CCSA Governance Academy

Brown Act, Conflicts and Best Practices for Charter School Board Members and Officials

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Topics we’ll cover

A. Roles and Responsibilities
B. Running public meetings (Brown Act and PLN Bylaws)
C. Public access to records
D. Duty of Care – informed decision-making
E. Duty of Financial Oversight
F. Duty of Loyalty (conflicts, confidentiality)
G. HR and Employment issues for boards
H. Open Forum--Questions?
Roles and Responsibilities

Charter Provisions:

– Board of Directors has legal and fiduciary responsibility for the charter school. Typically, the Board is responsible for providing fiscal accountability by approving and monitoring the budget.

– Directors nominated in accordance with bylaws and relevant board policies

– Sometimes charter will include board member requirements
Typical Charter and Bylaw Requirements

Board approves:
- Major educational and operational policies
- Major contracts
- Annual budget
- Evaluates CEO and maybe CBO
- Ensures long-term viability

CEO or Executive Director:
- In charge of day-to-day operations
- Selection of all other staff
Holding meetings

Boards take action at “meetings”

Do we have to comply with Brown Act (opening meeting law)?
- Most charters and/or bylaws require compliance
  (if not in charter, arguably not required)
- sometimes charter bylaws are not consistent with the Brown Act
  (when inconsistent, Brown Act controls)

Note: Sometimes a nonprofit operates other charities that are not a charter school (i.e., not Brown Act business), so those entities may want to consider bifurcating meeting agendas
Holding meetings

What is a meeting?

“Any congregation of a majority of the members of a legislative body … to hear, discuss, or deliberate, or take action on any item.”

You may not, “outside a meeting … use a series of communications … directly or through intermediaries, to discuss, deliberate, or take action ….”

Gov. Code sec. 54952.2
Holding Board “Committee” meetings

- Brown Act applies to committees created by board, even if just advisory:
  - “Ad hoc” committees exempt, but must be board members, less than quorum, limited existence (until purpose fulfilled)
  - Applies to “standing” board committees (e.g., finance committee, executive committee, facilities committee)
  - But Brown Act *inapplicable* to school working groups set up by President/CEO
    - *Much more flexible mechanism*
      - Board can delegate some authority to standing or ad hoc committees, but committee authority strictly limited to the four corners of that delegation
      - “Executive” committees can sometimes be helpful, but are unnecessary for most schools
Holding meetings

• Brown Act “types” of meetings
  – “Regular” meetings require 72 hour posting of notice
  – “Special” meetings require 24 hours notice
  – “Emergency” meetings (highly unlikely for charter schools)
  – Teleconferencing
    • Posting agenda
    • Notice in agenda
Holding meetings

- Brown Act much more restrictive than Nonprofit Corporations Law
- Under Corporations Code, bylaws can allow:
  - Action by unanimous written consent (but appointment of Board members this way violates Brown Act)
  - Quorum of 1/3 of board
  - Brown Act allows a majority to call a meeting, but is otherwise silent on quorum
Holding meetings

• Brown Act limits meeting to posted agenda:
  – Brief general description of business to be transacted (20 words or less)
  – Posted in publicly accessible place
  – New for 2012: post on website if you’ve got one
  – Suggest consent agenda for routine items
  – Don’t create “information only” vs. “action” items if you want flexibility
  – Adding items to regular agenda
Holding meetings

• Brown Act limits closed sessions:
  – Statutory basis must be identified, such as. . .
    • Litigation (identify matter)
    • Personnel evaluation, termination (identify position)
    • Collective bargaining strategy (identify negotiators)
    • Real estate negotiations (identify property)
  – Not for budget discussions, general planning
Holding meetings

• Rights of public:
  – Speak *before* action taken on any item (including closed session)
  – Attend meeting without having to “sign in”
  – publicly accessible location (with disabled access)
  – May criticize the school, employees and board
  – Can be time limited and required to identify themselves
  – At regular meeting to address board on something *not* on agenda
    • No non-agenda comment required at special meetings
Public information and obligation to respond to requests

- Public Records Act uses Brown Act definition of who is covered
  - All records subject to inspection and copying unless exempt
  - Burden on school to justify withholding records
- Obligation under Charter Schools Act to “promptly respond” to “reasonable inquiries”
What are public records?

