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TO: Members, New Haven Board of Education, Dr. Iline Tracey

FROM: Thomas B. Mooney, Shipman & Goodwin LLP

RE: Response to Request for Guidance

DATE: November 17, 2020

By email dated November 9, 2020, Assistant Corporation Counsel Elias Alexiades conveyed the request of the New Haven Board of Education (“Board” or “Board of Education”) for guidance in its consideration of and action on a report from Attorney Amita Patel Rossetti dated October 26, 2020, concerning a complaint by a Board employee against a Board member (the “Report”). I received a copy of that report on November 12, 2020, and I provide the following answers and recommendations to the Board members for your consideration.

Based on the questions and our responses, we recommend that the Board of Education receive this privileged communication in advance of a meeting (so that members have the opportunity to consider these answers), and that the Board then meet to discuss the legal advice set forth below. We further recommend that, after discussing this legal advice, the Board vote whether to receive the Report. Should the Board vote to receive the Report, we recommend that the Report be distributed to all members in advance of the Board’s meeting to discuss the Report as a confidential attorney-client communication, so that the Board may then meet to discuss the Report and to decide on next steps. We believe that the Board members will be best able to take these steps after having an opportunity to read the Report. However, we wish to remind Board members that both this Memorandum and the Report remain privileged documents that should not be shared further unless and until the Board of Education as a whole waives the attorney-client privilege as to either or both.

EXECUTIVE SUMMARY:

Given the many questions, answers, and the related analysis, the following summary may be a helpful overview. I explain each of these points in the answers that follow the various questions that Attorney Alexiades posed on behalf of the Board.

- The Board may discuss this Memorandum and, ultimately, the Report in executive session. I recommend that the Board do so in the first instance because public discussion of this Memorandum or the Report would waive the attorney-client privilege. Only the full Board can waive the privilege, and the Board may wish to do so. However, that decision would best be made after a discussion of the legal advice in executive session so that any waiver of the privilege would be done knowingly.
- To discuss this Memorandum (and ultimately the Report) in executive session, 2/3s of the Board members present and voting must vote to convene into executive session. In so doing, the Board should state that such executive session is for the purpose of discussing confidential information contained in a privileged attorney-client communication concerning a complaint by a Board employee.
- Mr. Goldson has the right to vote on whether the Board discusses this Memorandum (or the Report) in executive session, as that is a procedural issue.
- Mr. Goldson, as a member of the Board, has the right to attend all meetings of the Board of Education. Since Mr. Goldson will be attending in his official capacity, his attendance at a Board meeting called to discuss the legal advice in this Memorandum and/or the Report would not waive the attorney-client privilege.
- Mr. Goldson is also a represented party with regard to the complaint against him. Lawyers for the Board may speak with the Board members about this matter, and Mr. Goldson may attend that discussion in his official capacity. Lawyers for the Board may also answer their questions by Board members. Given the prohibition against direct communication with a represented party, however, Board lawyers should answer questions Mr. Goldson asks in any related discussion only if his lawyer confirms in writing that we may do so.
- While the discussion of this legal advice (and that in the Report) can be held in executive session, the discussion of the Board's response to the complaint should be held in open session unless a separate executive session privilege is available (such as discussion of the "performance . . . of a public officer").
- Mr. Goldson should not vote on the Board's response to the complaint. Mr. Goldson has a personal interest in how the Board responds to the complaint against him, and he therefore has a conflict of interest with regard to the Board's discussion and action of its response to the complaint. Given his conflict of interest, Mr. Goldson's participation in the Board's deliberation and action in response to the complaint is prohibited by the Board Bylaws 9270 and 9271, as well as the City Ethics Ordinance.
- Given that Mr. Goldson has not yet responded to the findings in the Report, I recommend that the Board invite him to respond to the findings in the Report during its deliberations on its action in response to the complaint. The Board will benefit in its deliberations by hearing Mr. Goldson's response, and it would not be a conflict of interest for Mr. Goldson to respond to the Report at the Board's invitation.

