

## OPINION SUMMARY

**OPINION NO:** 2005-2

**DATE:** 10/17/05

**CHARTER SECTION(S) INTERPRETED:**

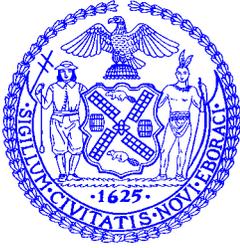
2601(4), 2601(11), 2601(12),  
2604(a)(1)(b), 2604(b)(2),  
(b)(3), (b)(4), and (b)(6),  
2604(c)(6), 2604(d)(6),  
2604(e)

**SUBJECT(S):** Charter schools

**OTHER OPINION(S) CITED:** 94-10, 98-11, 99-6, 2000-1

**SUMMARY:** Charter schools are not “firms” within the meaning of Charter Section 2604(a)(1)(b), so that public servants need not apply for Board waivers in order to work at a charter school; and charter schools are not “private interests” for the purposes of Charter Section 2604(b)(6) and are not “not-for-profit corporations” for the purposes of Section 2604(c)(6), so that those provisions do not prohibit a public servant who works at or volunteers for a charter school from communicating with the City on behalf of the charter school. Charter Section 2604(b)(2) may, however, restrict such communications by DOE employees or officials to their DOE subordinates or by certain public servants, such as employees of the DOE’s Office of Charter Schools and their superiors, whose official duties require them to oversee charter schools; such employees should consult with the Board

before making such communications. In all other respects, the provisions of Chapter 68 apply to the activities of public servants who work or volunteer for charter schools.



## CITY OF NEW YORK CONFLICTS OF INTEREST BOARD

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### Charter Schools

Charter Sections: 2601(4), 2601(11), 2601(12), 2604(a)(1)(b), 2604(b)(2), 2604(b)(3),  
2604(b)(4), 2604(b)(6), 2604(c)(6), 2604(d)(6), 2604(e)

Opinions Cited: 94-10, 98-11, 99-6, 2000-1

### **Advisory Opinion No. 2005-2**

The Chancellor of the New York City Department of Education (“DOE”) has asked the Conflicts of Interest Board (the “Board”) for a determination of questions left open in the Board’s Advisory Opinion No. 2000-1 concerning how certain provisions of Chapter 68 of the New York City Charter apply to current DOE employees who are associated with charter schools. Specifically, the Chancellor seeks a determination as to: 1) whether charter schools constitute “firm[s]” for the purposes of Charter Section 2604(a)(1)(b); and 2) whether Charter Sections 2604(b)(6) and 2604(c)(6) prohibit DOE employees who are associated with charter schools from communicating with the DOE on behalf of those charter schools.

For the reasons discussed below, it is the opinion of the Board, on the facts presented, that charter schools do not constitute “firms” for the purposes of Section 2604(a)(1)(b), so that City employees also working at charter schools will not require so-called “moonlighting” waivers from the Board. Similarly, the Board also concludes that charter schools are neither

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“private interests” for the purposes of Charter Section 2604(b)(6), nor “not-for-profit corporations” for the purposes of Charter Section 2604(c)(6), so public servants who are associated with a charter school may communicate with City agencies on behalf of the charter school. The Board nevertheless cautions that public servants in certain positions, such as employees of the DOE’s Office of Charter Schools and their superiors, may well violate Charter Section 2604(b)(2) by communicating with the City, especially with the DOE, on behalf of a charter school with which they are associated. City employees who communicate on behalf of a charter school with their City subordinates may likewise violate Charter Section 2604(b)(2). Public servants in such positions should seek further advice from the Board before making such communications. In all other respects, DOE employees who are associated with charter schools remain subject to the provisions of Chapter 68.

