make their preferences known at the ballot box. Thus, in this view it hardly matters who gets the contract for goods or services, so long as the district receives the lowest price of agreed upon quality.⁴³ Accordingly, public bidding and procurement processes adequately protect the public.

It is likely that a hybrid system which uses disclosure, open processes *and* limitations designed to insulate board member from distracting influences or self-interest, can maintain public confidence in local institutions and promote and protect the public interest. With this in mind, we looked at two areas of school board activity to ascertain if they approximated this hybrid model: 1) the relationship of the school board member to the employees within the district, and 2) the relationship of the school board member to the various contracts entered into by the school district for materials and services. In many states, we conclude that these statutes are not adequate.

B. Relationships with Employees within the District:

America: A Search for Definitions and a Theory,” 72 *Am Pol Sci Rev* 974 (1978); Edward C. Banfield, “Corruption as a Feature of Governmental Organization,” 18 *J L & Econ* 587 (1975); Dennis F. Thompson, “Mediated Corruption: The Case of the Keating Five,” 87 *Am Pol Sci Rev* 369 (1993).

⁴³ However, courts often require strict compliance with bidding requirements designed to protect public. *Haddock v. Board of Pub. Educ.*, Del. Ch., 84 A.2d 157 (1951)

Employment of Board Member in the District

Virtually all of the thirty states reviewed specifically disqualify education employees of the school district from serving as school board members.⁴⁴ However, some states make exceptions for other employment positions. For example, in South Carolina and Nebraska school board members may be employed in non-teaching positions. Iowa is an example of a state that generally prohibits employment, but makes limited exceptions to allow for part-time work such as substitute teaching or coaching positions. Vermont also has some narrow exceptions to the general prohibition. Maine extends the prohibition on the employment of a board member, or spouse, to include employment in a district represented by the same union.⁴⁵ Colorado was the only state statute reviewed which did not specifically prohibit a board member from being employed within the district. However, local practice may still prohibit the conduct and a court found in favor of a local board which refused to hire a board member based on a “conflicts of interest” policy.⁴⁶

Statutes which prohibit employees of the school district from also serving as board members are essential. Although exceptions permitting part-time or incidental employment seem reasonable, allowing employees to be school board members violates the principle that board members should be those free from personal self interest. Expecting school board members to essentially supervise themselves as employees is unwise. We recommend that prohibitions on employment be extended to all employees, not just teachers and other education personnel.⁴⁷

Employment of Relatives within the District

We also think it is essential for states to address the issue of relatives of board members being employed in the district. State statutes provide less direction or clear prohibitions

⁴⁴ See, Table of Results, column 4

⁴⁵ 20-A M.R.S. sec. 1002.

⁴⁶ *Montrose County School District et al. v. Patricia Lambert et al.*, 826 P. 2d 349 (1992). However, as will be discussed, these types of prohibitions based on policy are more vulnerable to attack than clear statutory directives.

⁴⁷ Some exceptions may be related to the pool of available candidates in small, remote districts. Certainly these types of situations could be treated as unusual exceptions with oversight by the state board of education or other outside entity.

on this issue. Only a very few states placed significant restrictions on employment of relatives of board members within the district. Maine does not permit spouses of board members to be employed.⁴⁸ Alaska and Virginia prohibit certain relatives of a board member from being employed in the district.⁴⁹ New York permits the employment of relatives, but a 2/3 vote is required.⁵⁰ Minnesota permits the employment of relatives, but requires 100% board approval.⁵¹

The definitions of family or relatives varied among the states and once adopted were strictly construed.⁵² Alaska limits the prohibition to “immediate family,” which is husband-wife, parent-child, and siblings.⁵³ Virginia extends the prohibition to include a son-in-law, daughter-in-law, sister-in-law or brother-in-law of the superintendent, or of any member of the school board.⁵⁴ Maine refers only to a spouse. States also provide exceptions. For example, Virginia and Alaska limits prohibition on employment to persons hired after the family member joins the board.⁵⁵

Many states permit a relative of a board member to be employed, but require the board member to abstain from any action on the employment contract. These solutions, however, do not address the issues which arise during a board member’s tenure which involve the expectations, work conditions and budgeting issues affecting all employees, including the relative. This approach also fails to address the issue of whether the

⁴⁸ 20-A M.R.S. sec. 1002

⁴⁹ 4 AAC 18.900(a), Va. Code Ann. § 2.1-639.16.