- The Board President does not have the authority under the Board Bylaws to prevent Mr. Goldson from participating in the Board deliberations and/or vote on the Board's response to the complaint due to the conflict of interest. However, Mr. Goldson would do so at his peril, given that such action on his part would violate the Board Bylaws and the City Ethics Ordinance.

I hope that these summary points are helpful. The specific questions and answers follow.

1. "May the BOE go into executive session under 1-200(6)(B) and 6(E) over Mr. Goldson's (6)(A) objection and demand for open session?"

The Board can convene into executive session to discuss the Report in accordance with Conn. Gen. Stat. § 1-200(6)(E).

Conn. Gen. Stat. § 1-200(6)(E) provides that public agencies can convene in executive session for the purpose of "(E) discussion of any matter which would result in the disclosure of public records or the information contained therein described in subsection (b) of section 1-210." Conn. Gen. Stat. § 1-210(b)(10) provides in turn that "communications privileged by the attorney-client relationship" are confidential. Accordingly, the Board may discuss the Report in executive session, as it is a privileged attorney-client communication.

I was not present when the Board discussed this matter, and I am not aware of Mr. Goldson's specific objection. My conclusion stands if Mr. Goldson's objection is based on Conn. Gen. Stat. § 1-200(6)(A), which provides that public agencies can convene into executive session for the purpose of discussing the "appointment, employment, performance, evaluation, health or dismissal of a public officer or employee." That right is limited, however, by the further proviso "that such individual may require that such discussion be held at an open meeting." If the Board were relying on this provision to convene into executive session, Mr. Goldson would have the right to require that such discussion in open session. However, that is not the case here.

Here the Board would rely on a separate provision of the Freedom of Information Act ("FOIA") that permits the Board to discuss information contained in a privileged attorney-client communication in executive session, as discussed above. The privilege under Conn. Gen. Stat. § 1-200(6)(5) belongs to the Board, and not to any individual member.

Finally, I question whether it would be appropriate for the Board to convene into executive session pursuant to Conn. Gen. Stat. § 1-200(6)(B). That provision permits public agencies to convene into executive session for the purpose of discussing "strategy and negotiations with respect to pending claims or pending litigation." At this point, there is no pending litigation, and the FOIA defines a "pending claim" as "a written notice to an agency which sets forth a demand for legal relief or which asserts a legal

right stating the intention to institute an action in an appropriate forum if such relief or right is not granted.” Here, a Board employee has made a complaint against a Board member, demands an investigation, and refers to “potential litigation.” However, the complaint does not include a specific demand for legal relief or describe an intention to institute an action (referring only to “potential litigation”). Accordingly, we recommend that the Board not rely on Conn. Gen. Stat. §1-200(6)(B) in any vote to convene into executive session to discuss this matter.

“This question includes:

- a. “Is the BOE’s receipt of written attorney advice and discussion that follows (FOIA § 1-200(6)(E)) separate and apart from the discussion of possible action on the advice (FOIA § 1-200(6)(A))?”

Yes, as described above. “FOIA § 1-200(6)(A)” refers in part to the discussion of the performance of a “public officer or employee,” here a Board member, and under that provision, a Board member can require that the discussion as to his or her performance be held in open session. However, the executive session anticipated here would not invoke this section, as discussed above.

- b. “May the BOE may receive the document and discuss the advice therein, and then decide when and how to act on the matter in a separately, either at the same meeting or subsequently?”

Yes. The discussion of the legal advice contained in the Report is separate from the discussion of whether, when and how to act on the complaint, and the second discussion may be deferred to a subsequent meeting. Significantly, the rules for the two discussions are different, and discussion of whether, when and how to act on the complaint after considering the confidential legal advice should be held in open session unless there is a separate executive session privilege for the discussion.