• Lots of *exempt* records:
  – Identifiable student records (FERPA)
  – Personnel and medical records
  – Pending litigation
  – Preliminary drafts
• But emails, and material kept in ordinary course of business may be public
Fiduciary duties of directors

Directors owe fiduciary duties to the “corporation”—

• duty of care
• duty to provide financial oversight
• duty of loyalty
Duty of a fiduciary is to:

- Act with care, skill, prudence and diligence
- Under the circumstances
- Of a prudent person acting in a like capacity
- With familiarity with those matters, and
- Considering the background and experience of the director
Board members can be personally liable when:

- Acting outside course and scope of duties (such as involvement in management, rather than policy-making)
- Breaching fiduciary duties
- Conflicts of interest create personal benefit
- Intentional or willful misconduct
Potential liabilities of board members

- Broad nonprofit law immunity for volunteer board members
- Check for D&O insurance
What a Board Member Needs to Know

Duty of Care
Business Judgment Rule

Courts will *refuse to review* the actions of Board in managing the corporation unless there is some allegation of conduct that (1) violates (a) the directors' duty of care, (b) duty of loyalty, or (c) duty of good faith; or (2) that the decisions of the directors lacks a rational basis.
What is Board role and responsibility?

• The Board makes policy, and is protected from liability when doing that.
• The CEO/Executive Director is accountable for implementing all Board policies.
• The Charter and/or policies further delineate roles and responsibilities, including delegated authority.
You must be informed, stay informed and be proactive in your role.

- Ask questions to seek clarity before voting.
- Listen to all perspectives and test your understanding of information and implications.
- “Own your decision”
What a Board Member Needs to Know

Duty of Financial Oversight
Charter School Finances: Why is this important?

- Charter schools face unique challenges requiring them to have one foot in larger business world and the other foot in public school finance world.
- Unique business model because strictly service-oriented, with limited financing sources
- Annual budget is blueprint for school year, setting spending priorities and goals
Charter School Finances -- Reserves

• Reserves are used to allocate a specific percentage of the schools expenditures to a reserve account.
• That percentage is sometimes defined in a schools charter, and is usually 3-5%
Charter School Finances -- Audits

• Required annually by Charter Law.
• It validates the schools reported finances.
• Audits are also used to validate the charter schools internal controls.
• Depending on the charter – the school can choose its own auditor or must use one assigned by authorizer.
• Board must approve Audit Agreement in Spring of the each year.
• Board must approve the audit prior to submittal to oversight agencies.
What a Board Member Needs to Know

Duty of Loyalty
Duty of Loyalty

Individuals in a position of public trust must avoid conflicts of interest which prevent them from fulfilling their duties in an impartial manner.
Duty of Loyalty

Corporate assets subject to “charitable trust”
• Disposition of assets should be described in Articles of Incorporation, and can also be defined by historic practices
• enforceable by Attorney General
• consider when transferring assets, merging or winding up corporation
Duties of directors

• Directors’ duty of loyalty
  – Conflicts of interest must avoided
    • disclosure of personal financial interests
    • disclosure of duties to other corporations
    • “interested” directors can’t be majority
  – Corporate opportunities must be kept for corporate benefit
Nonprofit directors’ “self-dealing” transactions:

- Majority of Board must affirm “fairness” of transaction
- Is it “material” to business of corporation?
- Must disclose and disqualify

…but wait, there’s more!
Charter Boards also subject to **Political Reform Act***:

- Fair Political Practices Commission says charters subject to Political Reform Act
- Requires school to adopt conflict code
- Requires annual financial disclosures by designated officials (the "**Form 700**")
- Requires disclosure, disqualification from any decision that may affect material financial interests
- Code reviewed by either County Board of Supervisors or FPPC
- LA County says LAUSD-chartered schools must report under LAUSD’s onerous conflict code…but FPPC is considering a simple “model code” for charter schools

Conflicts of interest under Political Reform Act:

- Financial effect can be as little as $250
- Interests of spouse and dependents count
- Civil and criminal penalties for violation
- No defense or indemnity by school or insurers
Charter School Governance Best Practices
Best Practices in Charter Schools

• Board helps recruit diversity of expertise and experience on Board
  – Political
  – Financial
  – Fundraising
  – Goal-setting/vision
  – Community outreach
Best Practices in Charter Schools

• Board meets monthly or less often

• Board reviews and approves annual management goals, in-line with vision/goals of organization, as part of CEO/Executive Director evaluation

• Board approves annual budget, which sets spending priorities, gets periodic updates
Best Practices in Charter Schools

• Board approves only major policies, and those legally-mandated, such as:
  – Harassment Policy
  – Admissions/Discipline policy
  – Conflict of Interest Code
Best Practices in Charter Schools

• Management provides complete and timely communication on key issues
  – Agenda materials conform to mutual expectations
  – Periodic updates via “Friday Letter” or other vehicles
  – All Board members get the same info at same time
Board’s Role In Supervising Employees – Before Hiring The First Employee . . .

