

Roles and Responsibilities for Charter School Boards

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Purpose of Presentation

- Understand applicable conflicts of interest laws and ethics requirements
- Confirm your Academy's code of conduct is effective and identify methods for addressing ethics issues
- Discuss fiduciary duties

PRESENTATION OUTLINE

- **THE OATH OF PUBLIC OFFICE**
- **ETHICAL OBLIGATIONS**
- **THE “FIDUCIARY DUTIES” EMBEDDED IN THE OATH**
- **CONFLICTS OF INTEREST**
- **OPEN MEETINGS ACT**
- **QUESTIONS AND ANSWERS**

CONSTITUTIONAL OATH OF PUBLIC OFFICE

ARTICLE XI, SECTION I OF THE MICHIGAN CONSTITUTION OF 1963 PROVIDES AS FOLLOWS:

“All officers, legislative, executive and judicial, before entering upon the duties of their respective offices, shall take and subscribe the following oath or affirmation:

I do solemnly swear (or affirm) that I will support the Constitution of the United States and the constitution of this state, and that I will faithfully discharge the duties of the office of

According to the best of my ability. No other oath, affirmation, or any religious test shall be required as a qualification for any office or public trust.”

Responsibilities of a Public Office Are Different than the Fiduciary Duties Contained in the Oath

- Each public office's responsibilities are shaped by:
 - Constitutional law
 - Statutory law
 - Case law
 - Promulgated rules
 - Administrative orders
 - Attorney General opinions
 - Board decisions/ policies

Key Statutory Provisions Regarding the Oath

- Michigan Election Law.
- Revised School Code
 - Oath must be taken by the public official in order to be eligible to serve
 - Oath creates a “moral contract” between the public officer (who is willing to serve) and the electorate (who is willing to have them serve)

WHAT IS A “FIDUCIARY DUTY?”

Fiduciary duty means “the legal duty of a fiduciary to act in the best interests of the beneficiary.”

- Board members (“fiduciaries”)
- General public (“beneficiary”)

Fiduciary Duties Contained Within the Oath

- Duty of Candor
- Duty of Care
- Duty of Loyalty

Duty of Candor

A duty obligating board members to disclose all material facts known to them about a particular matter that involves board input or approval

- requires the board member to inquire and inform others of their inquiries
- requires the board member to listen and understand competing positions
- this duty is reflected in the oath's requirements that the board member operate to the best of their abilities

Duty of Care

A duty to use due care toward others in order to protect them from unnecessary risk of harm

- requires a board member to be informed
- requires a board member to ask “what would a reasonable person in similar circumstances” do?
- requires the board member to protect the interest of the school to the best of their abilities

Duty of Loyalty

Two types of duties contained in the oath:

- duty of allegiance
- duty obligating board members to refrain from using their public office to further their own personal interests rather than the interests of the public (as by self-dealing or fraud)

Code of Conduct - Source

- Under the Revised School Code, the Legislature has given school boards the authority to establish their own policies for the “effective and efficient function of the board.”
- Any Code of Conduct adopted by a school board should include provisions which achieve these objectives.

Example Provisions From Current Policies— Where Do They “Fit”?

- No member of the board shall engage in...soliciting or accepting a gift or loan of money, goods, services or other things of value that tends to influence the manner in which the Board of Education member performs his/her official duties
- No member of the board shall engage in...using personnel resources, property, or funds of the School District, except in accordance with prescribed constitutional, statutory, and regulatory procedures, and in accordance with good business procedures and not for personal gain or benefit
- A member shall not have direct or indirect personal interest in any contract with the District and shall not perform any labor or furnish equipment or supplies.

Where Do They “Fit” Continued...

- Board members will...recognize that they should endeavor to make policy decisions only after full discussion at publicly held Board meetings
- Board members will...inform themselves about current educational issues by individual study and through participation in programs providing needed information, such as those sponsored by the State and National School Board Associations
- Board members will...take no private action that will compromise the Board or administration, and respect the confidentiality of information that is privileged under applicable law

METHODS FOR DEALING WITH UNETHICAL BEHAVIOR

- Many board members express an interest in policing their own
- Self-policing is more challenging when a code of conduct policy does not provide for methods of dealing with unethical behavior
- By focusing on a board member's fiduciary duties, a board can categorize the unethical behavior and seek solutions to address the problem

METHODS FOR DEALING WITH UNETHICAL BEHAVIOR Continued...