⁵⁰ NY CLS Educ § 3016

⁵¹ Minn. Stat. § 122A.40

⁵² See, e.g. Op S.C.St. Ethics Comm., SEC A092-214, June 9, 1992 which found that an emancipated son did not fall within the definition of “immediate family.”

⁵³ 4 AAC 18.900(a). Alaska provides for approval for employment of relatives through the state commissioner of education. This approval is not always granted. See, *Degnan v. Bering Strait Sch. Dist.*, No. 3310, File No. S-2011, Supreme Court of Alaska, 753 P.2d 146; 1988 Alas. LEXIS 44, April 29, 1988

⁵⁴ Va. Code Ann. § 2.1-639.16

⁵⁵ Virginia provides an exception if the relative was employed by the school district prior to the board member’s term of office or the inception of the relationship. Alaska provides an exception available through the commissioner and also does not apply to continued employment of persons hired before the family member was seated on the board. October 24, 1994, Op. Att’y Gen.

existence of the family relationship makes it more likely that particular interests that are not common to the general public interest will influence the board member.⁵⁶

We were surprised that many states do not attempt to clearly define this issue at all in the school code. Although some states had nepotism statutes applicable to all public officials, in several states we found no state statute which clearly prohibited board members from participating in the employment decisions affecting relatives.⁵⁷ It should be noted that local practice might be to have the board member abstain.⁵⁸ In some states, a general conflict of interest statute could also be interpreted to exclude voting for relatives. These types of statutes generally include language that prohibits an official when it would “inure to the special private gain or loss of a relative or business associate.”⁵⁹ This may be less effective than a clear statement in the school code specifically referring to employment situations.

We believe that being closely related to an employee of the school district violates the principle that the relationship should be structured to avoid the influence of personal self-interest. To the contrary, the existence of some relationships, for instance, being married to a teacher within the district, so clearly creates a situation of personal or particular interest that these types of relationships should be absolutely prohibited.

We would anticipate objections to this call for reform as it may: 1) violate the American ideal of measuring an individual on their own worth, and not their ancestry; 2) could be perceived as unfair to an excluded employee; and 3) may exclude some candidates from office. We note that a board member’s service is completely voluntary. A board member is not required to serve and there are arguably many other qualified candidates within the district who could more appropriately fulfill the duties of the office. The objection also

⁵⁶ This criticism could also be made regarding states which provide an exception for family members hired before the board members’ service. This exception acknowledges that the initial employment decision was not tainted by self interest, but fails to fully address issues of “particular” interest with regard to continuing employment decisions.

⁵⁷ See, e.g., Colorado, Georgia, Hawaii, Illinois, Indiana, Iowa, Massachusetts, Michigan, Missouri, North Carolina, Oregon, and Utah.

⁵⁸ For example, the survey response from Nebraska indicated that limitations of employment of relatives were according to local policy.

fails to acknowledge that public issues often involve a balancing of the individual and group interest. The alleged ‘unfairness’ to one potential candidate or employee must be weighed against the needs of the institution as a whole. The objection also encompasses the ideal of board members objectively measuring the merits of various employment decisions based on an individual’s worth, but then fails to realistically adopt a solution to meet this ideal. This proposal simply recognizes the natural human tendency to be influenced by personal interests. In determining whether a board member is qualified for office it is legitimate to question whether their personal relationships within the district create a situation that is not in the best interests of the district.

There are problems with this approach. In practical terms, disqualification of board members based on personal relationships creates line-drawing problems. One court noted: “regardless of the criticism of nepotism and of tandem employment of relatives, a difficult decision is always presented as to where the line is to be drawn -- at spouses, or parents and children, or brothers and sisters, etc. Some families are extremely close unto two or three degrees of kindred. Some are to the contrary.”⁶⁰ Further, any attempt to extend prohibitions to associates can easily run afoul of the individual’s Constitutional “right of association.”⁶¹ It may be difficult to know where to “draw the line,” and certainly, any rule cannot deal with all possible personal associations and relationships that may be problematic. However, the fact that *all* situations are not capable of regulation does not lead to the conclusion that *any* limitation is unsound.

