



# **Staying In Your Lane: Unnecessary Board Actions Can Create Legal Risk**

Insights

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In the wake of the ravages COVID-19 is wreaking on educational institutions, independent and private school boards of trustees are seeking clarity on legal protections for board members and boards of trustees acting on behalf of schools, especially in the midst of crises. Naturally in new and unchartered territories, many boards instinctively attempt to take more control of daily school operations, put the administration under the microscope, and assert increased scrutiny of every decision because board members are nervous. However, during these times – arguably now more than ever – it is critical that boards remain in their governance role and exercise best practices in doing so. The risks of not doing so are considerable.

## **Risky Business: Boards Should Stick To Their Roles**

Broadly speaking, an independent or private school board of trustees' responsibilities include fulfilling the mission and vision of the school, strategically planning for the school's future, ensuring the financial sustainability of the school by fundraising and other activities, establishing policy, and employing the head of school. These duties and responsibilities are nearly universal in nature whether one looks for guidance from national associations, local accrediting bodies, or other standards.

It is important to note that, in times of crisis, it is not necessary for a board of trustees or its individual members to take over operations of the school in order to fulfill their fiduciary obligations of care, loyalty, and obedience to the institution. In fact, to the contrary, straying from a governance role is when legal liability for a board of trustees is most likely to occur.

## **Insurance Policies Play A Key Role In Offering Protection**

There are several avenues of legal protection for boards or trustees and individual board members as they fulfill their duties and responsibilities as trustees. First and foremost, independent and private schools should always carry a directors and officers insurance policy. These policies, in many instances, provide coverage for claims that may be asserted against boards of trustees or individual board members acting in their official capacity. The school should also review its bylaws for indemnification obligations to trustees for claims brought against them in their collective or individual capacity as board members. The indemnification obligations are often fulfilled through the directors and officers insurance policy or the school's general liability policy.

It is imperative that schools work with their insurance broker and legal counsel to be sure the director and officers liability insurance coverage is sufficient, and that everyone has a clear understanding of the exclusions and exceptions – preferably prior to a claim arising. For example, some policies provide coverage only to the extent the trustee was working within the course and scope of their duties. This means that if the board engages in day-to-day operational matters that are within the course and scope of the head of school's duties, even during a pandemic or other crisis, insurance coverage for claims arising out of the board's actions may be denied.

## **Federal Law Is Another Avenue For Protection**

Subject to the application of relevant state law, the Federal Volunteer Protection Act of 1997 (VPA) is another source of legal protection to trustees of non-profit corporations such as private and independent schools, if certain conditions are met. Among those conditions of protection under the VPA is that the trustee was "acting within the scope of the trustee's responsibilities at the time of the act or omission that caused the harm."

Again, the immunity provided by this avenue of legal protection is in serious peril if a board member or board of trustees was acting outside of their own duties. For example, if the board of trustees wades into the teacher discipline or termination waters, which falls squarely within the head of school's duties, the board of trustees may not have immunity from liability if the employee were to sue the board for wrongful termination, discrimination, or a myriad of other claims. Additionally, there is no protection under VPA if the harm was caused by "willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed." A terminated employee's legal counsel might well argue that allowing a board of trustees to terminate an employee without knowing the employee's disciplinary history, the entire context of the issue at hand, or the legal landscape for such a termination meets this standard for an exception to protection under the VPA.

## **State Laws Also Offer Important Guardrails**

Many states provide some form of protection for volunteers as well. These state statutes have their own requirements and exceptions for those seeking to qualify for protection. For example, Louisiana provides that a trustee of a non-profit organization is "not individually liable for an act or omission resulting in damage or injury arising out of the exercise of judgment in their duties." Similar to many school's bylaws, this protection requires that the individual was acting in good faith and within the scope of his or her official duties. If a trustee were to direct a head of school to expel a student based on a single behavioral incident, for example, that trustee's volunteer protection could be at risk because the trustee may not know the history of the student's disciplinary record, how the school handled similar incidences with other students, and student enrollment is not a responsibility of the board of trustee's or any individual board member.

Similar to the volunteer protection provided at the federal and state levels, some states provide charitable immunity protection that may encompass an independent or private school board of

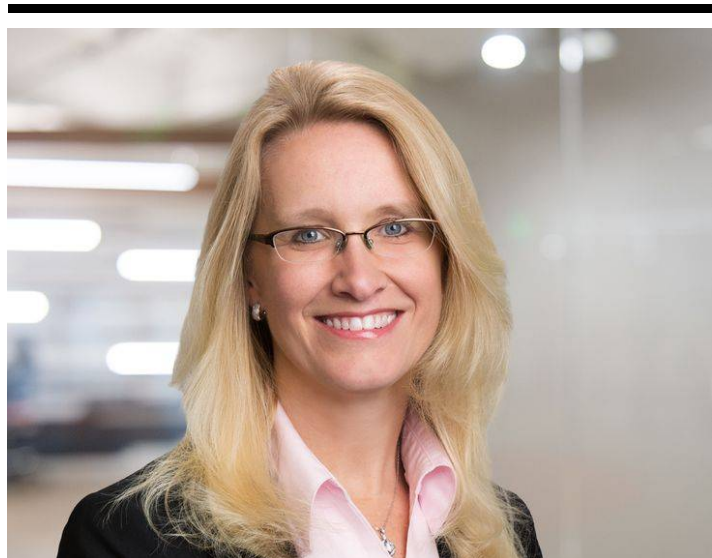
charitable immunity protection that may encompass an independent or private school board or trustees or individual board members. For example, if all requirements are met, the Texas Charitable Immunity and Liability Act of 1987 limits the liability of a non-profit private or independent school in civil lawsuits that arise out of acts or omissions by employees or volunteers, which would include acts or omissions by volunteer members of the board of trustees. In those instances, a plaintiff in Texas can be limited to damages of \$500,000 or \$1 million for bodily injury or death and \$100,000 for property damage or destruction. Other states, such as Massachusetts, provide charitable immunity to the individual but not to the institution as a whole – so protection can turn on who the plaintiff names as defendants and whether the act can be attributed to the institution or any given individual. Certain states also have limitations on or special protections for religious organizations, including religious schools.

Understanding the interplay between the VPA, any applicable state volunteer or charitable protection, and the directors and officers liability policy is sometimes complex but nonetheless critical to determining a board of trustees' or its individual members' risk exposure. For example, Arkansas state law limits volunteer protection under its statute if the individual is covered by liability insurance.

## **Conclusion**

In short, boards of trustees and individual board members are often provided a variety of legal protections in their roles. But it is crucial that they understand the scope of the protections available in their state, and that the conditions of availing themselves of those protections are kept in mind when stepping outside of a governance role...even in the midst of crises.

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