

5 ADDITIONAL FACTORS TO CONSIDER WHEN UPDATING YOUR SCHOOL'S BYLAWS FOR NEXT ACADEMIC YEAR

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Last year, drawing on lessons learned during the pandemic, we provided a list of considerations for schools to take into account as you update your bylaws ([which can be found here](#)). Now that the school year is close to wrapping up and you cast your eyes towards improvements you can make for next academic year, you should consider how you can improve your governance procedures. This includes ensuring that your bylaws provide the mechanisms necessary to enable you to fulfill your school's mission. Here are five additional factors for Boards and Heads of School to consider as you gear up for next year.

1. Consider Conflicts in Decision Making and Voting

While most schools are careful to clearly delineate what types of votes are needed for different actions, Boards often overlook the impact that disqualifying conflicts of interest may have in the process. When reviewing bylaws, we often find that it is unclear whether a disqualified Board member with a conflict should be counted for purposes of quorums and majorities. As you assess your bylaws, consider including language clarifying the impact of conflicts, such as provisions stating that only those Board members "eligible to vote" shall be included in the quorum or number of votes needed to pass various measures.

This is also a good time to consider addressing conflicts of interest generally and having a well-written policy for Board members to sign each year reminding them of their obligations. However, as we noted in our previous article, bylaws bind the Board and are challenging to change.

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Therefore, when addressing conflicts of interest, it may be better not to be specific and to instead put many of the details in a separate policy that can be revised more easily if necessary, such as a governance or board policy manual. That does not mean that conflicts of interest should be ignored. In many cases, language in the bylaws indicating that the Board will implement a conflict-of-interest policy can suffice, allowing for greater flexibility in the actual policy.

When drafting bylaws or conflicts policies, be clear and precise in your language. For example, specific language referencing when a Board member is recused from discussions and/or voting can make a big difference practically. Language like “a Board member will be asked to recuse themselves” leaves open the option for them to refuse. Whereas language like “a Board member will be recused” or “at the discretion of the Board Chair/Governance Committee/Executive Committee, the Board member may be recused” provides more clarity.

2. Provide the School with More Flexibility Than You May Need

In revising bylaws, the Board will often include provisions that reflect the way it is currently functioning. While that is a useful starting point, the Board should also consider where it might need more flexibility and should ensure that it does not unnecessarily restrict itself.

For example, most Boards tend to have 12-18 members. However, there are circumstances when it may become difficult to retain that number. If your school needs to downsize or close, or is going through a challenging community issue, it may be difficult to attract or retain that many Board members.

For that reason, we recommend that the bylaws provide for a lower number of Trustees so that the Board has flexibility. This is an example of one of the areas where greater flexibility, even if it is never needed, is beneficial.

3. Consider Standing Committees

When reviewing your bylaws, schools should consider what standing committees their bylaws require. Common standing committees include:

- Executive Committee; Governance Committee (or Committee on Trustees);
- Head Support and Evaluation Committee;
- Advancement Committee;
- Risk Management Committee; Finance Committee; and
- Audit Committee.

(As noted in the prior article, it is a good practice to have the Finance Committee separate from the Audit Committee, with distinct members in each, to have another group check on the school's finances.)

While some or all of these standing committees may be appropriate for the school, they must be maintained if included in the bylaws. An alternative to identifying all of the different standing committees that the school must have is to specify the ones that the school cannot live without or are required to maintain pursuant to state law, such as an Executive Committee. You can then include a method by which other committees, usually called *ad hoc* committees, can be formed.

Bylaws should also contemplate flexible membership on committees so they can evolve with the school's needs. For example, Risk Committees of yesteryear often consisted of a small number of board members with legal, regulatory, or insurance backgrounds who periodically reviewed the school's insurance coverage, monitored legal action against the school, and assisted in strategic risk mitigation. Today Risk Committees play a key role in the overall safety and security of school campuses, students, and employees.

Additionally, the bylaws may provide for committee members who are not also Board members. This can be a great tool for "test driving" a potential board member. However, it is important to remember that some states (and best practices) require the majority of the committee be made up of voting board members if it is delegated the Board's authority to act. It is also a good idea to maintain an odd number of committee members to avoid stalemates.

4. Build in Circumstances that Require the Termination of Board Members

While we previously noted that it can be helpful to specifically identify circumstances that require Board members to submit their resignations – such as if they withdraw their students from enrollment – there are also times when the Board may want to automatically terminate members.

For example, some schools include provisions emphasizing the importance of having Trustees present for Board meetings and providing that any Trustee who is not present for a certain number of meetings in any given school year shall be automatically removed as a Trustee without the need for a vote of the Board. An automatic termination provision also avoids the awkward conversation with the Trustee who is just not showing up to meetings.

As an alternative, other schools include milder language allowing a Trustee to avoid being dismissed if they can provide compelling reasons for their absences. This can be subjective and requires that there to be a process, as opposing to an automatic dismissal, so the Board will want to decide what would work best for the particular school.

5. Be Careful in Selecting Board Members

Over the last year reviewing school bylaws, we have also noticed that some schools have made school employees members of the Board. One common situation is to include either the Director of Development or Chief Financial Officer. However, the only school employee who should a member of the Board is the Head of School. The Director of Development, Chief Financial Officer, or other school employees can be appointed to committee work and attend Board meetings by invitation but should not be a Board Member regardless of voting status.

Conclusion

While schools cannot anticipate every issue that could arise, comprehensive bylaws can ensure that the school's required processes will not prevent the school's Board from accomplishing its mission. As you start your planning for the next academic year, now is a good time to give your governance documents a fresh look with these considerations in mind.

We will monitor these developments and provide updates as warranted, so make sure that you are subscribed to [Fisher](#)

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