⁵⁹ See, e.g., Fla. Stat. § 112.3143(3)

⁶⁰ *Montrose County School Dist. v. Lambert*, 826 P.2d 349, 352-53 (Colo. 1992)

⁶¹ See, e.g., *Robin R. Milligan v. Albertville City Board of Education*, 628 So. 2d 625; 1993 Ala. Civ. App. LEXIS 271 (1993). The United States Supreme Court has stated: "Our decisions have referred to constitutionally protected 'freedom of association' in two distinct senses. In one line of decisions, the Court has concluded that *choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State* because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme. In this respect, freedom of association receives protection as a fundamental element of personal liberty." *Roberts v. United States Jaycees*, 468 U.S. 609, 617-18, 82 L. Ed. 2d 462, 104 S. Ct. 3244 (1984), emphasis supplied.

We also questioned whether a state law was necessary or whether regulation or local policy could handle these problems. However, enforcement of even basic limitations will be vulnerable to attack if not backed by a state law. For example, in New York two board members were successful in annulling a portion of the code of ethics adopted by the Board of Education which prohibited board members from voting on employment contracts of their spouses. In its opinion the commissioner reasoned:

Conspicuously absent from this provision is any restriction on the exercise of power by board members whose spouses are employed by the district as teachers. The reasonable inference drawn from this omission is that the Legislature did not intend to restrict board members from voting on their spouses' employment contracts. By enacting a standard which does precisely that, the Board of Education has contravened the plain intent of § 3016, and has, in effect, prevented certain board members from substantially performing the duties of office. Accordingly, the provision of the Board of Education's ethics code which prohibit board members from voting on the employment contract of their spouses is an excess of the authority of the Board of Education, and is null and void.⁶²

In another instance, a Wyoming court held that board members could not be disqualified from sitting on the board of a school district because a spouse was a teacher employed by the district. The court reasoned that “a husband and wife could no longer be viewed in the law as a single entity,” noting Wyoming’s equal rights amendment and statutory provisions that treated spouses as “independent actors” with respect to income, contracts, and property.⁶³ In Wisconsin, a court held that an anti-nepotism policy adopted by a local district was part of the terms and conditions of employment and therefore subject to collective bargaining.⁶⁴ Accordingly, while some courts may allow higher ethical standards to be adopted, others will view such attempts as an infringement on state legislative power or contractual rights.

C. Business Relationships with the School District

⁶² *Appeal of Behuniak and Lattimore*, 1991 Op Comr Educ No 12447. The opinion also references an exception for spouses in the conflict of interest law.

⁶³ *Coyne v. State ex rel. Thomas*, 595 P.2d 970 (Wyo. 1979)

⁶⁴ *School District of Drummond v. Wisconsin Employment Relations Commission*, 120 Wis. 2d 1; 352 N.W.2d 662; 1984 Wisc. App. LEXIS 4050 (1984)

The ability of board members to enter into contractual relationships with the district was another area where we found governance structures inadequate. While some states prohibit direct business dealings between a board member and the board, many states rely on disclosure requirements and a bidding process to protect the district from board member self interest. The bidding processes and procurement practices varied among the states.

Georgia, Minnesota, New York and New Jersey do not permit business dealings between school districts and board members. More often, the statute permits the business dealings with certain requirements such as disclosure of the interest and/or an open bidding process.⁶⁵ Some states seem unclear in their direction. For example, Wyoming requires abstention if the official has a personal or private interest in the matter, but states that in determining whether an interest exists, the elected official “shall recognize his right to represent his constituency and shall abstain from voting *only in clear cases* of a personal or private interest...”⁶⁶ In contrast, Virginia’s statute, although not absolutely prohibiting business relationships, is quite clear in discouraging the practice. Virginia law requires that in addition to a competitive sealed bidding process, the need for the contract must have been established prior to the board member’s service and the remaining board members must adopt a written resolution “that it is in the public interest for the member to bid on such contract.”⁶⁷

States also differ in the source of law on the subject of business dealings. Some states, such as Pennsylvania, specifically address the issue of contracts with board members in the school code. Some states address the issue of business dealings in general statutes applicable to all public officials including school board members. Still others address this issue in case law. For example, in Georgia the common law doctrine of “conflict of interest” was cited as prohibiting contracts with the board without citation to any specific

⁶⁵ See, e.g., Colorado, Indiana, Iowa, Florida, Maine, Nebraska, Texas, Virginia and Vermont.

⁶⁶ Wyoming Ethic and Disclosure Act, 9-12-106, *emphasis supplied*.

