

When is it a Necessity?

Why school boards may need to invoke the “doctrine of necessity”

By JONATHAN M. BUSCH, ESQ.

School board members are legally prohibited from participating in or voting on matters in which they may have a conflict of interest. For example, a board member with a family member teaching in the district may not sit on the negotiations committee or vote on a contract. But what happens when several members on the same board have a conflict of interest?

Sometimes, this means that the school board may invoke what is known as the “doctrine of necessity.” The doctrine of necessity permits school board members who have a conflict of interest in a particular matter to vote despite the conflict.

As attorneys, we are often asked the circumstances under which our school board clients may invoke the doctrine of necessity. The doctrine of necessity is intended to be invoked on the rare occasion when a quorum of school board members are conflicted on a particular matter and as a result, the school board is unable to act. In other words, the doctrine of necessity serves as one of the most ironic concepts in school law: it may only be invoked if too many members cannot vote, and as a result, all of them may.

Background The modern concept of the doctrine of necessity was first explored in a 1936 opinion by the Court of Errors and Appeals of New Jersey entitled *Downs v. Mayor and Council of the City of South Amboy*. In that case, the South Amboy City Council was permitted by the Court to act on a proposed ordinance on which three of the five Council Members were conflicted. The Court held that if the three Council Members were to abstain, “there would be no council and therefore no body to pass upon this locally important matter which . . . would not permit of delay.” Therefore, the Court concluded that the Council should act, despite the three conflicts. In

1952, the State Supreme Court articulated an important limitation on the use of the doctrine of necessity in *Pyatt v. Mayor and Council of Dunellen*. In this matter, the Court held that the doctrine of necessity may not be invoked if the public body has a sufficient number of non-conflicted officials to vote.

In 1960, the State Supreme Court issued two opinions which further shaped the version of the doctrine of necessity that we know today. In *Griggs v. Princeton Borough*, the Supreme Court cited a 19th century conflicts of interest case when it stated that “in order to prevent a failure of justice”, there must be “an imperative reason” for the invocation of the doctrine of necessity. The Court in *Griggs* held that the doctrine of necessity can be used in cases of only significant necessity and actions which can be addressed at a later time must be removed from the agenda until such time as a quorum of a public body’s members are not conflicted. Later, that year, in *Borough of Fanwood v. Rocco*, the Court imposed the requirement that there must be the presence of an important public issue in order for a public body to apply the doctrine of necessity.

The School Ethics Commission and the Doctrine of Necessity Over the years, the School Ethics Commission (“SEC”) has issued a series of decisions and advisory opinions applying the logic of the case law to the school board context. For example, in 1996, *In the Matter of Edward DeYoung*, the SEC held that the Vernon Township Board of Education appropriately invoked the doctrine of necessity to vote on its teachers’ contract. In *DeYoung*, more than a quorum of the board members had conflicts that would have required them to abstain from voting on the contract. The SEC noted that the “inability to ratify the

contract could lead to a walk-out or other action that could be detrimental to the students and thus, to the public welfare.” Thus, the board was required to invoke the doctrine of necessity to achieve a quorum and enable itself to act.

In 1998, the SEC issued Advisory Opinion A03-98, in which the SEC advised a county special services board on the manner in which it must form a negotiating team and vote on a collective negotiations agreement when four of the five then-eligible voting members of the board were conflicted. The SEC explained that since only one board member was eligible to negotiate without conflict, there were not enough eligible board members to form a negotiating committee. The SEC held that in order to allow the other school board members to participate in the negotiations, the doctrine of necessity must be invoked. “Then, the Board could either determine to act as a committee of the whole or to choose a committee from among any of its members to participate in the negotiations.” The SEC further held that the doctrine of necessity would have to be invoked again when it became time for the entire school board to vote on ratification of the collective negotiations agreement.

The SEC addressed the use of the doctrine of necessity in the context of school board member election endorsements in late 2002 in Advisory Opinion A13-02. In this opinion, the SEC advised that, among other things, the doctrine of necessity would not be invoked if three members of the school board were endorsed by the local union in the most recent school election because there would be others available to serve on the negotiations committee. However, the SEC further opined that, in the event a quorum of school board members was not available

to vote on ratification of the applicable collective negotiations agreement, the board should invoke the doctrine of necessity.

The Doctrine of Necessity Today In view of Advisory Opinion A13-02, the SEC issued specific guidance on the doctrine of necessity for the purpose of repeating and clarifying the guidance it previously issued in Advisory Opinion A03-98. At its meeting on February 25, 2003, the SEC resolved the following:

- 1.) When a school board must invoke the Doctrine of Necessity, the school board should set forth in a resolution:
 - a. that it is invoking the Doctrine of Necessity;
 - b. the reasons that such action is necessary; and
 - c. the specific nature of the conflicts of interest; and
- 2.) The resolution invoking the Doctrine of Necessity must be read by the school board at a regularly scheduled public meeting; and
- 3.) The resolution must be posted where the school board posts public notices, for a period of 30 days; and
- 4.) The school board must provide the SEC with a copy of the resolution.

While the invocation of the doctrine of necessity might seem appropriate in a given situation at first glance, all school boards must take care to ensure that the use of the doctrine of necessity is appropriate. In making this determination, it is imperative that all school boards consider the history of the doctrine of necessity and the specific guidance issued by the School Ethics Commission. **sl**

Jonathan Busch is an attorney and is counsel at Schwartz Simon Edelstein & Celso LLC. He can be reached at jbusch@sseclaw.com.

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