Discussion of matters relating to the operation of the New Haven Board of Education must be held in open session unless there is a clear exemption from that requirement because the provisions of the Freedom of Information Act will be construed broadly in favor of public disclosure. As one example of the many judicial pronouncements on this subject, the Connecticut Supreme Court stated the following in *Wilson v. Freedom of Information Commission*, 181 Conn. 324 (Conn. 1980):

The Freedom of Information Act expresses a strong legislative policy in favor of the open conduct of government and free public access to government records.

* * *

The general rule, under the [Freedom of Information Act], however, is disclosure. General Statutes 1-19. Exceptions to that rule will be narrowly construed in light of the underlying purpose of the [Freedom of Information Act] [citations omitted]; and the burden of proving the applicability of an exemption rests upon the agency claiming it.

Applying these principles here, the Board must be aware of and respect the limits of the executive session privilege under Conn. Gen. Stat. § 1-200(6)(5).

The executive session privilege under Conn. Gen. Stat. § 1-200(6)(5) relates to the Board's discussion of confidential information contained in certain records listed in Conn. Gen. Stat. § 1-210(b), here, an attorney-client communication. However, in interpreting the Freedom of Information Act, the Connecticut Supreme Court has construed "legal advice" strictly. *See Harrington v. Freedom of Information Commission, 323 Conn. 1 (2016)*. The Board may discuss the legal advice contained in the Report in executive session. However, discussion of whether and how the Board may take action on the basis of such legal advice is not privileged to executive session under Conn. Gen. Stat. § 1-200(6)(E).

Accordingly, Board discussion of whether and how to act on that advice must be held in public session unless there is another executive session privilege for that discussion. Here, given that the complaint relates to the actions of a Board member, the Board could further discuss those actions and the response to such actions in executive session under Conn. Gen. Stat. § 1-200(6)(A). However, as noted above, the Board member whose performance would be discussed would have the right under that provision to require that the discussion be held in open session.

2. "May the BOE exclude Mr. Goldson on grounds of conflict of interest or attorney client privilege?"

No. Mr. Goldson is a member of the Board of Education. As such, Mr. Goldson has the right to attend all meetings of the Board. A public agency, here the Board of Education, does not have the authority to exclude a member of that agency from a meeting of that agency, whether conducted in open session or executive session.

The question refers to two separate possible concerns, conflict of interest and attorney client privilege, and it is possible that the Board could ask Mr. Goldson to recuse himself from the executive session on either or both of these grounds. However, Mr. Goldson can decide for himself whether to attend the meeting (including the executive session discussion of the attorney-client communication). Moreover, neither concern (waiver or conflict of interest) would be a basis for excluding Mr. Goldson from a meeting of the Board, as discussed below under Question 3 (waiver of the privilege) and Question 5 (conflict of interest).

3. “Would Mr. Goldson’s participation in the executive session constitute a waiver of the BOE’s attorney-client privilege?”

No. The attorney-client privilege extends to the Board of Education. As a member of the Board, Mr. Goldson may attend a meeting in which the Board discusses an attorney-client privileged communication. However, all Board members have a duty to maintain the confidentiality of this Memorandum or the Report unless and until the Board (acting as a whole) votes to waive the privilege, either directly by express vote or indirectly by voting to make this Memorandum and/or the Report public with the knowledge that such action will constitute a waiver of the privilege.

“This question includes:

- a. “Is the attorney-client privilege held by the BOE as a corporate body, not by any individual member?”

The client in this case is the Board of Education, and as the client, the Board of Education holds the privilege to maintain the confidentiality of communications between the Board and the attorney for purpose of requesting and receiving legal advice. However, the Board can delegate review and recommendations concerning the Report to a committee of the Board, which would then hold the privilege.

The Report is a privileged communication exempt from public disclosure under Conn. Gen. Stat. § 1-210(b)(10), and the Board may discuss the Report in executive session under Conn. Gen. Stat. § 1-200(6)(E).

