Independent School Governance: The Good, The Bad and the UPMIFA!

Sarah Daignault
Today’s Agenda

- Review the Basics of Governance
- Examine different Modes of Governing
- Look at UPMIFA
- Case Study (after the break)
Governance Function

- Board’s legal responsibility to exercise power and authority over an organization on behalf of the community it serves
- Fiduciary Responsibility
Definition: Fiduciary

- A legal duty imposed on individuals who are in positions of trust or confidence
- Requires an individual to act primarily in the interests of others.
- Requires scrupulous good faith and candor.
- Fiduciary duties are defined by statutes and common law (case law)
- The state of incorporation will have codified concept of fiduciary duty
Fiduciary Duties

- Duty of Care
- Duty of Loyalty
- Duty of Compliance
Overall Duty of care:
◦ Act in good faith
◦ Act with reasonable care
◦ Act in the best interest of the institution

To ensure that the institution’s resources are dedicated to the fulfillment of its mission.
Duty of Care – Real Life

- Attend and participate in all meetings
- Be informed
  - Read, review and understand all materials
  - Ask questions
- Use independent judgment
- Be reasonably prudent
Trustees/board members should be cautious about relying completely on the guidance and judgment of the institution’s CEO and management. Board members have ultimate responsibility for governance of the institution’s resources and their primary role is protecting the public interest.
Duty of Loyalty

- Trustees are required to put the interests of the school first, above their own self-interest or the interests of others.
Duty of Loyalty – Real Life

- Annual Conflict of Interest statement
  - Be able to recognize a conflict and act appropriately
- Maintain confidentiality
  - What is said in the Board room stays there
  - The Board speaks with one voice outside of the meeting
Ensure the school is in compliance with all applicable laws and that there are no unauthorized activities.

Ensure the actions of the Board are consistent with the mission of the school.
Duty of Compliance – Real Life

- Keep full and accurate records of all of its meetings, committees and policies
- There are no unauthorized activities.
- Outside Auditor to review financials statements and operational procedures
- Measure all actions of the Board against the mission of the school
- Minimize legal exposure by being in compliance with all laws – training, expertise
Current Regulatory Climate
Uniform Prudent Management of Institutional Funds Act – UPMIFA
Approved on July 13, 2006, by the National Conference of Commissioners on Uniform State Laws
Current version S.4778–C/A.7907–D
Impacts the management (including delegation), investment and expenditure of charitable funds
Governor just signed it last week
Prudent Investor Standard

- Manage and invest the fund in good faith and with the care an ordinarily prudent person in a like position would exercise under similar circumstances.
- A person with special skills or expertise, whether inside or outside, must use them (including those selected in reliance on such a representation).
Prudent Investor Standard NY

- Requirement to adopt a written investment policy
- Guidelines on:
  - Investments
  - Delegation of investment management
- Done “... in accord with the standards of this article.”
Portfolio Theory

- Decisions about an individual asset made not in isolation but rather in the context of the investment portfolio as a whole and as a part of an overall investment strategy having reasonably suited risk and return objectives
- Duty to diversify, unless institution reasonably determines that special circumstances exist
Decision *not to diversify must be reviewed*
- As frequently as circumstances require
- At least annually
- Be specific about diversification in minutes, and each time recite basis for *lack of diversification*
Delegation Standard

- Ordinarily prudent person in a like position
- Selecting, continuing or terminating an agent
- Establishing the scope and terms of the delegation, consistent with the purposes of the institution and the institutional fund
- Periodically reviewing the agent’s actions in order to monitor the agent’s performance and compliance with the scope and terms of the delegation
Effect of Delegation

- By making an effective delegation, the institution is not liable for the decisions or actions of an agent to which the function was delegated.
- In performing a delegated function, an agent owes a duty to the institution to exercise reasonable care to comply with the scope and terms of the delegation.
- Must make a reasonable effort to verify facts relevant to management and investment.
Effect of Delegation NY

- Each contract pursuant to which authority is so delegated shall provide that it may be terminated by the institution at any time, without penalty, upon not more than 60 days notice.
- An effective delegation requires an assessment of the agent’s independence, including conflicts of interest.
- Clarity that ability to delegate to committees, officers or employees remains intact.
Spending—Which of these is correct?

- Use only income . . .
- Expend the interest . . .
- Pay the dividends earned . . .
- Spend the rents, issues, or profits . . .
- Preserve the principal intact . . .
- None of the above!
Terms setting forth a specific spending level, rate, or amount, or explicitly modifying of overriding gain recharacterization will limit the authority of the institution.