⁶⁷ Va. Code Ann. 2.1-639.7:1

statutory authority.⁶⁸ In another case, the Georgia court upheld a more stringent local ethical policy reasoning that the state ethics law was “a floor not a ceiling for the boundaries of ethical conduct by government officials.”⁶⁹ In contrast, in New York a court found invalid a local ethics requirement because it eliminated persons from office whom the state had found qualified.^{70 71}

In conclusion, our review of thirty state statutes with regard to their regulation of school board member business relationships with their district indicates there are three basic approaches to the issue of business relationships with the district. Some states require that the board member disclose the interest and abstain from deliberating and voting on the issue. Other states combine abstention and disclosure provisions with public bidding and procurement processes. Few states took the approach of eliminating or severely limiting the ability of board members to enter into business relationships with the district. We concluded that the latter approach is the one that provides maximum protection to the public and also increases the confidence of public and employees in the fairness of the process.⁷²

V. Personal and Campaign Finance Disclosure Laws

In addition to the various provisions outlined above, many states also require elected officials to disclose their personal and campaign finances. These statutes help assure the openness and fairness of the process and provide the public with necessary information to make informed decisions. Although an exhaustive review of these types of statutes was beyond the scope of this project, we noted the following differences among states. Although many states included school board members and other locally elected officials

⁶⁸See also, *State v. Agan*, 259 Ga. 541, 384 SE 2d 863,(1989) *cert den.* 494 US 1057, 110 S. Ct. 1526, 108 L.Ed. 2d 765 (1990).

⁶⁹ *Dick v. Williams*, 215 Ga. App. 629, 631; 452 SE 2d 172 (1994).

⁷⁰ *Matter of Guilderland CSD*, 23 Educ. Dep’t Rep. 262 (1984).

⁷¹Although a distinction could be made between the court ruling on *service on* the board versus *election to* the board, we think it more likely that these different results are an example of the wide variety among the states reviewed in addressing ethics issues.

⁷² An absolute prohibition on business could be combined with some process for exception in extreme cases of hardship on the district.

in disclosure laws, some states limited application to state level positions. Another difference was in the level of disclosure. Some states required disclosure of the official and persons in the household, while others limited disclosure to just the public official. We observed that many disclosure provisions could easily be avoided by placing business or contracts in a spouse or dependent's name. On the other hand, broad disclosure provisions are often challenged.⁷³

We also found broad differences in the direction given to officials. Further, the variety in types of information requested, form of the information, different filing procedures between localities and states make review of disclosure information difficult. We also concluded that a clearer statement of purpose, such as might be found in an oath of office, would powerfully define the board member's duty in a formal fashion and would be a helpful addition to negative statements of prohibited conduct.

VI. Implementation Challenges

A. Unintended Effects

In some cases, adopting what are common called "ethics statutes" did not necessarily seem to lead to desired results. Passing "ethics" and "conflict of interest" laws can have unintended effects. A classic example of this phenomenon in the area of "ethics reform" is the sudden rise in the number of political action committees ("PACs") after passage of campaign reforms in the 1970s.⁷⁴ Sorauf notes that PACs were "unquestionably one of the beneficiaries of the fundamental laws of the mechanics of campaign finance: available money seeks an outlet, and if some outlets are narrowed or closed off, money flows with increased pressure to the outlets still open."⁷⁵ The creation of the distinction between "hard" and "soft" money only increased the secrecy of certain types of campaign contributions.⁷⁶ These experiences suggest that failing to carefully define prohibited

⁷³ Recall the furor over Geraldine Ferraro's husband's reluctance to disclose his business dealings? In Pennsylvania a similar issue was litigated and eventually the disclosure provisions changed by the legislature to limit disclosure to the office holders. *See, Snider v. Shapp*, 45 Pa.Comm. 337, 405 A.2d 602 (1979), *affirmed in part*, 496 Pa. 159, 436 A.2d 593 (1981)

⁷⁴ The number of PACs rose from 600 in 1974 to 4,000 one decade later. Sorauf, *Id* at 77.

⁷⁵ Sorauf, *Id* at 74.