Please note, however, that sharing the Report with the entire membership of the Board is not the only option for the Board in considering the Report. Given that the Board holds the privilege, the Board can delegate review of the Report (and the related privilege) to a committee of the Board created for that purpose. Such limited disclosure of the report to a committee of the Board would reduce the likelihood that the Report would be disclosed to the public more generally unless and until the Board votes to do so.

Specifically, if it wishes, the Board of Education can establish an investigative committee in accordance with Board Bylaw 9130 for the purpose of conducting investigatory activities, including reviewing the Report and making recommendations to the full Board of Education with respect to a complaint made by a Board employee pertaining to the conduct of a Board member. Should the Board create such a committee, the Board President would have the right to appoint one or more members to that committee in accordance with Board Bylaw 9121.

If the Board wishes to consider this approach, the possible charge to such a committee could be:

- Review and consideration of the Report and any other investigatory information;
- Directing any such further investigatory activities as the committee considers appropriate in its discretion;
- Consultation with legal counsel for the Board with respect to the Report, the investigation process, information received, remedial actions considered (if any) and development of recommendations to the full Board;
- Maintaining the attorney client privilege with respect to information received by the committee, including but not limited to making decisions pertaining to the waiver of such privilege; and
- Making recommendations to the Board as a whole pertaining to the complaint and investigation thereof, including but not limited to making decisions as to the form and substance of such recommendations.

Please let me know if the Board would like to discuss further this option of delegating review and consideration of the Report to a committee of the Board.

- b. “If so, is an individual board member outside the attorney-client privilege such that disclosure of privileged material to persons outside the attorney-client relationship will constitute a waiver of the privilege?”

No. The only way to share the Report with the Board is to share it with its members in their capacity as Board members, and such sharing does not waive the attorney-client privilege as to the Report. Individual Board members who receive the Report, however, do not have the authority to disclose the Report further and/or otherwise to waive the privilege.

A complicating factor is that an individual Board member may wish to seek personal legal advice as to whether and how the Report affects him or her. Further disclosure to independent legal counsel is the only way that an individual Board member can obtain such personal legal advice, and accordingly there is tension between the right of the Board to maintain the confidentiality of the Report as an attorney-client privileged communication and the right of the individual Board member to obtain personal legal advice regarding whether and how the Report affects him or her.

Anne Littlefield and Lee Anne Duval serve as General Counsel and Associate General Counsel of Shipman & Goodwin LLP respectively, and we have conferred on this matter. Our analysis is that an individual Board member may share the Report with private legal counsel for the purpose of obtaining individual legal advice on the Report. We do not believe that such disclosure would constitute a waiver of the privilege because counsel for the individual Board member would serve as an “alter ego” for the individual Board member who is seeking legal advice. The corollary is that counsel for the individual Board member would be bound by the same duty of confidentiality that applies

to the individual Board member. Both would be bound to maintain the Report as confidential unless and until the Board itself votes to waive the privilege.

4. “May the BOE waive its attorney-client privilege without seeing the privileged communication or otherwise made aware of the substance? (*i.e.* will it be a knowing and voluntary waiver?)”

Yes. The Board of Education holds the privilege to maintain the confidentiality of the Report as an attorney-client communication, and it can vote to waive that privilege. The Board of Education may only do so by formal vote, given that public agencies take action through public vote. Such a vote could expressly waive the privilege or it could implicitly waive the privilege by directing that the Report be made public. Whether and when to waive the privilege is a decision for the Board, and it may make that decision before or after receiving the Report.

Lawyers representing the Board are bound by Rule 1.6, which provides “(a) A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent.” Rule 1.0(f) defines “informed consent” as “the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.” Here, we advise that waiver of the privilege as to the Report could have adverse consequences for the Board. The Board would be better able to consider the advantages and disadvantages of waiving the privilege and making the Report public after reviewing the Report. However, as long as the Board understands that waiving the privilege could have adverse consequences, it is free to waive the privilege without first reviewing the Report.

