

# Advisory Opinion 2024-09

Issued on September 5, 2024, by

The West Virginia Ethics Commission

## Opinion Sought

A **Public Charter School Board Member**, for a nonprofit charter school, asks whether he is subject to the Ethics Act.

## Facts Relied Upon by the Commission

In 2019, the West Virginia Legislature authorized the creation of public charter schools in [Chapter 18, Article 5G](#)<sup>1</sup> of the West Virginia Code (“public charter school law”).<sup>2</sup> “[P]arents, community members, teachers, school administrators, or institutions of higher education”<sup>3</sup> may apply to the following entities to obtain authority to form a charter school: (1) a county board of education; (2) two or more boards of education; (3) the West Virginia Professional Charter School Board<sup>4</sup>; or, in limited circumstances, (4) the West Virginia Board of Education.<sup>5</sup> The public charter school law designates the listed entities as “authorizers,” and authorizers have the power to “review applications, decide whether to approve or reject applications, enter into charter contracts with applicants, oversee public charter schools, and decide whether to renew or not renew charter contracts.”<sup>6</sup> Public charter schools receive public funding as required by the public charter school law.<sup>7</sup>

The Requester’s public charter school is a nonprofit corporation, incorporated in West Virginia.<sup>8</sup> Public charter school applicants must have obtained 501(c)(3) tax-exempt status or have submitted an application for 501(c)(3) tax-exempt status to be approved as a charter school.<sup>9</sup> A 501(c)(3) tax-exempt status is a legal designation under the Internal Revenue Code. [IRS website](#) (discussing exempt organizations).<sup>10</sup> The Requester’s public charter school (“charter school”) organized itself as a nonprofit corporation to obtain its 501(c)(3) tax-exempt status from the IRS before submitting its application to the West Virginia Professional Charter School Board, which then approved its application.

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<sup>1</sup>West Virginia Code, Chapter 18, Article 5G, [code.wvlegislature.gov](#), August 25, 2024. The Legislature has also subsequently amended this law.

<sup>2</sup> SCHOOLS AND SCHOOL DISTRICTS, 2019 West Virginia Laws 1st Ex. Sess. Ch. 31 (H.B. 206)

<sup>3</sup> W. Va. Code § 18-5G-2(1)

<sup>4</sup> 18-5G-2(2)(C). The West Virginia Professional Charter School Board was created pursuant to §18-5G-15.

<sup>5</sup> W. Va. Code § 18-5G-2(2)(D)

<sup>6</sup> W. Va. Code § 18-5G-2(2)

<sup>7</sup> W. Va. Code § 18-5G-5

<sup>8</sup> West Virginia Nonprofit Corporation Act, W. Va. Code §§ 31E-1-101 to 31E-16-1603 (governing the creation and operation of nonprofit corporations in this state).

<sup>9</sup> W. Va. Code § 18-5G-2(1)(A). This Code provision also authorizes an applicant to be a state institution of higher education as defined in § 18B-1-2, but the Requester’s charter school was not organized by a higher education institution.

<sup>10</sup> “Exempt Organization Types,” [www.irs.gov](#), August 25, 2024

As required by the West Virginia public charter school law, the charter school is overseen by a board whose members receive no compensation for their service.<sup>11</sup> The charter school's bylaws state that the governing board (1) shall consist of five members, as required by the charter school law,<sup>12</sup> and (2) may increase the number of members by resolution. The public charter school law requires each charter school to establish how each will appoint their governing board members in the charter application.<sup>13</sup> The Requester's charter school selects its board members in the manner prescribed by its bylaws.

The public charter school law expressly states that public charter schools must comply with the Open Meetings Act and the Freedom of Information Act, but it does not expressly state whether public charter schools are subject to the West Virginia Ethics Act.<sup>14</sup> The Requester, therefore, is requesting this opinion to obtain clear guidance on whether the Ethics Act applies to him and other public charter school board members.

### **Code Provisions Relied Upon by the Commission**

W. Va. Code § 6B-2-5(a) states:

*Persons subject to section.* -- The provisions of this section apply to all public officials and public employees, whether full or part-time and whether compensated or not, in state, county, municipal governments and their respective boards, agencies, departments, and commissions and in any other regional or local governmental agency, including county school boards.