- An effective policy will not only focus on fiduciary duties but will also specifically list a process for addressing violations
- The problem is that current statutory law provides only drastic remedies for unethical board member conduct (i.e., recall or removal) and therefore does not provide an adequate or realistic remedy
- The problem is particularly noticeable when the unethical board member conduct involves non-feasance
- The University Charter School office can help guide an academy or individual board members who believe there is a problem with the Academy Board

Feasance

- Means “the doing or execution of an act, condition or obligation.”
 - *Misfeasance* - Improper and unlawful execution of an act that in itself is lawful and proper
 - *Malfeasance* - Misconduct or wrongdoing (intentional)
 - *Nonfeasance* - the failure or omission to do something that should be done (e.g., regular attendance at board meetings)

Conflicts of Interest

- Legal Conflicts
 - Contracts of Public Servants with Public Entities Act
 - The Revised School Code
- Contract Conflicts
- Appearance of Impropriety

Contracts of Public Servants with Public Entities Act

- Academy Board members are considered “public servants.” MCL 15.321(a).
- Prohibits public servants from being a party, directly or indirectly, to a contract between himself and the public entity of which he is an officer or employee. MCL 15.322(1).
- Prohibits public servants from directly or indirectly soliciting a contract between the public entity of which he is an employee or officer and himself or any entity of which he is a partner, member, or employee. MCL 15.322(2).
- Prohibits an employee or officer of a public body from taking any part in the negotiations for such a contract, from taking part in the contract approval, or from representing either party in the transaction.
- Violations of the Conflicts Act are punishable as a misdemeanor. MCL 15.327.

Revised School Code

- ***MCL 380.1203-*** Academy Board members cannot vote on matters for which they have a conflict.
- ***MCL 380.503(6)(k)-*** Contracts between Academy Board and certain individuals prohibited.
- ***MCL 380.507 (3)(b)-*** Charter Contract can be revoked for failure to comply with applicable law.

Appearance of Impropriety

- Academy Board should focus not just on what constitutes a legal conflict, but also actions that implicate the spirit of statutory prohibitions by tainting the Academy with an appearance of impropriety
- As Attorney General Frank Kelley explained:

“The spirit behind the law and public policy of this state in regard to conflicts of interest is that the temptation of impropriety should be avoided, as well as actual impropriety, between government officials and private individuals. Members of governmental boards and agencies at all levels must at all times be scrupulously cognizant of their position of public trust in relation to their private business dealings. If the latter would tempt them to color the performance of their public responsibilities, then they would be in violation of the spirit of the conflict of interest laws in this state.” See Opinion Letter to Honorable Joseph S. Mack, dated July 17, 1972.

Open Meetings Act

The purpose of the Open Meetings Act is to promote openness in government. It requires:

- 1. Public notice of **meeting** provided.
- 2. **Public bodies** meet in public.
- 3. **Decisions** only made at public meeting.
- 4. Minutes of meetings available to public.



Open Meetings Act (Continued)

What is a public body?

- Any state or local legislative or governing body, including a board, commission, committee, subcommittee, authority, or council, that is empowered by state constitution, statute, charter, ordinance, resolution, or rule to exercise governmental or proprietary authority or perform a governmental or proprietary function; a lessee of such a body performing an essential public purpose and function pursuant to the lease agreement; or the board of a nonprofit corporation formed by a city.
- The Board is a public body.
 - A board created by state statute.

OMA - What is a “Decision”?

A determination, action, vote, or disposition upon a motion, proposal, recommendation, resolution, order, ordinance, bill, or measure on which a vote by members of a public body is required and by which a public body effectuates or formulates public policy.

OMA - What is a “Meeting”?

The convening of a public body at which a quorum is present for the purpose of deliberating toward or rendering a decision on a public policy, or any meeting of the board of a nonprofit corporation formed by a city.