⁷⁶ Sorauf quotes from *Money in Politics: Campaign Spending out of Control*, (Washington, D.C.: Center for Responsive Politics, 1985), 23-24: "...soft money entrepreneurs have interpreted the law to say that they

conduct will fail to bring desired reforms if not part of comprehensive and systemic reforms. Continuing reform efforts must be implemented to respond to situations inevitably resulting from “the law of unanticipated consequences.”⁷⁷

B. Judicial Interpretation

Second, the efficacy of enforcement is heavily dependent on the judicial system. Again, unintended effects can appear. For example, once a legislature specifically defines prohibited conduct, courts may be reluctant to prohibit the conduct by resort to general principles of justice. For example, a recent Pennsylvania case found that since the legislature did not specifically prohibit the particular conduct, then it was legal even though it admittedly might create “giant loopholes” in the statute. The court found that there was no violation when the President of the school board participated in decisions to create a new position and then voted for his son-in-law, the *only* applicant for the position. The court stated:

Although there may be numerous cases where public officials seem to commit acts which create the "appearance of impropriety," the Commission is limited to enforcing those violations specifically set forth in the Act. It is not the function of the Investigative Division or the Ethics Commission itself to plug major loopholes in the Ethics Law which gives them power to adjudicate public officials as felons and to imprison and fine them.⁷⁸

Similarly, in South Carolina the Ethics Commission ruled that a city councilman could participate in deliberations on a contract award to a company in which the council member’s son was a principal because the emancipated son did not fall within the definition of “immediate family.”⁷⁹ Paradoxically, the attempt to prohibit self-dealing by government officials may result in less restriction under specific definitions of covered conduct and transactions than under previous broad principles applied by the courts. Further, because legislators are often adopting legislation that will apply to their own

do not have to disclose any money collected for ‘indirect’ or ‘non-federal’ purposes. This interpretation has enabled national parties to raise millions of dollars without telling anyone their financial sources....”

⁷⁷ Sorauf, Id at 80.

⁷⁸ *Pulice v. State Ethics Commission*, No. 875 C.D. 1997, 1998 Pa. Commw. LEXIS 474 (June 3, 1998), *appeal denied*, 1998 Pa. LEXIS 2662, (December 10, 1998)

⁷⁹ Op S.C.St. Ethics Comm., SEC A092-214, June 9, 1992.

conduct as public officials, is it any surprise that the resulting statutes have numerous “major loopholes?”

Traditional approaches to the relationship between the judicial and legislative branch may be inadequate when courts are charged with implementing laws whose purpose it is to regulate the conduct of those making the laws and protect the public from the abuses of these same lawmakers. While courts are generally reluctant to exceed their judicial authority, the unique characteristics in this situation may warrant a judicial approach that promotes the purposes of the act and adequately protects the public. Some courts have taken a public interest approach to this problem, but others seem to thwart the obvious purposes of the laws.

As a positive example, in *People v. Louis Honig III*, the court considered Honig’s appeal after a jury found him guilty of four counts of making official contracts in which he had a financial interest in violation of California laws.⁸⁰ Honig, the state Superintendent of Public Instruction and Director of Education, instructed employees to prepare contracts which provided for the salary of a public school principal on leave of absence to be paid out of state grants. This public school principal was employed full time by a non-profit organization started by the superintendent. The non-profit organization employed the superintendent’s wife. The prosecution also established that the contracts at issue arose in an unusual manner. Rather than commencing by application or request and then proceeding through channels in the state Department of Education (“DOE”) for ultimate approval, these contracts arose at the highest level of authority when Honig orally instructed his staff to put the contracts in place. Further, there was no supervision of the grants by the DOE.

⁸⁰*People v. Louis Honig III*, 48 Cal. App. 4th 289; 1996 Cal. App. LEXIS 755; 55 Cal. Rptr. 2d 555; 96 Cal. Daily Op. Service 5920; 96 Daily Journal DAR 9647 (1996); Another example of a public interest approach is found in *Hunt v. State*, 642 So. 2d 999 (Ala. Crim. App. 1993), aff’d, 642 So. 2d 1060 (Ala. 1994). The court noted that although the section contains no definition for “gain” or “personal financial gain,” it is “clear from the policy behind this statute, that the term “gain” is not intended to be a precise or comparative term, because it is the appearance of impropriety that this statute seeks to avoid.”

