

## STUDENT SUCCESS PROGRAMS

DBA – AUDEO CHARTER SCHOOL · THE CHARTER SCHOOL OF SAN DIEGO

(A California Non-Profit Public Benefit Corporation)

*Len Hering RADM, USN (ret) – Chairman,*

*Scott Barton – Member, David Crean – Member, Tim Morton – Member, Eric Schweinfurter - Member*

### BOARD OF DIRECTORS WORKSHOP/TRAINING

**Monday, October 17, 2022, 8:00 a.m.**

**Via Video Conference**

Access to the live video conference will be accessible prior to the start of the meeting at

CSSD: <https://charterschool-sandiego.net/board-governance/>

Audeo: <https://www.audeocharterschool.net/board-of-directors/>

This agenda contains a brief, general description of each item to be considered.

Except as otherwise provided by law, no action shall be taken on any item not appearing in the following agenda.

#### 1.0 OPEN SESSION

- 1.1 Call to Order
- 1.2 Roll Call
- 1.3 Consideration and Approval of Adoption of the Board Findings Pursuant to Government Code Section 54953(e)(1)
 

*The Charter School Board of Directors determines, in accordance with Government Code Section 54953(e)(1)(B), that meeting in person would present imminent risks to the health or safety of attendees. Pursuant to Government Code Section 54953(e)(3), the Board has also reconsidered the circumstances of the State of Emergency declared by the Governor on March 4, 2020, and finds the State of Emergency continues to directly impact the ability of the Directors to meet safely in person and/or that State or local officials continue to impose or recommend measures to promote social distancing.*
- 1.4 Establishment of Quorum
- 1.5 Pledge of Allegiance
- 1.6 Approval of Agenda [P.1-2](#)

#### 2.0 PUBLIC COMMENT

Public comment for items of interest to the public and within the scope of Student Success Programs Board (non-agenda) shall be no longer than two (2) minutes. Public comment for agenda items shall be no longer than three (3) minutes. Speakers may not yield their time. In meetings held over Zoom, any person who wishes to make a comment on either non-agenda or agenda items shall use the “Raise Hand” feature of Zoom to notify the Board. In accordance with the Brown Act, no discussion or action may occur at this time, but it is the Board’s prerogative to respond or give direction to staff. All public comment will be heard at this point in the agenda as ordered below. Each agenda item being commented on will have a maximum of 20 minutes allotted and each non-agenda item will have a maximum of 10 minutes allotted. If necessary, the Board Chair may equivalently decrease the time for each speaker in order to stay within the allotted maximum.

- 2.1 Non-Agenda Public Comment
- 2.2 Agenda Public Comment

### 3.0 BOARD WORKSHOP/TRAINING

- 3.1 Young, Minney & Corr Law Firm will provide training to the Board regarding Professional Development Training Including Best Practices in Charter Schools Board Management, Updates on The Charter Schools Act and a Review of Corporate Practices, Fiduciary Duties and Fiscal Oversight, the Brown Act and Conflict of Interest Laws [P.3-189](#)

### 4.0 ADJOURNMENT

**Next Regular Board Meeting: Wednesday, December 7, 2022, 8:00 a.m.**

Meeting Agenda available at:

[www.charterschool-sandiego.net](http://www.charterschool-sandiego.net), [www.audeocharterschool.net](http://www.audeocharterschool.net)

**Accommodation** -- Student Success Programs, Inc. (School's), does not discriminate on the basis of disability in the admission or access to, or treatment or employment in, its programs or activities. Angela Neri, has been designated to receive requests for disability-related modifications or accommodations in order to enable individuals with disabilities to participate in School's open and public meetings. Please notify Angela Neri at (858) 678-2020 twenty-four (24) hours or more prior to disability accommodations being needed in order to participate in the meeting. Translation services are available by notifying Angela Neri at (858) 678-2045 twenty-four (24) hours or more prior to the board meeting. In compliance with Government Code Section 54957.5, non-exempt writings that are distributed to a majority or all of the board in advance of a meeting may be viewed at 10170 Huennekens Street, San Diego, CA 92121; or at the scheduled meeting. In addition, if you would like a copy of any record related to an item on the agenda, please contact Angela Neri (858) 678 -2020.

