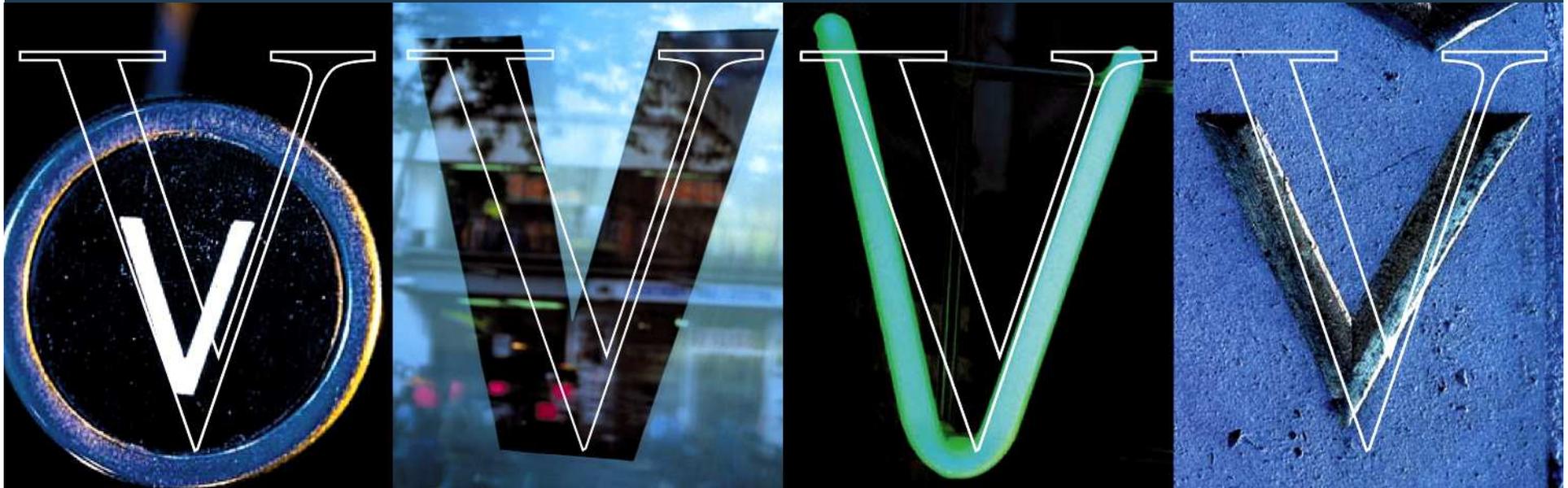


VENABLE<sup>®</sup>LLP

Good Governance:  
Holding in Trust Your Independent School

Caryn Pass

January 12, 2013



# Basic Foundation of Good Governance

What is Good Governance?

**“Planning the School your  
Grandchildren will attend”**

The Rest is Commentary

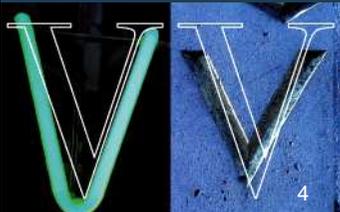
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## legal issues

- legal issues based on working with schools nationwide
- causes:
  - economic times
  - new legislation and increased government enforcement
  - new technology without policies to govern use
- preventing and resolving legal issues
  - establish policies and standards up front
  - be proactive in consulting counsel
  - act consistent with culture, mission and strategic plan
  - don't panic



## strategy to avoid legal exposure

- act in a manner consistent with good governance
- good governance:
  - framework for making decisions
  - decisions that are consistent with the law
  - process used to establish a defense to legal challenges
- top governance violations:
  - breach of confidentiality
  - acting outside of the scope of duty
  - breaching fiduciary duty

## board governance documents

- use your drafted tools to hard wire good governance and limit liability
  - by-laws
  - charter/articles of incorporation
  - conflict of interest policy
  - whistle blower policy
  - intermediate sanctions (process for compensation of head)
  - document retention and destruction

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## confidentiality

- deliberations and exchange of views essential
  - process requires full and honest discussion
    - chilling effect if question of confidentiality
- board = speak with one voice; appear unified
  - trustees = support board decision or leave board
- avoid “public” discussions of issues before the board
  - Car pool line; spouse; supporters of “your” position
- breach of confidentiality
  - breach of privacy (student/employee issue)
  - negative impact on decision (appearance of uncertainty)
  - Personal liability (cause damage to school)
  - negative reaction by community (reduction in pledges)

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## acting outside of scope of duty

- board
  - establishes policy and creating strategic plan for the school
  - makes larger policy decisions
  - supports head of school
- administration
  - responsible for daily operations of school
  - implements boards policy
- board operating in administration's arena
  - legal claims by heads of school
    - Inability to do job resulting from interference of board
  - legal claims by employees
    - trustees spoke in behalf of administration
    - retaliation for failure to appease trustee