Defendant Honig argued that the transactions were “grants” rather than “contracts” and thus were beyond the scope of the charged crimes. The court soundly rejected this argument and stated:

In enacting the conflict-of-interest provisions the Legislature was not concerned with the technical terms and rules applicable to the making of contracts, but instead sought to establish rules governing the conduct of governmental officials. Accordingly, those provisions cannot be given a narrow and technical interpretation that would limit their scope and defeat the legislative purpose.⁸¹

The court also discussed the broad purposes of the statute and recognized the danger to the deliberative process of permitting public officials to have financial interests in contracts with the state. The court states:

The conflict-of-interest statutes are based upon "[t]he truism that a person cannot serve two masters simultaneously," which is regarded as a "self-evident truth, as trite and impregnable as the law of gravitation" The duties of public office demand the absolute loyalty and undivided, uncompromised allegiance of the individual that holds the office. Yet it is recognized "that an impairment of impartial judgment can occur in even the most well-meaning men when their personal economic interests are affected by the business they transact on behalf of the Government." Consequently, our conflict-of-interest statutes are concerned with what might have happened rather than merely what actually happened. They are aimed at eliminating temptation, avoiding the appearance of impropriety, and assuring the government of the officer's undivided and uncompromised allegiance. Their objective "is to remove or limit the *possibility* of any personal influence, either directly or indirectly which might bear on an official's decision"82

But even within the same state, another court took an approach which we found appalling in its lack of concern for the protection of the public. In *City of Vernon v. Central Basin Water District*,⁸³ the City sought injunctive and other relief against a municipal water district, (“District”), an elected member of District's board of directors (“Zastrow”) and Peerless, a private water company in which Zastrow was an owner, stockholder, and salaried president. District sold reclaimed water to 23 purveyors of reclaimed water,

⁸¹ *Honig*, at 567-568 (citations omitted)

⁸² *Honig* at 567 (citations omitted)

⁸³ *City of Vernon v. Central Basin Municipal Water District et al.*, 69 Cal. App. 4th 508; 1999 Cal. App. LEXIS 53; 81 Cal. Rptr. 2d 650; 99 Cal. Daily Op. Service 710; 99 Daily Journal DAR 839, January 25, 1999)

including Peerless, who resold it to users such as parks, nurseries, and golf courses.

The City argued that this arrangement violated two different statutory schemes prohibiting financial conflicts of interest by governmental officials. City argued that Zastrow's participation in decisions to set the rates to be charged to the purveyors for reclaimed water, and to set a standby assessment on all land within the district to help finance District's water conservation program, violated the prohibition against officials "making, participating in making, or using their official position to influence a governmental decision in which they have a financial interest." City sought an injunction to restrain Zastrow from participating in decisions pertaining to assessments and water rates for District's reclaimed water program. City also contended that Peerless' continuing receipt of reclaimed water from District were contracts which should be voided pursuant to the Government Code section 1090, the same statute discussed in *Honig*, which prohibits officials being financially interested "in any contract" made by any board of which they are members.

The court rejected these arguments and concluded that the sale of water to Peerless, one of only 23 purchasers, was within an exception for "a public service generally provided by District, at an established rate of general applicability to all purveyors of reclaimed water, on the same terms and conditions." Plaintiff-City argued that the phrase "public services generally provided" must be construed to mean "services provided to the general public," or to the "public at large." The court disagreed and stated:

Plaintiff is advocating that we rewrite the words of the statute. Public agencies provide many kinds of "public services" that only a limited portion of the public needs or can use. ... There are 23 purveyors, all of whom are charged the same set rate. This is sufficient to establish that the public services, delivery of reclaimed water, are 'generally provided' 'on the same terms and conditions as if were not a member of the board.' There is no special rate for Peerless.⁸⁴

Completely absent from the court's discussion was any consideration of how the public interest could be affected by having a board member so obviously interested in the

⁸⁴*City of Vernon* at 514-15

outcome of board decision making.⁸⁵ The court also declined to grant Plaintiff's request for an injunction prohibiting Zastrow from participating in future decisions and stated: "Plaintiff is seeking to enjoin an elected District board member from participating in any decisions involving standby assessments and water rates. 'Especially where governmental action is involved, courts should not intervene unless the need for equitable relief is clear, not remote or speculative.'"⁸⁶ Although some of this difference in approach is certainly attributable to procedural and technical grounds, the court in *City of Vernon* did not seem concerned with the obvious "possibility of any personal influence, either directly or indirectly" which was central to the court's analysis in *Honig*.⁸⁷

Statutes designed to regulate complex conduct will be ineffective if courts adopt overly technical approaches or focus on the "rights" of individual officials without a careful weighing of the impact of their decisions on the public's need for disinterested public officials. Legislative reformers may need to include strong provisions that instruct courts to interpret the act to accomplish broad purposes and to avoid technical interpretations.

