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June 16, 2017

ATTORNEY GENERAL OPINION NO. 2017-8

Barry R. Wilkerson, County Attorney  
Riley County Attorney's Office  
Carnegie Building, 105 Courthouse Plaza  
Manhattan, Kansas 66502-0106

Re: Schools—Organization, Powers and Finances of Boards of Education—  
Board of Education; General Powers

Synopsis: The common law doctrine of incompatibility of offices does not preclude a person from concurrently serving as a victim-witness coordinator employed by a County Attorney's Office and as a member of the board of education of a unified school district in the same county. Cited herein: K.S.A. 19-248; 19-702; 25-4318 *et seq.*; 60-1202 *et seq.*; 72-8123; K.S.A. 2016 Supp. 72-8205 and Kan. Const., Art. 6, § 5.

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Dear Mr. Wilkerson:

As County Attorney, you request our opinion on whether the doctrine of incompatibility of offices or conflict of interest prevents a victim-witness coordinator employed by the County Attorney's Office from concurrently serving as a member of the board of education of a unified school district in the same county.<sup>1</sup>

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<sup>1</sup> We note that your request references a "conflict of interest," which also may be construed to be a question about governmental ethics laws. The Kansas Governmental Ethics Commission is the agency that is authorized to administer, interpret and enforce laws related to conflict of interests and to issue advisory opinions on the State Governmental Ethics Law, K.S.A. 46-215 *et seq.* and Local Governmental Conflict of Interest Laws, K.S.A. 75-4301a, *et seq.* We limit our opinion to a "conflict of interest" related to the doctrine of incompatibility of offices.

Incompatibility of offices is a common law doctrine that precludes a person from concurrently serving in two offices when “the nature and duties of the two offices are such as to render it improper, from considerations of public policy, for one person to retain both.”<sup>2</sup> Specifically, “[o]ffices are incompatible when the performance of the duties of one in some way interferes with the performance of the duties of the other. This is something more than a physical impossibility to discharge the duties of both offices at the same time. It is an inconsistency in the functions of the two offices.”<sup>3</sup> Kansas has adopted the doctrine of incompatibility, and extended its application to situations where one position is a public office and one is public employment.<sup>4</sup> Notwithstanding this common law prohibition, “[t]he legislature decides who may qualify for public office. . . . If the legislature has spoken, the statement supersedes common law, and the doctrine of incompatibility of office does not apply.”<sup>5</sup>

There is no constitutional or statutory provision that we have found which prevents a victim-witness coordinator employed by the County Attorney’s Office from concurrently serving as a member of the local board of education. Neither are there any provisions specifically authorizing the simultaneous performance of both functions. Therefore, we turn to the common law doctrine of incompatibility of offices to determine if the two positions are incompatible.

You state, “[t]here are no situations where [the employee’s] position as a school board member would overlap with responsibilities of the County Attorney’s Office.” For instance, a victim-witness coordinator employed by the County Attorney’s Office is hired by the County Attorney and is directly answerable to the County Attorney. Such employee’s continued employment is determined by the discretion of the County Attorney. Where the County has a County Counselor, as Riley County does, it is the responsibility of the County Attorney’s Office to prosecute all criminal actions and proceedings in the county.<sup>6</sup> Thus, the duty and function of such public employment is to assist and support the County Attorney in prosecuting all criminal actions and proceedings in the county.

Local school board members are elected.<sup>7</sup> Such public official is subject to involuntary removal by recall<sup>8</sup> or ouster.<sup>9</sup> It is the duty and function of the local school boards “to prescribe courses of study for each year of the school program and to adopt rules and regulations for teaching in the school district and general government thereof, and to approve and adopt suitable textbooks and study material for use therein subject to the

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<sup>2</sup> *Unified School District No. 501, Shawnee County v. Baker*, 269 Kan. 239, 248 (2000), quoting *Abry v. Gray*, 58 Kan. 148, 149 (1897).

<sup>3</sup> *Dyche v. Davis*, 92 Kan. 971, 977 (1914).

<sup>4</sup> *Dyche*, 92 Kan. at 971-977.

<sup>5</sup> *Baker*, 269 Kan. at 243.

<sup>6</sup> K.S.A. 19-702 and K.S.A. 19-248.

<sup>7</sup> K.S.A. 72-8123.

<sup>8</sup> K.S.A. 25-4318 *et seq.*

<sup>9</sup> K.S.A. 60-1202 *et seq.*

plans, methods, rules and regulations of the state board of education.”<sup>10</sup> Thus, the duty and function of such public office is to operate local schools subject to the general supervisory power of the State Board of Education.<sup>11</sup>

It is clear that neither position unduly interferes with the duties of the other. The primary functions of each position are wholly separate and distinct from the other and neither supervises or controls any of the functions of the other.

Because there is no interference with the performance of the duties of the two positions, it is our opinion that there is no incompatibility with the position of a victim-witness coordinator in a County Attorney’s Office and the public office of local board of education board member.

Sincerely,

/s/ Derek Schmidt

Derek Schmidt  
Kansas Attorney General

/s/ Athena E. Andaya

Athena E. Andaya  
Deputy Attorney General

DS:AA:sb

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<sup>10</sup> K.S.A. 2016 Supp. 72-8205.

<sup>11</sup> Kan. Const., Art. 6, § 5.