



The Commonwealth of Massachusetts

OFFICE OF THE

DISTRICT ATTORNEY

BRISTOL DISTRICT

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C. SAMUEL SUTTER
DISTRICT ATTORNEY

February 17, 2009

The Honorable Robert Correia
Mayor
City of Fall River
One Government Center
Fall River, MA 02722

Dear Mayor Correia:

On October 30, 2008, you sent to the Bristol County District Attorney's Office a report titled "Report On The Durfee High School Education Enrichment Fund." Your letter accompanying this report stated: "In accordance with the provisions of MA General Laws Chapter 44, Section 62, I hereby inform you of a violation of MA General Laws, Chapter 44 Section 54 A and Chapter 71 Section 37 A by members of the Fall River School Department with respect to the acceptance, deposit and expenditures of charitable funds." You sent this letter and Report and accompanying materials following a vote of the Fall River School Committee authorizing the transmittal of these materials to the District Attorney's Office for the purpose of an investigation. Apart from the vote of the School Committee, state law mandated that you notify the District Attorney once the Law Department for the City of Fall River determined that there had been a violation of the aforesaid statutes. M.G.L. Chapter 44, section 62 reads in applicable part: "... and the mayor, selectman, prudential committee or commissioners shall and five taxpayers may, report such violation to the district attorney who shall investigate and prosecute the case" (emphasis added).

Our investigation encompassed the review of all of the materials we received from you and the City's legal department, including the Report, the attached exhibits and appendices totaling approximately 80 pages, and additional materials received from the City's legal department totaling approximately 50 pages. In addition to these materials, we reviewed the videotapes of the hearings conducted by the Fall River School

Department concerning this matter. We also interviewed at our office, Craig Dutra, the President of the Community Foundation of Southeastern Massachusetts (which will hereafter be referred to as CFSEMA). Finally, we scrutinized the relevant statutes and applicable case law. Our review has revealed the following facts.

In 2006, Omari Walker, Vice Principal at Durfee High School, proposed the establishment of a fund to assist in the support and development of the Alternative High School. Mr. Walker submitted a plan whereby funds would be solicited from charitable donors specifically for the benefit of non-traditional learners in the Alternative School. He had previously been successful in a similar endeavor in Framingham, Massachusetts. The plan was approved by the Fall River School Department Superintendent, Dr. Nicholas Fischer. Mr. Walker and Kathleen Macedo, at that time Chief Financial Officer of the School Department, sought counsel from the CFSEMA for assistance in setting up the fund.

In July 2006, Mr. Dutra and Mr. Walker discussed the mechanism to fulfill the donors' intent. The documents provided to the District Attorney's Office establish that the donors' intent was that the funds directly benefit the Fall River Alternative School and that the funds not be deposited with the general treasury. In fact, according to Mr. Dutra, these funds would not have been made available to the Alternative School if they were going to be subject to municipal finance laws. As such, Mr. Dutra proposed that CFSEMA act as a fiscal agent for the donations to satisfy the preconditions of the donors as well as to receive a non-profit IRS 501 (c) (3) status for tax purposes. A formal agreement followed which established the Durfee High School Educational Enrichment Fund with CFSEMA as the fiscal agent. In August of 2006 this agreement was provided by Superintendent Fischer to the Attorney for the School Committee, Attorney Bruce Assad, for his review. In his response¹ to Superintendent Fischer, dated August 28, 2006, Attorney Assad stated:

As you are aware, it is within the School Committee's authority "to determine expenditures within the total appropriations" of the School Department's operating budget. In essence, the School Committee has final authority for approving all items within its overall budget. M.G.L. c. 71 §34; Vol. 18B Mass. Practice. 884 and 1431; Mass. DOR "A guide to Financial Management for Town Officials"; Department of Education on School Governance. The School Committee's statutory authority to review and approve all budgetary expenditures includes funds received from grants or gifts. By law, the expenditure of educational grant funds or gifts (for the purposes of such grant or gift) is subject to the approval of the School Committee. M.G.L. c. 44§53A.1

In conclusion, Attorney Assad offered his opinion: "Hence, it is my legal opinion that since the Fund Advisors for the Durfee High School Education Enrichment Fund are authorized to expend any and all funds, the designation of Ralph Olsen and Omari

¹ A copy of the response was sent to the Fall River School Committee.

Walker as Fund Advisors would require the approval of the Fall River School Committee.”

At the September 11, 2006 Fall River School Committee meeting, there was a “discussion and recommendation to accept funds donated through the Community Foundation for Alternative Education Programs.” At the same meeting, the School Committee designated Mr. Olsen and Mr. Walker as fund advisors. A motion was made to approve and accept these recommendations. They were passed, unopposed.² The minutes from that meeting included a discussion about the receipt of private funds given through the Community Foundation. Mr. Fischer and Mr. Olsen were present at this meeting. Mr. Olsen discussed the intended distribution of the first expected donation received in the amount of \$55,000.³ Attorney Assad spoke of the legalities of the Community Foundation and recommended that the School Committee vote to accept grants and gifts and the establishment of fund advisors who would have control over the monies. Mr. Olsen assured the Committee that he and Mr. Walker, as the fund advisors, would remain accountable.⁴

During this time period, Superintendent Fischer requested from the Department of Education a written opinion regarding the authority of school committees over gifts to public schools. The Deputy General Counsel for the Department of Education, Attorney Kristin F. McIntosh, wrote back to Superintendent Fischer in a letter dated October 10, 2006. At two different junctures in a relatively short letter, Attorney McIntosh discussed the legally ambiguous nature of the Durfee High School Education Enrichment Fund as it was constituted in the fall of 2006. In paragraph four she wrote: “It is unclear from these documents whether the Durfee High School Education Enrichment Fund is a private entity.” And in the following paragraph she reiterated: “The legal status of the Enrichment Fund is unclear in the documents provided. Some characteristics of the documents seem to indicate that the Enrichment Fund is a public entity.” Most significantly, she advised Superintendent Fischer to take steps to correct the legal ambiguity of the Fund: “We recommend clarifying the legal status of the Enrichment Fund.”

