

5 THINGS TO CONSIDER WHEN UPDATING YOUR SCHOOL'S BYLAWS

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As schools reflect on the most challenging year in memory and start a new one, you may want to consider using this time to update your school's bylaws. There have been a number of lessons learned over the past 18 months that suggest your bylaws may be in need of an update to give schools, Heads of School, and Trustees the flexibility and processes necessary to keep up with changing times. While this list does not include all of the bylaws issues that you should consider, these are a few that have most plagued schools this year and could be adjusted to avoid that in the future.

1. **Enable Your Board of Trustees to Meet and Vote Remotely**

While we have seen schools effectively conduct academics and operations remotely, Boards also need to have the ability to operate and vote even when they cannot meet in person (as a whole or on an individual basis). You should adjust your bylaws to allow trustees to participate in and hold meetings of the Board or committees by means of a telephone conference or by another suitable electronic communications system, including videoconferencing technology. The bylaws should ensure, however, that the telephone or other system permits each person participating in the meeting to communicate with all others. The bylaws should be clear that participation in that type of meeting constitutes "presence" at a meeting unless participation is to object to the transaction of business on the grounds that the meeting was not properly convened.

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In addition, bylaws should contemplate remote voting at meetings. If remote voting is permitted, the bylaws should require that there be reasonable measures to verify that every person voting at the meeting by means of remote communications is sufficiently identified. They should also state that there should be a record kept of any vote or other action taken.

2. Separate the Audit and Finance Committees

While the Finance Committee should work with the school to prepare and make recommendations to the Board of Trustees regarding the school's operating, capital, and long-range budgets, and develop and recommend broad financial policies, the Board should have a separate Audit Committee. Having a separate Audit Committee is a best practice to assure financial oversight and a check on the Finance Committee and the school's financial operations.

The Audit Committee should recommend an independent certified public accountant or firm to conduct an annual audit and any other similar services as determined by the Audit Committee. The Audit Committee should also review responses of the school's administration to significant internal control recommendations made by the independent accountant or firm, and should review the annual financial statements prior to the issuance thereof and then should recommend action by the Board of Trustees. By having an Audit Committee that can own the audit process, the school creates a doublecheck on the school and its fiscal matters.

3. Consider Restricting Board Membership

While having diverse backgrounds among Board members can generate new ideas and problem-solving, certain categories of Board member can create challenges for the Board.

- First and foremost of these are **students and employees** of the school. While K-12 schools often do not have students on their Boards, the bylaws should also prohibit employees from being voting members of the Board. Otherwise, the Board may face conflicts when addressing issues like compensation, benefits, and possible tenure.

- Another sometimes problematic situation is where **family members of employees** and/or persons who have a **close business relationship** (like a financial advisor and some of their clients) are on the board together. Having spouses or family members on the school's Board can create voting blocks that are not objective.
- For the same reason, Boards may want to include provisions in their bylaws prohibiting Board members from having **personal relationships** (such as dating or marital relationships) with each other.
- Other requirements, such as having a certain number of **alumni** or a specific number of **religious leaders**, can make it hard for the Board to fill positions and may result in Board members who do not have the areas of expertise needed. Moreover, it could result in the Board violating its own bylaws if it proceeds with business when a particular required category, such as a religious leader, is missing. Any Board member requirements in the bylaws should be thoughtfully considered before being adopted.

4. **Build In Circumstances that Require the Submission of Board Resignations**

There have been a number of cases this year where rogue board members caused trouble for their school boards. While this can never be totally eliminated, there are some clear warning signs that a board member may no longer be supporting the school's mission. Your bylaws could require that Board members offer their resignation if they trigger certain conditions, which the Board Chair can then accept or refuse depending on the circumstances.

One such situation is when a Board member withdraws their children from enrollment at the school. While a Board member may do that because their student needs a different type of program and may still be fully in support of the school's mission, it can also be a sign that the Board member's support for the school has waned. By including a provision requiring that Board members tender their resignations if they withdraw their children, it avoids a difficult vote among the board members, often requiring a two-thirds majority, in order to remove that Board member from the Board. If there are other

circumstances that would give the Board concern over a Board member continuing in office, consider writing those into the School's bylaws.

5. Be Careful How Much Detail is Included in the Bylaws

Bylaws should be carefully constructed to give the Board the leeway needed to deal with developing circumstances and should avoid including detail that would be better included in a Board Manual, employee handbook, or separate policy. Bylaws that are overly detailed can result in unnecessarily restricting the Board or require them to follow detailed procedures that may become outdated or unnecessary.

For example, while IRS Form 990 asks if non-profits have a document retention policy and suggests this is a good practice, such a policy should not be in your bylaws. Instead, this should be in a separate document that can be easily updated. Other policies – such as travel reimbursement procedures, diversity statements and sexual harassment policies – may be useful for the school but are more suitable for other manuals and handbooks. By not unnecessarily restricting the Board, the bylaws can enable it to have the necessary structure without unnecessary restrictions.

Conclusion

While schools can never totally eliminate issues that could arise among their Boards, updated bylaws can ensure that the school's processes will not be an impediment to enabling schools to fulfill their mission. We will monitor these developments and provide updates as warranted, so make sure that you are subscribed to [Fisher Phillips' Insights](#) to get the most up-to-date information direct to your inbox. If you have further questions, contact your Fisher Phillips attorney, the author of this Insight, or any attorney in our [Education Team](#).