W. Va. Code § 6B-1-3(j) states:

“Public employee” means any full-time or part-time employee of any state, county or municipal governmental body or any political subdivision thereof, including county school boards.

W. Va. Code § 6B-1-3(k) states:

“Public official” means any person who is elected to, appointed to, or given the authority to act in any state, county, or municipal office or position, whether compensated or not, and who is responsible for the making of policy or takes official action which is either ministerial or nonministerial, or both, with respect to: (1) Contracting for, or procurement of, goods or services; (2) administering or monitoring grants or subsidies; (3) planning or zoning; (4) inspecting, licensing, regulating, or auditing any person; or (5) any other activity where the official action has an economic impact of

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<sup>11</sup> W. Va. Code §§ 18-5G-3(b) and § 18-5G-7

<sup>12</sup> W. Va. Code § 18-5G-7

<sup>13</sup> W. Va. Code § 18-5G-7

<sup>14</sup> W. Va. Code § 8-5G-3(c)(2) and W. Va. Code § 18-5G-7(f). The Open Meetings Act is codified at W. Va. Code §§ 6-9A-1 to 6-9A-12, and the Freedom of Information Act is codified at W. Va. Code §§ 29B-1-1 to 29B-1-7.

greater than a de minimis nature on the interest or interests of any person.  
The term “public official” includes a public servant volunteer.

W. Va. Code § 6B-1-3(l) states:

“Public servant volunteer” means any person who, without compensation, performs services on behalf of a public official and who is granted or vested with powers, privileges, or authorities ordinarily reserved to public officials.

## **ADVISORY OPINION**

The Ethics Act applies to “all public officials and public employees, whether full or part-time and whether compensated or not, in state, county, municipal governments and their respective boards, agencies, departments, and commissions and in any other regional or local governmental agency, including county school boards.”<sup>15</sup> The general rule is that the Ethics Act only applies to public officials and public employees, not board members or employees of nonprofit corporations. For example, in [Advisory Opinion 2017-12](#), the Ethics Commission held that a convention and visitors’ bureau is not a government agency under the Ethics Act because statutorily they must be non-stock, nonprofit corporations.<sup>16</sup>

Advisory Opinion 2017-12 (and other advisory opinions holding that the Ethics Act does not apply to nonprofit organizations) does not directly answer the question of whether a public charter school, organized as a nonprofit corporation, is subject to the Ethics Act because the Legislature has expressly designated the governing board of a charter school as a *public corporate body* (emphasis added).<sup>17</sup> See [Advisory Opinion 2010-10](#)

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<sup>15</sup> W. Va. Code § 6B-2-5(a)

<sup>16</sup> W. Va. Code § 7-18-14 (d)(1)

<sup>17</sup> W. Va. Code § 18-5G-7 states, in relevant part:

(a) To ensure compliance with this article, a public charter school shall be administered by a governing board accountable to the authorizer as set forth in the charter contract. A public charter school governing board shall consist of no fewer than five members elected or selected in a manner specified in the charter application, including at least the following:

(1) Two parents of students attending the public charter school operating under the governing board; and

(2) Two members who reside in the community served by the public charter school.

(b) Members of the governing board shall:

(A) Not be an employee of the public charter school administered by the governing board;

(B) Not be an employee of an education service provider that provides services to the public charter school, unless the services are provided by a state institution of higher education;

(C) File a full disclosure report to the authorizer identifying potential conflicts of interest, relationships with management organizations, and relationships with family members who are employed by the public charter school or have other business dealings with the school, the management organization of the school, or any other public charter school;

(finding that a county rescue services organization formed as a nonprofit was not subject to the Ethics Act and listing other advisory opinions analyzing the application of the Ethics Act to nonprofit organizations). The Ethics Commission must determine, therefore, whether the statutory designation of a public charter school as a public corporate body brings its board members within the purview of the Ethics Act, even if the public charter school is also required to be a nonprofit corporation or has organized itself as such.