## charter and articles of incorporation

- establishes school as legal entity
  - do you know where your articles are?
- review regularly
  - check state filing
  - document consistent with board modifications/amendments
- charter or articles in “forfeiture”
  - actions of board invalid
    - board acts without authority
  - school name can be taken
  - loans and or financing in jeopardy
- JEPORDIZE 501 (c)(3) status



## by-laws

- review regularly to ensure compliance
  - board’s actions must be consistent with by-laws
  - failure to comply with by-laws invalidates boards’ actions
    - proxy vote not provided for in by-laws
    - e-mail notification of board meetings
- use by-laws as good governance foundation
  - consider how board wants to act as an entity
  - what is the board’s culture
    - transparency?
    - commitment to diversity?
    - ability to address issues?
    - level of “democracy”?
    - expectations of board service?



## by-law provisions

- selection of board members
  - fixed skills or open spots
  - from committee, board in general or community
  - interview process and vetting
  - presentation to the board
- voting for board members
  - slate vs. individual nominees
  - nominations from the board at meeting
  - percentage vote needed
- term limits
  - board chair and other officers
  - board members



## by-law provisions

- percentage of votes needed for various decisions
  - what decisions are most vs. least important
- committees
  - what committees exist
  - role of each committee
- executive committee
- “care and feeding of head committee”
- governance or committee on trustees
  - review of trustees
  - removal of trustees
    - receives and investigates complaints, reports to board, makes recommendation
  - TRUSTEE LEAVES DURING DELIBERATION



## by-law provisions

- executive sessions
  - standing session at end of each board meeting
  - with/without head of school
- head of school
  - selection and review
  - method for establishing compensation
- Directors and Officers insurance and indemnification
  - how much coverage?
- make up of board
  - Faculty? Student? Alumni officer? PTA officer? Non-parents? Other head of school?

## conflict of interest policy

- written policy
- formally adopted by board
- signed by trustees and head annually
  - perhaps others
- create disclosure statement
- process for disclosing conflicts
- process for vetting conflict
- include tracking system
- confirm tracking in board resolutions
- referenced in 990

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## whistle blower policy

- ensures protection of employees who report financial impropriety from retaliation
- care be taken to limit extent of reporting topics
  - only financial impropriety
- consider who accepts and considers complaints
  - audit committee
  - finance committee



## document retention and destruction policy

- policy outlining how documents are maintained and destroyed
- important for litigation
  - once litigation filed documents must be kept
- assists in litigation filed against school
- assists in subpoena by parents
- ensures maintenance of necessary documents
- consider all documents including
  - financial aid, development, application
- consider all parties at school with documents



## intermediate sanctions

- method for review of compensation of head, business manager and others
- avoid payment of excess benefit
- review directly or by board establishing a committee
- committee
  - ensures members have no conflict of interest
  - selects comparable schools
  - collects comparable remuneration of similarly situated professionals (more than just salary)
  - considers information
  - establishes remuneration
  - documents process
- presentation to board
  - general vs detail



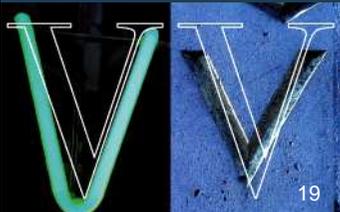
## fiduciary duty and due diligence

- authority to bind school
  - policy authorizing binding of school
  - who can sign and amount limits for multiple signatures
  - what goes before board/finance committee
- audit and 990 completion
  - create policy that states
    - who prepares and reviews
      - Lawyer/accountant
    - who signs audit and 990
  - how is 990 presented to board
  - how is audit presented to board



## Legal Exposure

- Employment
  - Allegations of wrongful termination
  - Discrimination based on protected category
  - Employment Contract breach
  - Handbook non-compliance
  - Reduction in staff
  - Violations of payment laws
    - Overtime, independent contractor
- Board Actions
  - Actions outside scope of duty
  - Self dealing or conflict of interest
  - Breach of fiduciary duty
  - Breach of confidentiality
- Creating safe environment
  - Establishing policies that ensure the safety of students



## Legal Exposure

- Student issues
  - Discipline and addressing performance
    - Common college applications, Due process
  - Enrollment
    - Failure to admit
  - Failure to educate
- Social Media
  - Sexting and other inappropriate use by adults and students
- Tuition collection
  - Parent's failure to pay tuition, termination of agreement after deadline
  - Enforcement of penalties ie: holding of transcripts
- Compliance with reporting obligations pursuant to child protective services

## contact information

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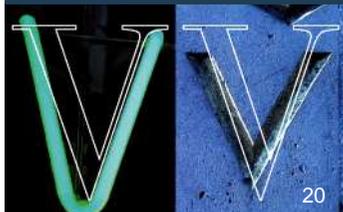
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