### Background

Charter schools are “independent and autonomous” public schools, authorized by the New York Charter Schools Act of 1998 (the “Act”) in order to “[p]rovide parents and students with expanded choices in the types of educational opportunities that are available within the public school system.” Education Law (“E.L.”) Section 2850(2)(e). Section 2853(1)(a) states that charter schools shall be “education corporation[s].” See E.L. Section 216-a(1)(a) (defining education corporation as, *inter alia*, a corporation chartered or incorporated by the Board of Regents). The Act provides that “[a] charter school shall be deemed an independent and autonomous public school, except as otherwise provided in this article.” E.L. Section 2853(1)(c). Although charter schools are treated as public schools for the purposes of health,

safety, and civil rights requirements (E.L. Section 2854(1)(b)), Board of Regents educational standards and assessments (E.L. Section 2854(1)(d)), employee pension eligibility (E.L. Section 2854(3)(c)), and property and income taxation (E.L. Section 2853(1)(d)), they are exempt from most DOE regulations and State laws governing public schools. E.L. Section 2854(1)(b). This autonomy allows for experimentation and innovation in the programs and curriculum offered by the charter schools.

To create a charter school in the City, teachers, parents, school administrators, or any community resident may submit an application to either the Chancellor of the DOE; the Board of Trustees of the State University of New York; or the Board of Regents. E.L. Sections 2851(1), (3). If the application is approved, the “charter” must be authorized by the Board of Regents. E.L. Section 2851(3). New York City public schools seeking to convert to charter status must apply to the Chancellor, who will then submit approved applications to the Board of Regents. Id. Charter schools must accept any student qualified for admission to a public school and cannot charge tuition or discriminate on the basis of achievement or aptitude. E.L. Section 2854(2). The school district in which the charter school is located must pay the full cost of student attendance to the charter school. E.L. Section 2856(1). While charter schools operate with considerable autonomy, the DOE and Board of Regents have some authority to inspect charter schools (E.L. Sections 2853(2), (2-a)), and to terminate a charter under certain conditions (E.L. Section 2855(1)).

In Advisory Opinion 2000-1, having examined the above authority, including in particular the provisions exempting charter schools from most local regulation, the Board determined that employees of charter schools are not public servants subject to the provisions of

Charter Chapter 68, the Conflicts of Interest Law. The Board further noted, however, that DOE employees who also serve as officers or employees of charter schools, either while on leave from the DOE or during hours when they are not required to provide services to the DOE, remain subject to Chapter 68 – that is, DOE employees do not cease to be covered by Chapter 68 simply because they are also associated with a charter school. In that Advisory Opinion, the Board explicitly reserved several questions regarding the application of Chapter 68 to DOE employees who also maintain such positions with charter schools. Thus, the Board noted, a DOE employee who becomes associated with a charter school

will ask whether by working at the charter school he or she is working at a “firm” engaged in business dealings with the City within the meaning of the moonlighting restriction of Charter Section 2604(a)(1)(b). That inquiry will require . . . [a] subtle determination as to whether the charter school in question is indeed a “firm” within the meaning of Chapter 68. In that regard, analysis similar to that undertaken by the Board in Advisory Opinion No. 99-6 may well be necessary, to wit, an analysis of whether the charter school is, as CUNY and SUNY were determined to be in that opinion, a “governmental entity” and not a firm, so that outside employment at the charter school would not violate Section 2604(a)(1)(b). A similar analysis might well be appropriate regarding the applicability of Sections 2604(b)(6) and 2604(c)(6), which involve appearing before the City and volunteer work, respectively.

Even if a given charter school were determined to be a firm and not a governmental entity, the Board might, if the approval of the [DOE] chancellor were forthcoming, conclude that employment at the charter school by a [DOE] employee on leave did not conflict with the purposes and interests of the City and might therefore grant the employee a waiver pursuant to Charter Section 2604(e). The Board expresses no opinion on these issues at this time.

Advisory Opinion 2000-1, p. 7.

These reserved questions are now presented to the Board via the instant request. The Chancellor has identified three DOE employees who are associated with charter schools. The

first (Employee No. 1), a teacher, is currently on leave from the DOE and is employed as a co-director of a charter school located in Queens. This charter school, which had been a public school before “converting” to charter school status in 2000, employs several DOE employees, including this co-director, who have taken renewable two-year leaves of absence from the DOE in order to work full-time for the charter school. See E.L. Section 2854(3)(d) (allowing public school teachers to take leaves of absence in order to work at charter schools).

The second DOE employee identified by the Chancellor (Employee No. 2) is a teacher on active status at a DOE school who serves, without compensation, as a board member of a charter school located in Harlem. The third DOE employee identified (Employee No. 3) works full time for the DOE as a Curriculum Instructional Specialist, conducting professional development trainings for teachers in a range of subject matters. She proposes to contract with a charter school to develop a professional development plan for the charter school’s staff members.

