



## CITY OF PHILADELPHIA

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### **Philadelphia Board of Ethics Non-Public General Counsel Opinion No. 2020-511**

December 8, 2020

#### **Re: Application of ethics rules to application for PHLpreK programs**

Dear Requestor,

You have asked whether the ethics rules restrict you or your partner from applying for or enrolling your child in a PHLpreK program. Based on the information you provided, you may apply for and enroll your child in a PHLpreK program, but both the application and enrollment create a conflict of interest. As a result, you will need to disclose the conflict and disqualify yourself from official actions that would specifically impact your child's application and enrollment as explained below.

#### **I. Background**

You are a City employee within the Office of Children and Families. Your responsibilities include strategic planning and executing an overall early childhood education plan for the City. Among other things, you are involved in the seat allocation and contracting process for PHLpreK sites and providers.

PHLpreK is a free preschool program open to all 3- and 4-year-olds living in Philadelphia. There is no income threshold or employment requirement for PHLpreK. Approximately 130 locations provide programs through PHLpreK, with over 3,000 seats available across the City. Admission decisions for PHLpreK programs are made by a contractor. You have no input into whether or not a particular applicant will be admitted.

You plan to enroll your two children in a childcare program in Philadelphia. Some of the providers you are considering participate in PHLpreK. One of your two children is age-eligible for PHLpreK. The PHLpreK programs at the sites you are considering do not have a waitlist. You plan to have your partner handle the application process.

## II. Relevant Law and Discussion

The Board of Ethics is charged with administering and enforcing all Philadelphia Home Rule Charter provisions and ordinances pertaining to ethical matters, including the political activity restrictions found at Home Rule Charter Section 10-107. The Charter and the Philadelphia Code authorize the Board to render advisory opinions concerning a City officer's or employee's proposed future conduct.

Home Rule Charter Section 4-1100 also gives the Board "concurrent authority" with the Law Department to advise City officials on the application of State law. My advice on State law, however, does not provide protection from possible enforcement by the State Ethics Commission. For guidance on the State Ethics Act that would provide such protection, you should contact either the State Ethics Commission or the Law Department.

### Conflicts of Interest

City Code Section 20-607 prohibits a City officer from taking action in an official capacity when either (a) the officer (or a close family member) has a personal financial interest in that action; or (b) a for-profit business of which the officer is a member, or a fellow member of such business, has a financial interest in that action. The Board has advised that a person has a financial interest in matters that have a potential impact on their income, compensation, value of assets, wealth, employment prospects, or business prospects. *See, e.g.*, Board Op. 2019-002 at 3. If such a conflict of interests arises, Section 20-608 requires a City officer to submit a letter disclosing the conflict and disqualifying themselves from any official action related to it.

The State Ethics Act, 65 Pa.C.S. §1101, et seq., prohibits a public official from taking official action that would have a private pecuniary benefit for: (1) the official; (2) the official's immediate family; or (3) a business, whether for-profit or not-for-profit, with which the official or a member of their immediate family is associated.

PHLpreK is unique in offering free preschool to Philadelphia residents regardless of income or employment. Given the cost of preschool and childcare programs, a free program open to all income levels arguably has significant financial value.

Your official role – which focuses heavily on managing the PHLpreK program – gives you some ability to affect who has access to PHLpreK seats. To the extent your official actions impact your own child's ability to get a PHLpreK seat, you would be required to follow the disclosure and disqualification procedures set forth in Section 20-608 of the Ethics Code.<sup>1</sup>

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<sup>1</sup> Because of the type of program involved and your role in administering that program, it is not necessary to address whether there is an exception to the City's conflicts of interest rule based on the scope of the program's impact. (*Cf.* Board Op. 2019-002; GC Op. 2020-505.)

You are not, however, disqualified from all official actions related to PHLpreK. Rather, you must disqualify yourself from actions that would impact your child. For example, you cannot take any action to involve yourself in the contractor's consideration of your child's application. This would include asking the contractor to expedite your child's application or seeking a waiver of the age requirements.

Once you identify centers to which you will apply or in which you wish to enroll your child, you cannot take any action – whether limited to those centers or applicable to the system as a whole – to specifically benefit your child. This would include increasing the number of seats at a particular center to ensure access for your child. Because it is difficult to quantify the extent to which PHLpreK seats, funding, or other supports received by a provider impact individual enrollees, the safest course of action is that once your child is enrolled, you should not take any official actions involving your child's specific provider. In addition, because the program is age-limited, you would only be disqualified from such actions in years that you had a child of eligible age for whom you are considering applying for a PHLpreK program.

You have asked whether you would be disqualified from several specific actions within your official responsibilities based on your child's application for or enrollment in a PHLpreK program.

