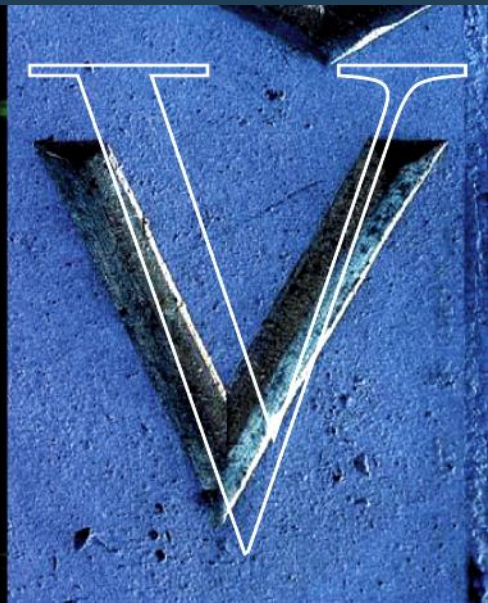
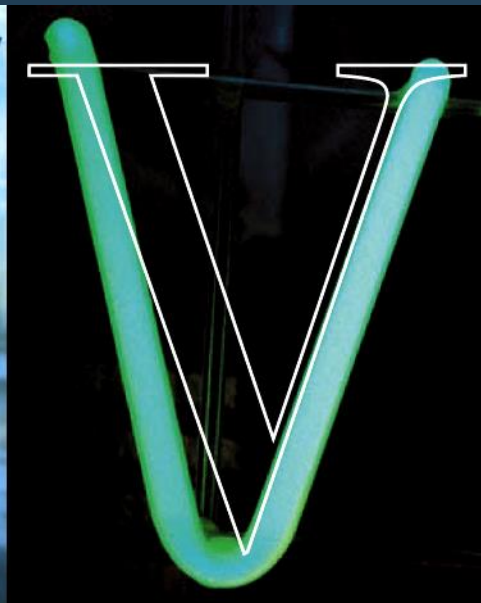
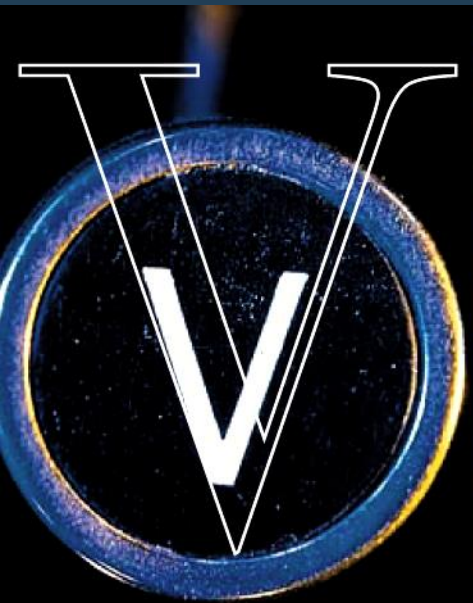


# VENABLE<sup>®</sup><sub>LLP</sub>

Ensuring the proper role of the board:  
hardwiring good governance into board bylaws

Caryn Pass, Presenter  
@schoollawyer

NJAIS Trustee Enrichment Day 2015



# Basic Foundation of Good Governance

What is Good Governance?

“Planning for the School

your

Grandchildren will attend”

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The Rest is Commentary

# Overview of Session

- Based on working with schools nationwide
- Substantial increase in legal claims
- Matters with un-anticipated legal implications
  - custody battles
  - confidentiality of board
- Causes:
  - economic times
    - higher tuitions & expectations (parents)
    - concern for job (employees & parents)
  - new legislation & increased enforcement
  - technology (good and bad)
  - general increase in litigation
  - poor governance
  - too many parent lawyers and parents who practice without a license



# Top legal issues: Board Actions

- Breach of fiduciary duty
- Confidentiality
- Actions outside of scope of duty
- Governance documents
  - By-laws
  - Conflict of interest
  - Charter/Articles of Incorporation
  - Whistle Blower Document
  - Ret/Destruction
- Intermediate Sanctions
- Committees for risk management oversight
  - Executive committee
  - Audit committee
  - Personnel Committee
  - Investment Committee