*Certification of Posting*

*I, Angela Neri, hereby certify that I posted this agenda on the Audeo Charter School and The Charter School of San Diego webpage on October 13, 2022.*



**YOUNG, MINNEY & CORR, LLP**



**STUDENT SUCCESS PROGRAM  
AND  
AUDEO CHARTER SCHOOL  
(CORP.)  
BOARD MEMBER TRAINING**

**AUDEO OCT. 3, 2022 & OCT. 17, 2022  
SSP OCT. 17, 2022 AND NOV. 1, 2022**

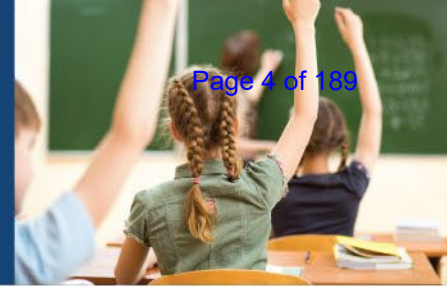
**Presented by:**

Paul C. Minney, Partner ([pminney@mycharterlaw.com](mailto:pminney@mycharterlaw.com))

Kaela M. Haydu, Senior Counsel ([khaydu@mycharterlaw.com](mailto:khaydu@mycharterlaw.com))

**THE CHARTER LAW FIRM**

# YM&C Firm Overview



- Partners have over 150 years of collective experience working with charter schools
- 33 attorneys working with charter schools throughout the state in all areas of charter school law (e.g., employment/labor, special education, nonprofits, litigation, audits, facilities, etc.)
- Represent more than a majority of California's charter schools
- Conduct workshops for charter schools in all areas of legal compliance

# Introduction

# What It Means to Be a Charter



- The CSA passes in 1992
- The basic bargain
- Charter life cycles -- approval, renewal, revocation
- Charter school academic accountability
- Charter school legal compliance
- Charter school fiscal solvency
- Charter schools and nonprofit corporations

# Articles of Incorporation and Bylaws



1. Specific purpose of corporation
2. Dedication of assets
3. Corporate bylaws
4. Board member eligibility and election process
5. Restrictions on interested persons as directors
6. Director's term
7. Removal of directors
8. Granting agency representative

# Articles of Incorporation and Bylaws



9. Voting of the board
10. Non-compensation
11. Officers
12. Indemnity of board members



# Role of the Board Member



- Management v. Governance
- How Well v. How Will
- Avoid administrivia
- Individual Board members
- Decisions of the majority of the board
- Conflicts of interest
- Fiduciary duties – duty of loyalty and care
- Academic accountability
- Fiscal oversight, legal compliance, safety
- Complaint processing



# Fiduciary Duty of Directors

- Board members owe a fiduciary duty to the Corporation:
  - Duty of care: Directors should act in a reasonable and informed manner
  - Duty of loyalty: Directors should act in good faith in the best interest of the corporation

# Continuing Duties



- Corporations must comply with applicable continuing filing requirements:
  - Tax and/or information returns with the IRS/FTB (FTB Form 199, IRS Form 990)
  - Statement of Information (CA Secretary of State SI-100)
  - Form 700 Statement of Economic Interest with Code Reviewing Body

# Continuing Duties



- Annual corporate meeting to elect officers
- Creation and maintenance of minutes from corporate Board meetings
- Maintenance of corporate records/documents

# **Student Success Programs & Audeo Charter School (Corp.)**

# Charter Schools Under Each Non-Profit



Student Success Programs	Audeo Charter School (Corp.)
The Charter School of San Diego	Audeo Charter School II
Audeo Charter School	Audeo Charter School III
	Audeo Valley Charter School
	Grossmont Charter School
	Sweetwater Secondary School
	Mirus Secondary School

# Distinct Non-Profits



Each nonprofit board operates independently and governs their respective charter schools in accordance with their respective charters, corporate bylaws, fiduciary responsibilities under the Corporations Code, and all applicable State and Federal laws.

“Altus Schools” is not a legal entity; rather, it refers to the philosophy, systems, practice, procedures, and culture that comprise the concept surrounding the creation of the schools under each nonprofit that supports an innovative approach to personalized education, the professional development of employees, and data-informed change to create sustainable schools.