- Develop Organization Chart
- Develop solid employee policies and practices
- Develop template for employment agreements
- Develop employee handbooks
Board’s Role In Supervising Employees

- Board Supervises 1-2 Top Employees
- Top Employees Supervise Other Employees
  - Top employees should report regularly to Board re hiring, firing, layoffs, evaluations, personnel issues
    - open session v. closed session
Best Practices in Charter Schools

• Implement and Follow
  – Employment Policies & Practices
  – Hiring/Firing/Discipline Process
  – Evaluation Process
  – Discipline & Termination
  – Process For Employees to Communicate To Board
  – Investigation Policy
Format of School’s Policies

• Policies And Procedures Manual
• Employee Handbook
• Stand Alone Policies
• Informal Policies or Practices
Essential Employment Practices and Policies

- Recruitment and Hiring Process
- Pre-Employment Process
- Employment At-Will
- Employment Contract
- Attendance/Substitutes
- Holidays/Vacation/Sick Leave/PTO
- Performance/Discipline
Essential Employment Practices and Policies

• Unlawful Harassment/Discrimination
• Leaves Of Absence/Disability Accommodations
• E-mail/Voice Mail And Internet Usage
• Social Media
• Teacher/Student Interaction
• Mandatory Reporting of Child Abuse
• Solicitation/Distribution
Essential Employment Practices and Policies

• Payroll Policies
  – Employee Classifications
  – Meal and rest break
  – Final pay
  – Pay periods
  – Volunteers
  – Payment of Substitutes
  – Payment for 10, 11 and 12 months
  – No monthly pay for classified employees
Hiring, Firing & Discipline – Employment Contracts

• **Advantage Of At-Will Language**: Employer Can Terminate An Employee For Any Non-discriminatory Reason Without Reason Or Without Notice

• All Employment Is At-Will By Statute In California, but should still be reinforced

• Contracts For A Specified Term Can Still Be At-Will

• Termination for “Cause” is Opposite of At-Will

• Include Notice of Mandatory Reporting Obligation
Hiring, Firing & Discipline – Discipline Policies

• Be As Simple And Clear As Possible

• Avoid “Tables Of Penalties”

• Retain Reasonable Degree Of Flexibility

• Whatever You Adopt, You Must Follow
Hiring, Firing & Discipline – Discipline Policies

• Provide Examples Of Disciplinary Actions That May Be Taken
  – Avoid required disciplinary steps
• Reinforce That Termination Is At-will And Requires No Cause
• Good Documentation Is Essential
Hiring, Firing & Discipline – Termination

• If You Specify Termination Only For Cause, You Must Provide Due Process
• Due Process May Include
  – Pre-Disciplinary Notice
  – Employee’s right to meaningfully respond
  – Hearing
Evaluation of Employees

• Role Of Performance Evaluations
  – Acknowledge superior performance and identify performance problems
  – Supervisor training recommended

• Policy Should Set Forth:
  – Frequency of evaluations
  – Who will conduct
  – Not tied to wage adjustments, promotions or termination
Teacher/Student Interaction Policy

• Should Be Tied To Mandatory Reporting Requirements
• Will Help Keep School, Teachers and Students Protected
• Will Provide Basis and Grounds For Handling Difficult Situations
• Recommend Annual Training Re Mandatory Reporting Guidelines and Best Practices
Employee Communication

• Important for Employees To Be Able To Speak To Board

• First Amendment Right To Speak At Board Meetings

• No Retaliation
Investigation Policy

• Policy to Handle Complaints Against Top Administrators or Board Members

• Neutral, Third-Party investigator

• Prompt Investigation

• Document!
Brown Act and Personnel Issues

• Personnel Issues Must Be Properly Agendized

• Brown Act permits Closed Session for appointment, employment, evaluation of performance, discipline or dismissal of employees.

• If Board hears specific charges or complaints against employee, must give employee:
  – 24 hours written notice
  – Right to have matter heard in open session
  – Otherwise, any action taken is void
Brown Act and Unions

• Negotiation Team Must Be Selected In **Open** Session
• Direction May Be Given To Negotiation Team In **Closed** Session
• Initial Proposals from Union and School Must be “Sunshined” At Public Meeting Before Negotiations Can Begin
• Any Subsequent Proposals On Different Topics Must Also Be Sunshined Within 24 Hours
Brown Act and Unions

• Before entering into a written agreement with a union, the major provisions of the agreement, including the cost that will be incurred by the school under the agreement, “shall be disclosed at a public meeting of the public school employer.” (Gov. Code §3547.5(a).)

• The director and the chief business official shall certify in writing that the costs incurred by the school under the agreement can be met by the school during the term of the agreement. (Gov. Code §3547.5(a).)
Open Forum!

- Any questions?
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