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# Board's Fiduciary Duty

- Authority to bind school
  - who can sign and amount limits for multiple signatures
  - what goes before board/finance committee
- Endowment investments
  - compliance with investment policy
- Audit and 990 completion
  - how is 990 presented to board
  - how is audit presented to board
- Retirement plans and oversight
- Review of budget
  - passing balance budget
- Assuming debt

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# Board's Confidentiality Obligations

- **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)



# Actions Outside of Scope of Duty

- **Board responsibility**
  - establishes policy; creates strategic plan for the school
  - makes larger policy decisions
  - **supports head of school**
- **Administration responsibility**
  - responsible for daily operations of school
  - implements boards policy
- **Board operating in administration's arena**
  - legal claims by heads of school
    - prevents head from performing job
  - legal claims by employees
    - trustees spoke in behalf of administration
    - retaliation for failure to appease trustee



# 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
- Compensation 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





# 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



# Bylaws Overview

- **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?



# Format for Selection of Board Members

- Governance committee
  - Who appoints the committee
  - Same system as other committees?
  - Former chair transitions to Committee Chair
- Governance vs Committee on trustees
  - Role and responsibilities
    - Selection of trustees
    - Selection of officers
    - Review of trustees
    - Removal of trustees
      - receives and investigates complaints, reports to board, makes recommendation
      - TRUSTEE LEAVES DURING DELIBERATION



# Selection of Board Members

- Trustees vs. Directors
- Number of Trustees on Board
- Selection of board members
  - Fixed skills or open spots
    - Design for needs of board
  - Who selects the candidates
    - Governance Committee, board in general or community
    - Level of Head of School participation
    - Can community make suggestions?
  - Interview process and vetting
    - Is there an interview process, who performs
  - Presentation to the board



# Voting and Term Limits

- **Voting for board members**
  - If membership or community involvement
    - One vote/family
  - Slate vs. individual nominees
  - Nominations from the board at meeting
  - Percentage vote needed
- **Rotating terms**
  - % of trustees that roll off each year
- **Term limits of trustees**
  - Years per term
  - # of terms can serve
  - Break between terms
  - Honorary trustees

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# Leadership

## ■ Chair

- Unlimited vs. fixed term
- 2 or 3 years? 1 year with renewal?
- Who selects? Board, Governance committee?
- Succession planning
  - Vice chair becomes chair?

## ■ Other officers

- What positions exist?
  - Secretary, vice chair, treasurer,
- Term limits?
- Does term suspend during service
- Can term extend if in leadership role



# Votes, Attendance & Notice

- Percentage of votes needed for various decisions
  - What decisions are most vs. least important
  - Votes for:
    - removing trustee, employing and terminating head
  - Not established default to state law or Robert's rules
- Attendance
  - Meeting by phone or skype
  - Consequence of not attendance
- How are votes taken
  - By proxy
  - Email Votes
- Notice to trustees
  - By email, letter, phone
  - Emergency meeting rules



# Committees

- **Committees General**
  - What committees established
  - Creation of new committee?
    - Who can establish, what is needed to establish
  - Role of each committee
  
- **Executive committee**
  - Decisions between meetings
  - Regular meetings
  - With head of school
  - Creation of agenda
  - Plans for the year
  
- **Head's committee**
  - Evaluation of Head
  - **Transition for new head**
  - Work with executive coach





# Other Bylaw Issues

- **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
    - Intermediate sanctions obligations
    - 990 presentation to board
  
- **Directors and Officers insurance & Indemnification**
  - Amount of coverage?
  
- **Make up of board**
  - Faculty? Student? Alumni officer? PTA officer?  
Non-parents? Other head of school?



# Other Documents and Policies

- Charter and articles of incorporation
- Whistle blower policy
- Document destruction and retention policy
- Intermediate Sanctions Policy
- Audit Policy
- Investment Policy
- Conflict of Interest Policy
  - Process for vetting conflict
  - Disclosure of conflict
  - Annual execution by trustees, head and cfo



# 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



# 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

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# 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



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