# MOU Between SSP and Audeo Charter School (Corp.)

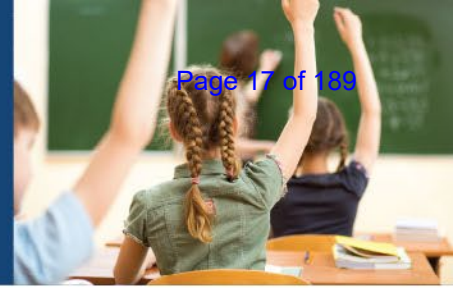


Both nonprofits are engaged in the business of providing educational services and benefit from collaboration consistent with their charitable purpose.

- Facilities Sharing Agreement
- Intellectual Property Agreement
- Shared Employees



# Requested Practices



San Diego Unified School District Requested Memorialization of Current Practice or Revisions in the Following Areas:

- Parent Representative on the SSP Board
- DOJ Clearance
- Benefits Between SSP and Audeo Corp.
- Employee Board Members
- Confidentiality and Access to Records
- Contracts With All Corporations
- Board Meeting Timing
- Consulting Contracts
- Parameters for Future Support of Other Orgs
- Employee Contracts
- Work Travel Policy
- Personal Email Addresses
- Allocation of Employee Time
- Real Estate Transactions
- Compliance Officer
- Altus Schools Service Mark

# Amended Board Policies



1. MOU Between SSP and Audeo Charter School (Corp.)
2. Code of Ethics Amendment
3. Email Policy
4. Travel and Expense Policy
5. Confidentiality Policy
6. Salary Apportionment Policy
7. Board Meeting Time Policy
8. Presidential Authorization Policy; Specified Real Estate Transactions; HR Action Policy 1500 Amendment

# **Best Practices for a Successful Board: 7 Habits of Highly Effective Governing Boards**

# Define Proper Roles of Board Versus Administration

## 1

- ▶ How well do all parts of the governance team know their roles?
- ▶ How does the CEO's evaluation correlate?



# Avoid Managing

## 2

- ▶ What is governing?
- ▶ What is managing?



# Establish & Enforce Operational Norms as a Board



## 3

- ▶ When is Board approval required?
- ▶ How does the Board work through its agenda?
- ▶ What if the Board is divided?
- ▶ What is a Board Member's basis for voting?

# Only Recognize/Sanction Group [Board] Authority

## 4

- ▶ When is it appropriate for a single Board member to act on behalf of the Board?
- ▶ What do individual Board members say when questioned about the Board's actions?

directorship, stewardship, her  
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**integrity**  
noun 1. adheren  
principles; sour

# Utilize Time Effectively and Efficiently



## 5

- ▶ How do agendas get prepared?
- ▶ How does the public participate in your meetings?
- ▶ What do you spend most of your time doing at your meetings?
- ▶ How do you prepare for meetings?
- ▶ How do you know if you are a healthy board?





# Continually Develop the Board Professionally

## 6

- ▶ What do you do to ensure regular professional development occurs?
- ▶ What are the ways you can develop yourself and the Board as a whole?

# Comply with Public Transparency Laws



## 7

- ▶ What are the essential public agency laws?
- ▶ How do you ensure compliance with such laws?
- ▶ Do you maintain the minimum core policies?

# Understanding the Brown Act

# The Six Questions



1. What is the purpose of the Act?
2. What constitutes a meeting?
3. What are the meeting notice & agenda requirements?
4. What are the public's rights at meetings?
5. What are the permissible closed sessions?
6. What are the penalties & remedies for violating the Act?

# QUESTION #1: What is the Purpose of the Act?



## To Foster Broad Public Access:

“ . . . The people of this State do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.”



# Public Access Is Not Absolute

## The Act Allows For Limited Confidentiality, But Closed Sessions Must Be Statutorily Authorized as Follows:

- Personnel matters
- Labor negotiations
- Real property negotiations
- Receiving legal advice from School's attorney
- Public security
- Pupil discipline

## QUESTION #2:

# What Constitutes A Board Meeting?



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## Basic Definition:

A meeting occurs when any congregation of a majority of the members of the body meet to hear, discuss, deliberate, or take action on any item of School business.



# What Are The Basic Exceptions?

## Exceptions to Definition of Meeting:

- Attendance by majority at public conferences of general interest
- Attendance of majority at other body's public meeting
- Attendance of majority at purely social or ceremonial gatherings

**SO LONG AS SCHOOL BUSINESS IS NOT DISCUSSED!**



# What About Committees?



## **The Brown Act Generally Does Apply to Subsidiary Committees:**

Commissions, committees and boards or other bodies of a local agency, whether permanent or temporary, decision making or advisory, created by ordinance, resolution or formal action of the body are subject to the act.