The inescapable implication of Attorney McIntosh’s letter is that a mechanism or “entity” could be lawfully established for both raising charitable donations to benefit this particular program and for expending the funds so raised which would fall outside the supervisory authority of the School Committee. She wrote: “In many municipalities, independent non-profit entities have been established for the purpose of raising funds for public schools. These entities are distinct from their associated school districts both legally and operationally.” She suggested that the Enrichment Fund, in the form it had in

² It should be noted that the agreement signed by Craig Dutra on behalf of CFSEMA and Nicholas Fischer, Kathleen Macedo, Ralph Olsen and Omari Walker was not actually signed until September 11, 2006.

³ There is no indication as to where the initial donation was deposited and as to whether distributions were to be made through the fiscal agent.

⁴ The minutes do not reflect any discussion as to the form or frequency of reporting to the Committee by the fund advisors.

October, 2006, had characteristics of both a private entity and a public entity. Her point apparently was that, if the Enrichment Fund was unambiguously a private entity, then the monies raised would not need to be deposited with the City Treasurer and the expenditures made would not need the approval of the School Committee. On the other hand, if the Enrichment Fund was for legal purposes a public entity, then the funds donated would need to be deposited with the City Treasurer and the School Committee would need to approve any expenditures in advance. Consequently, she recommended to Superintendent Fischer that he take steps to clear up the existing legal ambiguity. According to the evidence that we received, acquired, and reviewed, this was never done.

Attorney McIntosh also recommended that “the school district consult with their attorney and the State Ethics Commission as to whether the participation of school district officials as officers of a private fund that benefits the Fall River Public Schools may raise any conflict of interest issues.” Clearly, she was referring here to Durfee Principal Ralph Olsen and Vice Principal Omari Walker serving as “fund advisors” for the monies raised by the Community Foundation to benefit the Alternative School. The attorney for the School Committee, Attorney Bruce Assad, promptly wrote to the State Ethics Commission asking for advice concerning this potential conflict of interest issue. The opinion which was subsequently sent by the State Ethics Commission raised another red flag concerning the ambiguous legal status of the Enrichment Fund. The opinion was written by Attorney David Wilson, Deputy Chief of the Legal Division and was dated May 31, 2007, almost eight months after Attorney Assad’s request. In the opinion, Attorney Wilson wrote: “Your conflict of interest law question cannot be fully and finally answered until the School Department ascertains that the establishment and operation of the Fund is a lawful official activity of the School Department” (emphasis added). And in the following paragraph he stated: “Provided, however, that the establishment and operation of the Fund is indeed a lawful official activity of the School Department and that the Fund is an instrumentality of the School Department and not a separate non-profit entity or an instrumentality of CFSEM” (emphasis added). Yet, despite these cautionary caveats from State Ethics, once again according to our review, nothing further was done by any of the interested parties to rectify the ambiguous status of the Enrichment Fund.

Between 2006 and 2008, the Community Foundation received several significant donations for the benefit of the Alternative School. When Omari Walker testified before the School Committee this past fall, he described the process by which the donations for the Enrichment Fund were deposited into the Durfee High School Contingency Account. He stated that he would make purchases for the alternative school through his own personal credit card and then submit the receipts for reimbursement to Kathleen Macedo, the Chief Financial Officer for the School Department. Ms. Macedo would then send the receipts to Mr. Dutra and Mr. Dutra would then issue a check for deposit into the Durfee High School Contingency Account. Ms. Susan Phenix, a School Department employee, would then issue a check from the contingency account to reimburse Mr. Walker. Although this process was cumbersome, the accounting, including both donations and expenditures, were available for review.

As stated at the beginning of this letter, once the Law Department of the City of Fall River determined that there had been a violation of M.G.L. Chapter 44, section 53A, and Chapter 71, section 37A, you, as Mayor, were obligated by law to refer the matter to the District Attorney's Office for investigation. Nevertheless, in two separate conference calls between lawyers from the Law Department and lawyers from my staff, the City's lawyers asserted that they did not believe that there was criminal wrongdoing on the part of any of the individuals involved in the management of the Enrichment Fund. We wholeheartedly concur with this assessment. From the outset, the legal status of the Durfee High School Education Enrichment Fund was unclear and ambiguous. It had some characteristics of a private entity which would have made its management fall outside the authority of the School Committee and it had some characteristics of a public entity which would have put it squarely within the School Committee's supervisory authority. Yet, in spite of a clear recommendation by the Department of Education and a cautionary admonition by the State Ethics Commission, its status was never clarified. Furthermore, one of the two "fund advisors", Omari Walker, gave a detailed presentation to the School Committee in April of 2007 about what his plans for the Alternative School were. It appears, therefore, that the School Committee was on notice about what was taking place. Under these circumstances, we cannot even say for certain that a violation of M.G.L. Chapter 44, section 53A or Chapter 71, section 37A took place. Consequently, it is not necessary to pursue our investigation any further. Accordingly, we consider the matter, from our standpoint, closed.

Thank you for referring this matter to our office. Please call me if you have any questions about any aspect of this letter and our review.

Sincerely,

C. Samuel Sutter
District Attorney
Bristol District

Enc.: Letter from David A. Wilson, State Ethics Commission dated May 31, 2007
Letter from Kristin E. McIntosh, Department of Education dated October 10, 2006

cc: City of Fall River Legal Department
Community Foundation of Southeastern Massachusetts
Atty. Michael Harrington