Statutes must also allow for a broad range of remedies. This would give the courts the power to adequately prohibit questionable conduct while not unfairly punishing public officials who had some legitimate argument that their conduct did not violate the statute.⁸⁸ As the Pennsylvania case demonstrates, if courts are forced to label officials as

⁸⁵ We also thought it interesting that particular groups may effectively carve out exceptions. For example, in Alabama § 36-25-9, the conflicts of interest statute, provides: "(a) Unless expressly provided otherwise by law, no person shall serve as a member or employee of a state, county, or municipal regulatory board or commissioner other body that regulates any business with which he is associated. Nothing herein shall prohibit real estate brokers, agents, developers, appraisers, mortgage bankers, or other persons in the real estate field, or other state-licensed professionals, from serving on any planning boards or commissions, housing authorities, zoning board, board of adjustment, code enforcement board, industrial board, utilities board, state board, or commission." Is "urban sprawl" a surprise under these governance conditions?

⁸⁶ *City of Vernon* at 517

⁸⁷ See also, *Robert J. Quinn v. State Ethics Commission*, 401 Mass. 210; 516 N.E.2d 124; 1987 Mass. LEXIS 1523 where the court stated that the statute "is concerned with the appearance of and the potential for impropriety as well as with actual improprieties."

⁸⁸ A Georgia court found a violation, but was careful not to impugn the motives of the officials. The court stated: "In so holding, however, we would emphasize, as did the trial court, that there is no question of the integrity or motives of the defendants in this case. Indeed, Commissioner Cooper sought the advice of the county attorney on his participation in this matter on two occasions. However, we nevertheless agree with the trial court that the rezoning application in this case should be remanded and reheard by the Board, and that Commissioner Cooper should not participate in these proceedings." *Dick et al. v. Williams et al.*, 215 Ga. App. 629; 452 S.E.2d 172; 1994 Ga. App. LEXIS 1317; 94 Fulton County DR P4005 (1994).

“felons,” then they will admittedly be reluctant to take anything other than a narrow and technical interpretation of prohibited conduct.

C. Enforcement Mechanisms

Statutes, however well drafted, may also suffer for lack of enforcement. Poor funding, an inadequate system for enforcement, and systemic secrecy may undermine efforts to limit self-dealing. Who knows? Whose job is it to do something about it? Who has the resources to investigate and litigate? The answers to these questions will determine the effectiveness of statutes.⁸⁹

New Jersey is an example of a state with a continuously developing case law applicable to school board members. The School Ethics Commission and Commissioner of Education oversee application of the state’s laws. In recent years, decisions have limited a board member’s involvement which might affect a spouse who was a member of the local Administrators Association,⁹⁰ censured board members who participated in negotiations and voted on agreement when sister, fiancé and brother were in the bargaining unit,⁹¹ dismissed board members for failure to attend required training,⁹² and censured a board member for participating in discussions and voting for principal a person for whom he had been campaign manager in a township election.⁹³ The existence of an ethics commission specifically charged with providing guidance to local officials may help create a “body of law” which provides clear direction to school board members and their districts.

However, even with an adequately funded enforcement scheme and clear direction, there will always be areas of “gray” where persons may disagree on the propriety of the conduct and some individuals may thwart the purposes of the law. For example, while

While articulating the standards of conduct, it is important that the motives and integrity of local school board officials be treated respectfully and carefully.

⁸⁹ For example, although Georgia courts appear to take a more proactive approach, defendants have claimed selective enforcement by prosecutors. *See, e.g. State v. Agan, infra.*

⁹⁰ Advisory Opinion A16-96.

⁹¹ Complaints C12-97 (12/16/97)

⁹² *See, e.g., In the Matter of Bettie Jo Ziemer*, 97 N.J.A.R. 2d (EDU) ____ (Sept. 3).

⁹³ *Famularo/Asbury Park*, 98 N.J.A.R. 2d (EDU) ____ (March 16).

each state had some limitation on business dealings between a board member and the school district, actions which may benefit the board member indirectly, such as employment of acquaintances, contracting with relatives and acquaintances, or providing connections or business opportunities are harder to regulate. For example, in New Jersey a board member can have a college preparation and counseling business, in New York a spouse of a board member may be employed in the district, emancipated children are not considered “family” in New Jersey or South Carolina, and in-laws are not “relatives” in Pennsylvania. Common sense suggests that each of these relationships could easily influence a board member’s judgment or provide some economic or personal benefit.

Another area of concern is the fact that large district elections often require expensive campaigning and advertising. Candidates that can draw resources from established interest groups, such as the local education associations, may enjoy advantages that cannot be eliminated within our system.⁹⁴ The intersection of deliberative theories and “preference aggregation” in local decision making will continue to create tension.