# When Can A Committee Ignore The Brown Act?



## Exceptions to the General Rule for Committees:

Advisory committees, composed solely of the members of the board that are less than a quorum of the board are not subject to the act unless it is a standing committee which has a continuing subject matter jurisdiction, or a meeting schedule fixed by ordinance, resolution or formal action of the body.

# When Does A “Serial” Meeting Occur?



## Serial Meetings Are Strictly Prohibited

### Elements of a Serial Meeting:

- A majority of the Board members
- Outside a meeting
- Use a series of communications of any kind, directly or through intermediaries
- To discuss, deliberate, or take action on
- Any item of School business that is within the subject matter jurisdiction of the body

# Additional Limits On Board Communications



## Limit on Sharing Board Opinions/Positions Outside Agendized Meetings:

While an employee or official may engage in separate conversations or communications outside of a meeting with other members of the body in order to answer questions or provide information regarding a matter of School business, that person may not communicate to members of the board the comments or position of any other member or members of the Board.

# “Regular” (Normal) Teleconference Meetings



## Regular Teleconference Meetings

Six Additional Requirements:

1. Agenda must be posted at all teleconference locations.
2. Each teleconference location must be identified in the notice and agenda of the meeting.



# “Regular” (Normal) Teleconference Meetings



## Teleconference Meetings (*cont'd*)

3. All votes taken must be by roll call.
4. Each teleconference location must be accessible to the public. (ADA-compliance required.)
5. Members of the public must be able to hear and must have the right to address the Board directly from each teleconference location.
6. A quorum of the Board must participate from within the Charter School’s “jurisdiction.”

# Governor's COVID-19 Executive Expired – AB 361 Replaced It



**Pursuant to AB 361 (October 1, 2021), a charter school board may continue to hold teleconference meetings without adhering to some of the traditional requirements of the Brown Act. If certain conditions are met, a charter school board may continue to meet virtually with the following flexibilities:**

- The agenda does not need to provide notice of each teleconference location nor do agendas need to be posted at each location;
- A quorum of board members do not need to be located within the Charter School's jurisdiction; and
- Governing board members may participate in a teleconference meeting from places that are not publicly accessible.



# Governor's COVID-19 Executive Expired – AB 361 Replaced It



**A charter school board may continue to hold teleconference meetings without adhering to all the traditional requirements of the Brown Act under the following circumstances:**

- During a proclaimed state of emergency; and
- State or local officials have imposed or recommended measures to promote social distancing; or
- The charter school board determines that meeting in person would present imminent risks to the health or safety of attendees.





# Governor's COVID-19 Executive Expired – AB 361 Replaced It



## If meeting pursuant to AB 361, the board must:

- Protect the statutory and constitutional rights of the parties and public appearing before the board.
- Give notice and post agendas as otherwise required under the Brown Act.
- Allow members of the public to access the meeting (e.g., Zoom) and describe the manner in which the public can offer public comment.
- Not require members of the public to submit comments in advance of the meeting. The public must be able to participate in real time.
- Provide a timed or a reasonable period for public comment.
- If there is a technical disruption in the meeting broadcast, take no further action on items in the agenda until public access is restored.

# Governor's COVID-19 Executive Expired – AB 361 Replaced It



**In order to continue holding meetings pursuant to AB 361, the board must make the following findings by majority vote every 30 days:**

- The charter school board has reconsidered the circumstances of the state of emergency.
- Any of the following circumstances exist:
  - The state of emergency continues to directly impact the ability of the members to meet safely in person.
  - State or local officials continue to impose or recommend measures to promote social distancing.

# New Law! AB 2449



- Signed by the Governor on September 13, 2022; effective on January 1, 2023
- Amends the Brown Act teleconferencing rules to allow relaxed teleconferencing requirements for members' personal **emergencies** and for **just cause**
- Allows teleconferencing without any obligation to:
  - Identify the teleconferencing location on the agenda
  - Allow public access to the teleconferencing location
- Member must participate through both audio and visual technology

# New Law! AB 2449



Teleconferencing is available under these rules where one of the following circumstances applies:

- The member notifies the governing board at the earliest opportunity possible, up to the start of a regular meeting, for **just cause** up to twice per calendar year
- The member requests to participate in the meeting remotely due to **emergency circumstances** and the governing board takes action to approve the request.
  - A general description of an item generally need not exceed 20 words (no need to disclose medical diagnosis or disability, or any personal medical information that is already exempt under existing law)

# New Law! AB 2449



**“Emergency circumstances”** means a physical or family medical emergency that prevents a member from attending in person.