OMA - Decisions Only in Public Meetings

- All **decisions** of a public body must be made at a meeting open to the public; and
- All **deliberations** of a public body involving a quorum (at least half) of its members must take place at a meeting open to the public.
 - Includes any consensus building process or discussion.

OMA - Not Permitted

- Informal discussion of public policy outside of a public meeting
- “Round-the-horn” decision making where council members use telephone calls, e-mails, or subgroups to achieve same communication meeting of full board.
- Round-robin voting by sign-off sheet.
- Proxy voting.
- Secret ballots.
- Use of e-mail, text messaging, or other electronic communication among board members during an open meeting.



OMA - Permitted

- Advisory committees only capable of making recommendations
- Canvassing- Informal canvas by one member of council to predict votes should a decision be made at a public meeting without intent to avoid open meeting requirement.
- Purely social or chance gathering without policy discussions.
- Workshops, seminars, informational gathering or conferences designed to convey information about areas of professional interest without decisions, deliberations, or input from officers or employees.



OMA - Closed Sessions



- Only allowed for limited purposes (2/3 vote may be required):
 - Specified personnel matters, if requested;
 - Collective bargaining strategy or negotiations, if requested;
 - Consider purchase or lease of real property;
 - Consult with attorney on trial or settlement in connection with pending litigation, but only if open meeting would have a detrimental financial effect;
 - Review application for employment or appointment if applicant requests confidentiality; or
 - Consider material exempt from discussion or disclosure, such as written legal memo (but not oral advice from attorney).
- Closed session must occur at open meeting.
- No decision made during closed session.

OMA - The Public

- Public may attend a meeting without registering or providing name or identifying other information.
- A member of the public may not be excluded from a meeting except for a breach of the peace committed at the meeting.
- Council may adopt rules limiting public comment and requiring individuals to identify themselves before speaking.
- Meeting place should be accessible.
- Public may record meeting.



OMA - Minutes and Notice

- Minutes
 - Must include date, time, place, members present, members absent, decisions made, purpose of any closed session, and any roll call votes.
 - Proposed minutes must be made available to public within 8 days of meeting.
 - Minutes must be approved at next meeting and made available 5 days after approval.
- Notice
 - Annual schedule of regular meetings must be posted within 10 days of first meeting of a public body in each calendar or fiscal year.
 - Changes to schedule of regular meeting must be posted within 3 days of adoption.
 - For rescheduled regular or special meeting, notice must be posted and accessible to the public for at least 18 hours.

OMA Penalties

- Intentional violation is a **misdemeanor**. Public official may be **personally liable** for damages.
- Decisions made in violation of the Open Meetings Act may be invalidated by a court.
- Lawsuits may be brought to compel compliance.
- Attorney fees may be awarded if challenge successful.

Questions and Answers



Thank you



Notes

- (1) See MCL 15.301 et seq., commonly known as the “Conflicts of Interest Statute” (applying to State Officers); MCL 15.321 et seq., Contracts of Public Servants with Public Entities (applying to Public Servants and Employees).
- (2) MCL 15.181 et seq.
- (3) MCL 15.341 et seq., commonly known as the “State Ethics Act.”
- (4) House Bill No. 5250—The proposed “Michigan Financial Disclosure Act.”
- (5) See Matthew 5:33.
- (6) The Oath Act of June 1, 1789.
- (7) *The Oath of Office, a Historical Guide to Moral Leadership*, Lt Col Kenneth Keskel, USAF, *Air and Space Journal* (Winter 2002).
- (8) *Imbrie et al v Marsh et al*, 5 NJ Super 239; 68 A 2d 761 (1949).
- (9) MCL 168.310.
- (10) .
- (11) *The American Heritage® Dictionary of the English Language, Fourth Edition* (2000).
- (12) MCL 380.11a.
- (13) *Black’s Law Dictionary, Seventh Edition* (1999).
- (14) *Id.*
- (15) *Id.*
- (16) *Id.*
- (17) *Bylaws, Board of Education of the Flint School District*, sec. 1358, (adopted 2000, revised 2002).
- (18) *Board Policy, Hobart School District*, Art V, sec. F (adopted 1995).
- (19) *Board Governance Policy, Mounds View Public Schools*, sec. BG-0404, (adopted 2002).