5. “Does Mr. Goldson have a conflict of interest regarding the investigation, and to what extent may he vote or participate in related discussions?”

Yes. In answering this question, we have considered Bylaw 9270, Bylaw 9271 (the Code of Ethics for the Board of Education), as well as the “Ethics in Local Government Ordinance,” found in Section 125/8-1 *et seq.* of the Code of Ordinances, Code of the City of New Haven, Connecticut.¹ Based on the definitions of “personal interest” and “conflict of interest” in both the Code of Ethics for the Board of Education (“BOE Ethics Code”) and the Ethics in Local Government Ordinance (“City Ethics Ordinance”), we conclude that Mr. Goldson’s voting on the Board’s action (if any) on the complaint in light of the Report would be prohibited by both the BOE Ethics Code and the City Ethics Ordinance. However, we recommend that the Board invite Mr.

¹ Section 125/8-3 provides “Public official or city official means any elected officer, or any individual appointed to any office of the legislative or executive branch, including boards, commissions, and task forces.” Mr. Goldson, as a member of the New Haven Board of Education, is a public official subject to the provisions of the Ethics in Local Government Ordinance.

Goldson to respond to the Report so that the Board has the benefit of his perspective as it deliberates and takes action on the complaint in light of the Report.

Both the BOE Ethics Code and the City Ethics Ordinance define “personal interest” as follows:

Personal interest means any interest, other than a financial interest, which shall affect or benefit the individual or his immediate family or any organization with which the individual is affiliated, which is not common to the general interest of other citizens of the city.

Mr. Goldson has a personal interest in the Board’s action on the Report because the action that the Board takes on the Report could affect Mr. Goldson. It is likely that the interest at stake here is not financial in nature. Mr. Goldson took the actions that are the subject of the complaint while acting as a member of the Board of Education, and accordingly he will be subject to indemnification, including reasonable legal fees, should the employee bring a claim against Mr. Goldson unless his actions are determined to be “wanton, reckless or malicious.” Conn. Gen. Stat. § 10-235. However, the Board’s handling of the complaint could affect Mr. Goldson’s reputation or standing in the community, and as such we conclude that Mr. Goldson has a personal interest in the Board’s consideration and action on the complaint in light of the Report, as that term is used the BOE Ethics Code and the City Ethics Ordinance.

Given that Mr. Goldson has a personal interest in the Board’s consideration of and action on the complaint in light of the Report, Mr. Goldson would have a conflict of interest in participating in the Board’s decision-making with respect to the complaint under both the City Ethics Ordinance and the BOE Ethics Code.

Section 125/8-5 of the City Ethics Ordinance provides:

(b) *A municipal employee or public official has a conflict of interest if they, or a member of their immediate family or household, have a financial interest or personal interest in the outcome of any matter requiring the exercise of judgment or discretion within or before their department, or a board, or commission, or task force of which they are a member, except in circumstances enumerated in sections 12 5/8 -6 or 12 5/8 -7. (Emphasis added).*

Moreover, Section 125/8-5 expressly prohibits a public official from taking action on a matter on which he or she has a conflict of interest:

No officer, employee or official of the City of New Haven, whether elected or appointed, paid or unpaid, shall engage in any activities which result in a conflict of interest between the duties and responsibilities of his public office and his

private affairs, or which are incompatible with the proper discharge of his official duties or responsibilities. (Section 209(b) of the city charter.) (Emphasis added).

Thus, it is clear that the City Ethics Code prohibits Mr. Goldson from voting on whether and how the Board of Education takes action on the complaint.

Similarly, such action by Mr. Goldson is prohibited by the BOE Ethics Code. The BOE Ethics Code provides:

Conflict of interest means in a situation that presents a conflict with the proper discharge of a public official's or New Haven Public School employee's duties or responsibilities.