The Chancellor has confirmed in writing his conclusion that allowing these current DOE employees to maintain such associations with charter schools would not conflict with the purposes and interests of the City and would in fact further the purposes and interests of the DOE.

### Discussion

Charter Section 2604(a)(1)(b) provides that no regular employee of the City shall have an interest in a “firm” which that employee knows to be engaged in business dealings with the City, except if such interest is in a firm whose shares are publicly traded. Section 2601(12) defines “interest” as “an ownership interest in a firm or a position with a firm.” Charter Section 2601 (11) states that a “firm” shall be defined as a “sole proprietorship, joint venture, partnership,

corporation [or] any other form of enterprise, but shall not include a public benefit corporation, local development corporation or other similar entity as defined by rule of the board.”

In Advisory Opinion 94-10 the Board, in analyzing potential conflicts presented by a high-level public servant’s investment in bonds issued by public authorities, concluded that “governmental bodies are not firms within the meaning of Charter Section 2601(11).” The Board cited this authority in Advisory Opinion 99-6 in support of its conclusion that the City University of New York (“CUNY”) and the State University of New York (“SUNY”) were governmental bodies and therefore not “firms” for the purposes of Charter Section 2604(a)(1)(b), so that public servants need not obtain Board waivers in order to take teaching or other part-time positions at CUNY or SUNY.

Charter schools were authorized by the Legislature and are created by agreement with the DOE, pursuant to a charter from the Board of Regents. As charter schools, they are “independent and autonomous *public* schools.” (E.L. Section 2853(1)(c)) (emphasis added). Although they operate largely free of the DOE’s regulation and control, their purpose and function are identical to those of regular public schools. Therefore, the Board concludes that charter schools, like SUNY and CUNY, are “governmental bodies” and not “firms” for the purposes of Charter Section 2604(a)(1)(b). Public servants, including DOE Employees No. 1 and No. 3, will therefore not violate Charter Section 2604(a)(1)(b) by maintaining positions at charter schools and thus will not require waivers from the Board in order to hold such positions.<sup>1</sup>

While simply holding a position at a charter school will thus not violate Chapter 68, questions remain as to whether certain *conduct* in that capacity will be permissible. For

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<sup>1</sup> Although on leave from the DOE, Employee No. 1 remains subject to Chapter 68 as a DOE employee. See Advisory Opinion No. 98-11 at page 6.

example, Charter Section 2604(b)(6) provides that “[n]o public servant shall, for compensation, represent private interests before any [C]ity agency or appear directly or indirectly on behalf of private interests in matters involving the [C]ity.” Section 2601(4) defines “appear” as making “any communication, for compensation, other than those involving ministerial matters.” That section was designed to prevent public servants from drawing upon the contacts and know-how developed as City employees to further private interests before City agencies. A parallel provision, Charter Section 2604(c)(6), permits public servants, on their own time and without compensation, to volunteer on behalf of a “not-for-profit corporation, or association, or other such entity which operates on a not-for-profit basis,” that has business dealings with the City, but only if: 1) the public servant takes no direct or indirect part in any dealings with the City; and 2) the not-for-profit entity has no direct or indirect interest in any dealings with the City agency in which the public servant is employed, except that this latter condition shall not apply if the public servant’s agency head determines that the activity is in furtherance of the purposes and interests of the City. Again, public servants may not use their expertise and contacts, even as volunteers, to further the interests of favored not-for-profits in seeking City funding or other City benefits for which other not-for-profits may be competing.