### ***Reallocating unused seats***

In addition to making initial allocation decisions for PHLpreK seats, you are tasked with reallocating unfilled seats among providers. Reallocated seats are removed from one site and allocated to a different site. Typically, you would be responsible for selecting criteria upon which the reallocation of seats is determined, as well as coordinating funding for reallocated seats.

As noted above, you would be prohibited from taking official action that would specifically impact your child. With respect to the reallocation of seats, you would not be prohibited from selecting criteria applicable to all providers. You would, however, be prohibited from exercising your official discretion to reallocate seats to or from a provider to which you apply or with which you are enrolled. This would include taking action to adjust the criteria to change their impact on a provider to which you have applied or with which you are enrolled.

### ***Provider evaluations***

Your responsibilities also include evaluating PHLpreK providers. You determine the factors used to evaluate providers, and also analyze and approve the final provider evaluations. As with the seat reallocation process, you would not be prohibited from determining the factors to be used in evaluating all providers. You would, however, be prohibited from adjusting the evaluation factors with the intent of changing the results for a provider to which you have applied or with which you are enrolled if such results would impact the availability of a seat for your child. The safest course would be to avoid analyzing and approving the final provider evaluation for a center to which you have applied or in which you are enrolled.

### ***Funding and other supports for providers***

Part of your City role involves advocating for, identifying, and allocating public and private funding for PHLpreK seats. As part of this, you determine the criteria used to allocate funding to providers. Again, you would only need to disqualify yourself to the extent that your actions would specifically impact your child.

As a result, your general activities in support of funding for PHLpreK programs are not prohibited. You would, however, be prohibited from making discretionary determinations about funding for any provider to which you have applied or with which you are enrolled to the extent that such decisions would impact your child.

For example, if you establish a formula for allocating provider funding that applies equally to all providers without deviation, you could approve the overall allocation plan, including as it applies to the provider you selected for your child. If, however, you would need to exercise your discretion to determine the specific allocation to a provider to which you have applied or with which you are enrolled, the safest course is to remove yourself from that decision process. You could still exercise such discretion with respect to other providers.

### ***Disclosure & disqualification letter***

You should complete a disqualification and disclosure letter consistent with City Code Section 20-608. The letter should describe the interest (i.e., that you have applied for and plan to enroll in a PHLpreK program and identify the center(s) involved), as well as outline the actions from which you are disqualified. You do not need to list every potential action but may want to list some of the examples above as actions you could not take because they would specifically benefit your child as an applicant or participant in PHLpreK. A form letter is available at [bit.ly/DnDFormLetter](http://bit.ly/DnDFormLetter). Once you have submitted your letter, someone above you in the chain of command must handle or delegate any responsibilities from which you are disqualified.

### **Interests in City Contracts**

The Charter prohibits City employees from seeking or holding a financial interest in a City contract. Charter §10-102. I do not believe, however, that the Charter can be reasonably read to require City employees to forgo the benefit of basic City services. Here, the City has contracts (either directly or as subcontracts) with outside providers for PHLpreK programs. While there is a financial interest in having a spot in PHLpreK, in my opinion, a benefit available to any qualifying resident does not create an interest in a City contract prohibited by the Charter.

### **Representation in City transactions**

The Ethics Code prohibits City employees from representing someone else in a transaction involving the City. City Code §20-602(1)(a). In this case, you plan to have your partner handle the application process. This would not trigger the representation provisions because your partner is not a City officer or employee. Even if you chose to submit the application for your child, this would likely be permissible either based on the exception permitting representation of close family members or based on the relatively routine nature of the application. *Id.* at §20-601(27); 20-602(4). In any event, in keeping with the conflicts rules described above, you should avoid discussing your child's application with your colleagues or service providers.

### **III. Conclusion**

As explained above, you would be permitted to apply for and enroll in a PHLpreK program, but you must complete the disclosure and disqualification process consistent with City Code Section 20-608.

Thank you for your concern about compliance with the City ethics laws and for seeking advice. Advisory opinions are fact-specific, and this Opinion is predicated on the facts you have provided as stated here. Requestors of advisory opinions are entitled to act in reasonable reliance on opinions issued to them and not be subject to penalties under the laws within the Board's jurisdiction, unless they have omitted or misstated material facts in their requests. Since you requested a non-public opinion, the original Opinion will not be made public. As required by the City Code, a version of the Opinion that has been redacted to conceal facts that are reasonably likely to identify you is being made public. Please let me know if you have any questions.

BY THE PHILADELPHIA BOARD OF ETHICS

*/s/ Michael J. Cooke*

Michael J. Cooke, Esq.  
General Counsel

cc: Michael H. Reed, Esq., Chair  
J. Shane Creamer, Jr., Esq., Executive Director