Moreover, Bylaw 9270, expressly defines a “conflict of interest” as including the following:

(b) *A New Haven Public Schools employee or New Haven Board of Education member has a conflict of interest if they, or a member of their immediate family or household, have a financial interest or personal interest in the outcome of any matter requiring the exercise of judgment or discretion within or before their department, or a board, or commission, or task force of which they are a member, except in circumstances.*² (Emphasis added).

Moreover, the BOE Ethics Code sets out Standards of Conflict, which include the following situations Board members may face:

(a) A New Haven Board of Education member or New Haven Public Schools employee who has a conflict of interest in a matter affecting the city shall refrain from taking any action on or in the matter.

* * *

(g) New Haven Board of Education members and New Haven Public Schools employees shall avoid any action or activity that constitutes or gives rise to a conflict of interest.

In sum, both the City Ethics Ordinance and the BOE Ethics Code provision prohibit Board members from taking action on matters in which they have a conflict of interest, including matters on which a Board member has a personal interest, as Mr. Goldson has here.

² We note that words appear to be missing at the end of this provision. However, Bylaw 9270 goes on to specify circumstances in which there is no conflict of interest, and presumably this phrase “except in circumstances” refers to the fact that there are exceptions, as set out later in the Bylaw.

In considering this matter, the Board will have to reconcile competing considerations between the need to be fair to Mr. Goldson and to have complete information, on the one hand, and the need to comply with ethical rules, on the other. The normal rule is that a board of education member who has a conflict of interest should not participate in the discussion of the matter at hand, as well as the vote. That rule is based on the fact that a board of education is a deliberative body, and that deliberative bodies make decisions on the basis of the discussion before the vote. Accordingly, participation by a board member in the discussion of a matter on which the member has a conflict is itself a conflict of interest, whether or not the public official votes, because such participation could affect how other vote. *See, e.g., Low v. Town of Madison*, 135 Conn. 1 (1948).

Here, Mr. Goldson (along with all the other Board members) will be seeing a report concerning a complaint against his actions for the first time. Moreover, Mr. Goldson did not participate in the investigation to provide his side of the story (albeit by his own choice). In order that the Board has the best information on which to determine next steps, we recommend that the Board invite Mr. Goldson to respond to the Report when the Board discusses it, either in executive session or in open session. Through such invitation, the Board would make clear that Mr. Goldson is providing information to the Board as a subject of the Report, and not in his role as a Board member. By proceeding in this matter, the Board will have the benefit of Mr. Goldson's responses to the conclusions in the Report without Mr. Goldson's being subject to a conflict of interest claim for participating as a Board member in the deliberations on the Report.

"This question includes:

- a. "Does the BOE acting through its chair (president) have the power to act on conflicts of interest and bar individual members from participation, either under Robert's Rules or BOE by-laws, subject to appeal to the full BOE. See Robert's Rule § 45 (chair may not compel recusal)."

No. The powers of the Board President are set out in Bylaw 9121, and they do not include the authority to determine when conflicts of interest occur or to prohibit Board members from voting on specific matters. Should Mr. Goldson participate in the Board deliberations and action on the Report, and should the Board President (or other Board member) consider that such action is a violation of the BOE Ethics Code or the City Ethics Ordinance, he or she or they may refer the matter either to the Board of Education Ethics Committee (established by the BOE Ethics Code) or the Board of Ethics in accordance with Section 125/8-9 of the City Ethics Ordinance.

- b. "May Mr. Goldson vote on the executive session motion or an appeal of the chair's ruling if he has a conflict?"

Yes, as to a vote on whether the Board should convene in executive session. Mr. Goldson may have a preference (as any Board member may have) whether the Board should discuss this matter in executive session or in open session, but his vote relates to a procedural matter, and we do not conclude that Mr. Goldson has a “personal interest” in that vote that would create a conflict of interest.