Thus, although the Board has determined that charter schools are governmental entities, not “firms,” for the purposes of Charter Section 2604(a)(1)(b), that does not answer the further questions as to whether Sections 2604(b)(6) and (c) (6) prohibit public servants associated with charter schools, whether as volunteer board members or as compensated employees or consultants, from communicating with the DOE on behalf of their charter schools. Neither

Section 2604(b)(6) nor Section 2604(c)(6) contains, on its face, an exception for appearances on behalf of governmental entities.<sup>2</sup>

These can be critical issues, since charter schools receive funds from the DOE, and must deal with the DOE concerning inspections and concerning the periodic renewal of their charters. Thus, it will often be necessary for charter school employees and officers to communicate with the DOE. If Charter Section 2604(b)(6) is applicable, compensated employees of charter schools who are also employees of the DOE, such as Employees No. 1 and No. 3, could not communicate with the DOE on behalf of their charter schools. The Board now determines, however, that charter schools, which are financed with DOE funds, serve the same purposes as regular public schools, and are open to all students eligible to attend public schools, are not “private interests” for the purposes of Charter Section 2604(b)(6). Because charter schools are, for all relevant purposes, public schools, the private interests to which Section 2604(b)(6) is addressed are not implicated. Accordingly, this provision will not prohibit such employees from having either direct or indirect communications with City agencies, including the DOE, on behalf of the charter schools for which they work.

Similarly, the Board also concludes that charter schools, as public schools, are not within the group of not-for-profit organizations to which Charter Section 2604(c)(6) is directed. A DOE teacher or administrator who becomes involved in a charter school’s dealings with DOE is not thereby furthering the interests of a favored charity to the exclusion of other worthy not-for-profits who might be competing for City funding or other City benefits. Accordingly, public servants who volunteer for service on charter school boards, such as Employee No. 2, will not

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<sup>2</sup> In contrast, the post-employment restrictions contained in Charter Section 2604(d), do contain an exception for post-employment work for other government agencies. See Charter Section 2604(d)(6).

violate that provision by communicating with the City, including the DOE, on behalf of their charter schools.

While the foregoing will apply to most public servants, certain public servants, by virtue of the nature of their *public duties*, may violate Charter Section 2604(b)(2) if they communicate with the City on behalf of a charter school. That Section prohibits public servants from conduct which conflicts with the proper discharge of their official duties. Thus, for example, a DOE employee or official who communicates, on behalf of a charter school with which he or she is associated, with a person who is the *DOE subordinate* of that employee or official (or whom the employee or official rates) may well be acting in conflict with the proper discharge of his or her official duties. For example, if a director of a Regional Operations Center (“ROC”) were serving on the board of a charter school, it would likely violate Chapter 68 for that individual to contact a ROC subordinate on behalf of the charter school. Similarly, employees of the DOE’s Office of Charter Schools, as well as those high-level DOE officials to whom such employees report, may run into conflicts with their own official duties for DOE if they also communicate with DOE on behalf of a charter school with which they are associated. Employees in such positions should therefore seek further advice from the Board before communicating with the DOE on behalf of a charter school.

Public servants who work for charter schools remain subject to all of the other limitations imposed by Chapter 68. More particularly, public servants who are associated with charter schools must perform any work for the charter school at times when they are not required to perform services for the City; may not use their official City positions or titles to obtain any private or personal advantage for themselves or the charter school; may not use City equipment,

letterhead, personnel, or other City resources in connection with their charter school work, except as *expressly* permitted by their City agency; and may not disclose or use for private advantage any confidential information obtained as a result of their City employment. See Charter Sections 2604(b)(2), (b)(3), (4), respectively. In particular, the prohibition of Section 2604(b)(3), against using one's City position to benefit an entity with which one is associated means, without limitation, that City employees associated with charter schools must recuse themselves in their City work from dealing with any matters involving their own charter school.

### Conclusion

For the reasons discussed above, it is the opinion of the Board that: 1) charter schools are not "firms" within the meaning of Charter Section 2604(a)(1)(b), so that public servants need not apply for Board waivers in order to work at a charter school; and 2) charter schools are not "private interests" for the purposes of Charter Section 2604(b)(6) and are not "not-for-profit corporations" for the purposes of Section 2604(c)(6), so that those provisions do not prohibit a public servant who works at or volunteers for a charter school from communicating with the City on behalf of the charter school. Charter Section 2604(b)(2) may, however, restrict such communications by DOE employees or officials to their DOE subordinates or by certain public servants, such as employees of the DOE's Office of Charter Schools and their superiors, whose official duties require them to oversee charter schools; such employees should consult with the

Board before making such communications. In all other respects, the provisions of Chapter 68 apply to the activities of public servants who work or volunteer for charter schools.

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Dated: October 17, 2005

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