Neither the phrase “public corporate body ” or “public corporation” is defined in the charter school law<sup>18</sup> or in other parts of the West Virginia Code. In contrast, the Code does contain definitions for other types of corporations, such as business corporations,<sup>19</sup> corporations or domestic corporations,<sup>20</sup> and nonprofit corporations.<sup>21</sup>

The West Virginia Supreme Court of Appeals has explained the various meanings of the term corporation, including a public corporation, as follows:

As a general rule, the general corporation law is the law under which private corporations are organized. However, the terms “public” and “private” corporation are of limited use to us in our discussion of the nature of WVUH [University Hospitals, Inc.]. States create corporations, specifying the powers, rights, and duties of these artificial persons, L. Friedman, *History of American Law* 188 (2d ed. 1985), and it is only the power of the sovereign which breathes life into such a fictitious personality. See generally Schane, *The Corporation Is a Person: The Language of a Legal Fiction*, 61 Tul.L.Rev. 563 (1987). The very creation of any corporation, whether public, private, or otherwise, is an exercise of state

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(D) Collectively possess expertise in leadership, curriculum and instruction, law, and finance; and

(E) Be considered an officer of a school district under the provisions of § 6-6-7 of this code and removal from office shall be in accordance with the provisions of that section.

(c) The public charter school governing board shall:

(1) Operate under the oversight of its authorizer in accordance with its charter contract;

(2) As a public corporate body, have the powers necessary for carrying out the terms of its charter contract, including, but not limited to the power to:

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<sup>18</sup> W. Va. Code §§ 18-5G-1 through 18-5G-17

<sup>19</sup> “Business corporation” means a corporation with capital stock or shares incorporated for profit. W. Va. Code § 31E-1-150 (4)

<sup>20</sup> “Corporation” or “domestic corporation” means a corporation without capital stock or shares, which is not a foreign corporation, incorporated under the laws of this state: *Provided*, That “corporation” or “domestic corporation” does not include towns, cities, boroughs or any municipal corporation or any department or any town, city, borough or municipal corporation. W. Va. Code § 31E-1-150(6)

<sup>21</sup> “Nonprofit corporation” means a corporation which may not make distributions to its members, directors or officers. W. Va. Code § 31E-1-150(17)

action and authority. A charter is a governmental grant of authority to manage activity which, in effect, permits the incorporators to “govern” a particular enterprise. Under the police power of the state, however, a charter may control the actions, impose restraints, and limit the functions of a corporation. 18 Am.Jur.2d *Corporations* § 13 (1985).

In some circumstances, the term public corporation describes an organization which is made manifest in a statute, without recourse to the general corporation laws. On other occasions, persons referring to public corporations mean those bodies organized under the general corporation laws whose stock is publicly traded. Similarly, the general corporation laws of this state are commonly considered to create private corporations, yet even a cursory review of the purposes of many of the corporations so created would show that they are organized to carry out essentially public functions. See *generally Mullins v. Venable*, 171 W.Va. 92, 297 S.E.2d 866 (1982); *State ex rel. West Virginia Housing Development Fund v. Copenhagen*, 153 W.Va. 636, 171 S.E.2d 545 (1969).

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Queen v. W. Virginia Univ. Hosps., Inc., 179 W. Va. 95, 100, 365 S.E.2d 375, 380 (1987) (analyzing whether the West Virginia University Hospitals, Inc., a nonprofit, was subject to the Freedom of Information Act and finding that it was).

In the present case, the Ethics Commission finds that the Legislature has clearly designated a charter school’s governing body as a public corporation.<sup>22</sup> The Ethics Commission has previously held that a public corporation is a political subdivision for purposes of the Ethics Act. [Advisory Opinion 2010-09](#). The Ethics Commission also finds that a political subdivision, for purposes of the Ethics Act, includes county, regional, or local government agencies and that a public charter school is a county, regional, or local government agency.<sup>23</sup> While the Requester’s charter school is also a nonprofit corporation under West Virginia laws, this designation does not, in the opinion of the Ethics Act, exclude the charter school from also being a political subdivision for purposes of the Ethics Act. **The Ethics Commission finds that because the Legislature has designated a public charter school’s governing board as a public corporation, a public charter school is a political subdivision for purposes of the Ethics Act, even if it is incorporated as a nonprofit corporation.**