I understand that reference to an appeal relates to a possible ruling that Mr. Goldson cannot participate in the meeting because he has a conflict of interest. As discussed above, the President does not have the authority to rule that Mr. Goldson cannot participate because he has a conflict of interest (notwithstanding the conclusion to that effect in this Memorandum). In the first instance, Mr. Goldson must make his decision, and if he decides to participate in the Board’s action on the complaint in light of the Report, that action will be subject to review by either the Board Ethics Committee or the Board of Ethics of the City, should the President or another Board member refer Mr. Goldson’s actions to either the Board Ethics Committee or the Board of Ethics.

- c. Do recusals and/or abstentions count towards “an affirmative vote of two-thirds of the members of such body present and voting” to go into executive session under Conn. Gen. Stat. § 1-225(f).

As indicated in the question, the Board of Education must vote to convene into executive session to discuss the confidential information that is contained in the Report, stating the purpose of the executive session, here discussion of information that is contained in a confidential attorney-client communication under Conn. Gen. Stat. § 1-200(6)(E). Conn. Gen. Stat. § 1-225 provides in relevant part:

- (f) A public agency may hold an executive session, as defined in subdivision (6) of section 1-200, upon an affirmative vote of two-thirds of the members of such body present and voting, taken at a public meeting and stating the reasons for such executive session, as defined in section 1-200.

Given the reference to “members of such body present at voting,” we conclude that Board members who abstain from voting on convening into executive session (whether because they have recused themselves or otherwise) do not count in calculating the required two-thirds vote. Thus, if six Board members vote, four affirmative votes will permit the Board to convene in executive session. By contrast, if seven members vote, five votes would be necessary to meet the two-thirds requirement of the FOIA.

- 6. “As Mr. Goldson is represented by counsel, may BOE attorneys (Corporation Counsel and/or outside counsel) communicate with him directly – at a BOE meeting -- concerning the subject of the representation? [Rules of Professional Conduct Rule 4.2 Communications with Persons Represented by Counsel]”

BOE attorneys may communicate directly with their client, the New Haven Board of Education, and, in his official capacity as a member of the Board, Mr. Goldson has the right to be present for such communication. However, BOE attorneys may not communicate directly with Mr. Goldson in his individual capacity. Accordingly, in Board discussions with counsel on this matter, we recommend that either Mr. Goldson, through counsel, consent to Board counsel answering Mr. Goldson’s questions during any such Board discussion or that Board counsel decline to answer any questions posed directly by Mr. Goldson in such discussion. In any event, we conclude that Mr. Goldson’s private attorney may not attend any discussion, should such discussion be held in executive session, as his presence could be considered a waiver of the attorney-client privilege. Discussion of the contents of the Report in open session would be a waiver of the privilege in any event.

In relevant part, Rule 4.2 of the Rules of Professional Conduct provides:

In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

The answer to this question thus requires consideration of the semantics. We have concluded that the Board may discuss legal advice with counsel in executive session or in open session, and we have concluded that Mr. Goldson, as a member of the New Haven Board of Education, has the right to attend all meetings of the Board, whether held in open session or executive session. We do not consider any such communication by Board counsel to be communicating “directly” with Mr. Goldson, as the word “directly” suggest that Board counsel would be communicating with Mr. Goldson in his individual capacity. However, to address this concern conservatively, we suggest that the Board, through counsel, reach out to Attorney Williams and inform him that (1) Mr. Goldson will be permitted to attend any Board discussion of the Report, including executive session, (2) he (Attorney Williams) will not be permitted to attend the executive session, if any, and (3) Board counsel will not answer any questions Mr. Goldson has during Board discussion unless Attorney Williams consents to Board counsel doing so.

We apologize for the length of this response, but the list of questions was long. We hope that this information is helpful to the Board, and we look forward assisting further as the Board may find helpful.

Cc: Attorney Patricia King, Corporation Counsel
Attorney Elias Alexiades, Assistant Corporation Counsel
Attorney Natalia Sieira Millan, Shipman & Goodwin LLP