**“Just cause”** means any of the following:

- A childcare or caregiving need of a child, parent, grandparent, grandchild, sibling, spouse, or domestic partner that requires them to participate remotely.
- A contagious illness that prevents a member from attending in person.
- A need related to a physical or mental disability as defined in law and not otherwise accommodated
- Travel while on official business of the governing board or another state or local agency.

# New Law! AB 2449



Teleconferencing based on an **emergency** requires that:

- The member shall make a request to participate remotely as soon as possible.
- The member must make a separate request for each meeting in which they seek to participate remotely.
- If the request does not allow sufficient time to place proposed action on such a request on the posted agenda for the meeting for which the request is made, the legislative body may take action at the beginning of the meeting.

# New Law! AB 2449



- Under no circumstances can a member participate in meetings solely by teleconference from a remote location for a period of more than:
  - three consecutive months;
  - 20 percent of the regular meetings within a calendar year; or
  - more than two meetings if the legislative body regularly meets fewer than 10 times per calendar year.

# New Law! AB 2449



## Other requirements:

- At least a quorum of members must participate in person from a singular physical location clearly identified on the agenda and which is open to the public and situated within the local agency's jurisdiction.
- Members of the public must be provided a means to “remotely hear and visually observe the meeting, and remotely address” the governing board” i.e., a two-way audiovisual platform or a two-way telephonic service and live webcasting of the meeting.



# New Law! AB 2449



- Agenda must provide notice of how members of the public can access the meeting and provide public comment. Cannot require public comments to be submitted in advance.
- If the broadcast is disrupted, the board may not take action until remote access to the meeting is restored
- Board cannot require public comments to be submitted in advance
- The member shall publicly disclose before any action is taken, if any individuals 18 years of age or older are present in the room at the remote location, and the general nature of the member's relationship with any such individuals.

## QUESTION #3:

# What are the Meeting Notice & Agenda Requirements?



### Golden Rule:

*With limited exceptions:* If it is not on the agenda, the Board may not discuss the matter.

### Technical Rule:

The agenda shall be posted properly in advance of a meeting and must include a brief description of items to be transacted or discussed.

# What Are The Limited Exceptions When The Board Can “Discuss” A Non-Agenda Item?



1. Rarely Authorized Emergency Situations:  
If “emergency situation” and super majority votes there is a need for immediate action and need arose after agenda was posted
2. Continued Matters:  
If the agenda item was posted from prior meeting within five (5) days or less, and matter was continued

# Exceptions To Discussing A Matter Not on The Agenda (cont'd)



3. Direction to Staff
4. Brief Responses/Clarifying Questions/Announcements
5. Discussion Over Future Agenda Items

## DISCUSSION POINT:

# Board Interaction with Public on Agenda Items

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- The Board may briefly interact with the public on agenda items beyond receiving input.
- Significant Board interaction with public during comment period is not a best practice.

## DISCUSSION POINT:

# Board Interaction with Public on Agenda Items (cont'd)



- Possible risks attendant to extensive interaction with public during comment period.
  - Discussion (Q&A or conversation) with public risks discussion of topics not on the agenda.
  - Discussion with public risks inefficient/chaotic/long meetings.
  - Discussion with public risks Board indecision.

# What are the Agenda Posting Requirements?



## Posting Requirements Vary According To The Type of Meeting:

1. Regular meetings – Agenda posted 72 hours in advance
2. Special meetings – Agenda posted 24 hours in advance
3. Emergency meetings – at least 1 hour

# Where Must The Agenda Be Posted?



1. Physically posted in publicly accessible location for entire posting period within jurisdiction.
2. On the Website – homepage with a prominent, direct link and downloadable.



# CLOSED SESSION AGENDAS: How Must Closed Session Items Be Agendized & Processed?



1. Safe harbor language must be utilized.
2. Board chair must provide oral notice in advance of closed session.
3. Board must make public report of action taken in closed session and roll call vote or abstention of every member, if any.