**The Ethics Commission also finds that public charter school board members are public officials for purposes of the Ethics Act.** The Commission bases this finding on the Act’s definition of public officials that includes those given the authority to act in any county office or position who is responsible for the making of policy or taking other

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<sup>22</sup> W. Va. Code § 18-5G-7(c)(2)(a) (The Ethics Commission declines to find that the addition of the term “body” to the phrase “public corporate” creates any meaningful distinction for purposes of the Ethics Act.)

<sup>23</sup> The phrase “political subdivision” is a term of art used with varying degrees of application in numerous statutes. Queen v. W. Virginia Univ. Hosps., Inc., 179 W. Va. 95, 103, 365 S.E.2d 375, 383 (1987)

official action where the official action has an economic impact of greater de minimis nature.<sup>24</sup>

Next, the Ethics Commission must examine the provisions of the public charter school law to determine whether the Legislature exempted public charter schools from the Ethics Act. The applicable provision states: “A public charter school authorized pursuant to this article is exempt from all statutes, state board policies and rules applicable to a noncharter public school or board of education except the following unless otherwise specifically provided in this article . . . .”<sup>25</sup> Thus, public charter schools are exempt from those statutes, state board policies, and rules that apply to 1) *noncharter* public schools or 2) boards of education.<sup>26</sup> (emphasis added) The public charter school law defines a “noncharter public school” as “a public school or multicounty vocational center other than a public charter school established pursuant to this article.”<sup>27</sup>

“When a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute.” Syllabus Point 5, *State v. General Daniel Morgan Post No. 548, V.F.W.*, 144 W. Va. 137, 107 S.E.2d 353 (1959).” Jefferson Cnty. Found., Inc. v. W. Virginia Econ. Dev. Auth., 247 W. Va. 24, 37, 875 S.E.2d 162, 175 (2022), Syl. Pt. 7. The West Virginia Supreme Court has explained that when a provision is clear, it means the Legislature’s intent is plain, and the Court’s work is simply to apply the statute. *Id.* 247 W. Va. 24, 37, 875 S.E.2d 162, 175. The Ethics Commission finds that the public charter school law statute is clear: it only exempts public charter schools from statutes, state board policies, and rules that apply to noncharter public schools and boards of education. The public charter school law does not exempt public charter schools from all statutes in the West Virginia Code, which consists of approximately 64 or more chapters, one of which is the Ethics Act, W. Va. Code §§ 6B-1-1 to 6B-3-11. Nor does the public charter school law exempt charter schools from all laws applicable to public corporations, political subdivisions, or county, regional, and local government agencies. **The Ethics Commission finds that the public charter school law does not exempt charter school board members or employees from the Ethics Act.**

In conclusion, the Ethics Commission finds that public charter school board members are subject to the Ethics Act.

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<sup>24</sup> The charter school is a political subdivision that is properly classified as a county, regional, or local government agency under the Ethics Act. Charter schools may serve one or more counties.

<sup>25</sup> W. Va. Code § 18-5G-3(c)

<sup>26</sup> A county board of education is responsible for supervising a county school district and is “composed of five members, nominated and elected by the voters of the respective county without reference to political party affiliation. W. Va. Code § 18-5-1

<sup>27</sup> W. Va. Code § 18-5G-2(10)

*This Advisory Opinion is based upon the facts provided. If all material facts have not been provided, or if new facts arise, the Requester must contact the Ethics Commission for further advice as it may alter the analysis and render this Opinion invalid. This Advisory Opinion is limited to questions arising under the Ethics Act, W Va. Code §§ 68-1-1 through 6B-3-11 and does not purport to interpret other laws or rules.*

*In accordance with W Va. Code § 6B-2-3, this Opinion has precedential effect and may be relied upon in good faith by public servants and other persons unless and until it is amended or revoked or the law is changed.*

/s/ Robert J. Wolfe, Chairperson  
West Virginia Ethics Commission