Donor’s can still control spending.
Endowment Spending Policy

- Duration and preservation of the fund
- Purposes of the institution and the fund
- General economic conditions
- Possible effect of inflation or deflation
- Expected total return from income and the appreciation of investments
- Other resources of the institution
- Investment policy of the institution
Endowment Spending Policy NY

- Where appropriate and circumstances would otherwise warrant, alternatives to expenditure of the endowment fund, giving due consideration to the effect that such alternatives may have on the institution
- Compare other relevant endowment factors
**UPMIFA To-do list**

**Governing Board**
- Need to keep accurate accounts
- Treasurer’s annual report to members/Board
- Review of existing restricted accounts to establish whether changes are needed
- Review of veracity of internal reporting systems
- Establish approach with donors and donor inquiries
Advancement
- Provide notice to donors of endowment funds
- Amend standard forms
- Include required disclosure for any endowment solicitation

Investment
- Adopt written investment policy
- Recite specific criteria for investment and total return in a contemporaneous record
- Acknowledge lack of diversification
How to Take Board Service to the Next Level
Board Members

- Talented
- Bright
- Successful
- Articulate
- Rich 😊
- Passionate about the school
Board Behaviors

- The Board is too hands-off – It doesn’t know what is really happening.
- The Board is micro-managing and getting in the way of the staff.
- The Board is clueless – too many new people, no history, no structure
- The Board is boring
Board Tasks

- Approve the minutes
- Vote on the budget
- Listen to reports
- Discussion is not encouraged
- Get home early seems to be a goal
Volunteer Job – you choose to do it
Not just a job to do
But a job worth doing
When Board members feel the work is consequential, meaningful, influential, Board performance goes up
Fiduciary Governance

Legal responsibilities of oversight and stewardship

- Budget Development
- Monthly (Quarterly) Reports – Finance, Admission, Development and Head
- Annual Audit
- Head and Board Evaluations

Governance as Leadership: Reframing the Work of Non-Profit Board by Richard Chait, William Ryan and Barbara Taylor
Strategic Governance

Major decisions about resources, programs and services

- The Four Questions:
  - Are our goals consistent with our financial resources?
  - Are the sources and uses of resources matched?
  - Is there generational equity?
  - Are present resources sustainable?
Are our Goals Consistent with our Financial Resources?

- Small classes, higher salaries vs. revenue
- New facilities vs. debt capacity and fundraising
- Large Endowment that is not being used
Are Sources and Uses of Resources Matched?

- **Sources**
  - Tuition Revenue
  - Annual Giving
  - Endowment Income
  - Auxiliary Programs

- **Uses**
  - Educational Costs
  - Facility Costs

- Fixed expenses paid with variable revenue
- What about Annual Fund?
Is there Generational Equity?

- Endowment Spending rate
- Buildings
  - Deferred maintenance
  - PPRRSM
  - Bond payments
Are Present Resources Sustainable?

- Annual tuition increases
- Enrollment stability
- Growth in Annual Fund
- Auxiliary Programs
- Endowment Income
- Facility – deferred maintenance
Generative Governance

Board engages in deeper inquiry

- Exploring root causes
- Values
- Optional courses
- New Ideas
Skills Needed by Board?

- Traditions
- Values
- Culture
- Image
- Need to know enough to consider the ramifications of ideas on these basics
Fitness Center

- **Fiduciary**: Do we have the money and space to build it?
- **Strategic**: Should we do this to keep up with the competition?
- **Generative**: What produced this amenities arms race? Will it stop? Do we want to participate or not? How do we do it on our terms?
Great Governance

- Selects and Frames the problems
- Work products **are not:**
  - Decisions
  - Reports
- Work products **are:**
  - Understanding
  - Illumination
  - Insight
- Great Governing is a set of activities that generates the need for decisions
Board Structure

- Fewer Standing committees
- More task forces focused on issues
- Generative work depends on how the discussion unfolds, not the framework of the group
- We want to be in a better position to improve perception and perspective so we can invent new goals, discard old ones that no longer work, better see problems and stop focusing on what doesn’t matter.
Generative work – Right for Every School?

- Not while you are in crisis – fix that first
- Not if you are so small that the Board is doing a lot of hands on work out of necessity
- Head has to embrace the Board doing this
What Moves us Away from Generative work?

- Focus on fiduciary tasks – we will create procedural accountability, but not performance accountability
- If we are lawful and financially solvent, but have no mission, what is the point?
Case Study
Sarah Daignault
Boulder, CO and NYC
Sarah.daignault@gmail.com
303–775–9964