We are cognizant that no set of laws will eliminate the ability of personal motivations to influence the deliberative process or eliminate the fact that our government and laws do, to some extent, reflect the “preference aggregation” of more powerful elements. We also acknowledge that reform can have paradoxical and unintended effects. However, the issue of the relationship of the board member to the district is so fundamental to an effective governance structure that we believe reform is warranted. We argue that states that have seriously attempted to curb board member self interest through disclosure provisions and by adequately regulating employment of relatives and business dealings with the district represent the better practice.

⁹⁴ There has been some discussion within the federal debate on campaign financing on the issue of how donations “distort” the campaign process. However, the distortion approach has been heavily criticized and difficult to implement. We think it likely that limitations on campaign financing will not be sustained on these grounds and continuing inequities in resources are simply the inevitable result of the democratic process. For a thorough and compelling discussion of this issue, see, Burke, *infra* at 133. See, also, Scalia’s dissent in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652; 110 S. Ct. 1391; 1990 U.S. LEXIS 1665; 108 L. Ed. 2d 652; 58 U.S.L.W. 4371 (1990).

VII. Conclusions

A. Summary of Findings

Our review of state laws governing school board members' conduct has found that:

- requirements for election and service are modest
- few states limit the employment of relatives and some states do not prohibit school board members from voting on hiring relatives
- some states do not prohibit school board members from engaging in business relations with the district for profit or personal benefit
- conflict of interest prohibitions deal primarily with direct conflict of interest, and often rely on disclosure and bidding to protect the public interest
- drafting rules to deal with associations and indirect interests are complex and difficult
- court rulings can substantially augment or undermine local efforts to raise the ethical bar
- the oath of office is “generic” and fails to obligate school board members to act in their official capacity in the educational interest of the students;
- few states permit significant compensation to school board members in consideration for their service; and
- some states have established agencies to deal with school board ethics issues.

Have local control and Jeffersonian democracy gone wild? Why should we be surprised in this legal setting when evidence suggests that school board members do not hire the most academically qualified teacher candidates? Why should we be surprised that the public has lost confidence in the system of government when local officials are engaged in business dealings with the same government entities they are supposed to be supervising? Does the public buy the idea that a school board member whose spouse works for the system is free from bias? Is high board member turnover a result of the frustration of diligent members in this inadequate system of governance?

B. Structure of Legal Reforms: An Agenda to Make a Difference

Education repeatedly rises to the top of public concerns. Various proposals suggest injecting billions of additional dollars into our education system of over the next two decades. Without essential reforms to the governance structure, confidence in school boards functioning solely in the public interest may be misplaced. Further, it is likely that real efforts at reform will be ineffective if implemented within the “hobbling strictures of state and local governments' piecemeal” efforts.⁹⁵ Effective financial and campaign disclosure should be based on a uniform reporting system so that the public is assured access to usable information rather than the current hodge-podge of hundreds of forms and procedures followed in various states and localities. Further, if a model code for school board members was adopted, a consistent body of law could develop which would provide clear direction to judges as they apply the law to employment decisions and business interests. While a proposed “model code” is not offered here, our experience in sifting through the statutes in thirty states and the complexity and inconsistencies we found suggest that a national reform effort may offer the best vehicle for change.

A model law should address: full and complete financial disclosure, full and complete campaign finance disclosure, employment practices, and eliminating the ability of board members to enter into contractual relationships, directly **or** indirectly, with the district. Further, a clear and powerful statement requiring board members to promise to fulfill their duties and conduct all deliberations with the goal of providing the best possible education to the children in their district should be required of each board member upon accepting the office. In return we think that board members should be fairly compensated.

Board members, to the greatest extent possible, should not have a personal or particular stake in the school district which could hamper their ability to deliberate or which tends to diminish public confidence in the government of the school district. Although this

⁹⁵ See, Biretsky, note 6.

may be viewed by some as a naive and “moralist/idealist” view, we think the current crisis in public confidence in education suggests that some idealism may be warranted. We advocate reforms implemented in a fair and pragmatic way and recognize the likelihood of unintended consequences and the need for continued reform efforts. These governance reforms will help identify those persons for whom the best interests of children’s education are a secondary motivation. More importantly, a fair governance structure adequately protects and encourages the thousands of committed citizens who have sought public service for all the right reasons.

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