# A Note on Executive Compensation

## Executive Compensation

- Approval of CEO/Executive Director's compensation must occur at a regular (not special) meeting
  - Govt. Code 54953: Prior to final action, Board must orally report a summary of the recommendation for final action, including the salary, salary schedule, and fringe benefits, during the open meeting where final action will be taken.
  - Final action in open session



## QUESTION #4:

# What are the Public's Rights at Meetings?



### **Right To Provide Public Testimony:**

Members of the public have the right to provide input to the Board on non-agenda items & either before or during Board consideration of an agenda item.

# Other Rights of the Public in Board Meetings



- Right to Tape or Broadcast
- Right Against Conditions on Attendance
- Right to Non-discriminatory Facilities
- Right to Copies of Agendas and Other Public Writings

# Public Testimony Issues



## What Happens When Speakers:

- Criticize Staff?
- Disclose Confidential Information in Public?
- Act in a Disruptive Manner?

# New Law! SB 1100



- Signed by the Governor on August 22, 2022; effective on January 1, 2023
- Adds a new section to the Brown Act authorizing the presiding member of the governing board conducting a meeting or their designee to **remove, or cause the removal of, an individual for disrupting the meeting.**

# New Law! SB 1100



- “Disrupting” means engaging in behavior during a meeting of a legislative body that actually disrupts, disturbs, impedes, or renders infeasible the orderly conduct of the meeting and **includes, but is not limited to**, one of the following:
  - (A) A failure to comply with reasonable and lawful regulations or policies adopted by a legislative body related to public comment, or any other law.
  - (B) Engaging in behavior that constitutes use of force or a true threat of force.

# New Law! SB 1100



- Before removing an individual, the presiding member or their designee **must warn the individual** that their behavior is:
  1. disrupting the meeting; and
  2. that their failure to cease their behavior may result in their removal.
- The presiding member or their designee may then remove the individual if they do not promptly cease their disruptive behavior.



## QUESTION #5:

# What are the Permissible Closed Sessions?



## Authorized Closed Sessions Include the following:

- Personnel
- Real Estate Negotiations
- Labor Negotiations
- Conference With Legal Counsel
- Public Security Issues
- Pupil Discipline

# What Happens In Closed Session. . .



## **Confidentiality Requirement:**

No Board member, staff member or invitee may disclose information from closed session without the authorization of the Board.

## QUESTION #6:

# What are the Penalties & Remedies for Violating the Act?



1. Civil remedies:
  - Board action may be declared null and void
  - Injunctive relief may be obtained
  - Prevailing plaintiff awarded attorneys' fees
2. Criminal penalties apply if one or more Board members intend to deprive the public of information to which the member knows or has reason to know the public is entitled.
3. Potential charter revocation
4. Stakeholder trust harmed

# Notice & Demand For Cure Process



## Notice and Demand for Cure:

1. Generally, written demand for alleged open session violations must be made within 30 days.
2. Otherwise, demand must be made within 90 days.
3. Board must cure within 30 days or notify the demanding party that it will not cure.
4. Demanding party can initiate litigation to compel compliance and if successful, may be awarded attorneys fees and court costs.

# Understanding Conflict of Interest Laws

# Conflicts of Interest



## Broad Definition

- ▶ A *conflict of interest* arises when an individual who has a private financial interest in the outcome of a corporate contract or a public decision, participates in the decision-making process or influences or attempts to influence others making the contract or decision.
- ▶ In short, a conflict of interest is a clash between an individual's duty to his or her office and his or her personal interests.

# Financial Interests



## Common Types of Financial Interests Regulated by Conflict Laws

- ▶ Ownership or investment in business entity
  - ▶ Investment in real property
  - ▶ Source of income
  - ▶ Source of gifts
  - ▶ Effect on personal finances
- ☞ Financial interests of immediate family members of Board Members and employees typically are covered.



# Government Code Section 1090



## Elements

1. Public official (officer, board member, or employee)
2. Making a public contract (for sale or purchase)
3. Public official has a financial interest in the contract



# Government Code Section 1090



## What you need to know about Section 1090

- ▶ If board member has financial interest, the entire board is prohibited from entering into the contract; *even if it is with the best vendor at the best price and the interested board member abstains.* (Unless an exception applies.)
- ▶ Making a public contract is defined very broadly! Applies to earliest discussions, planning, solicitation for bids, etc., not just vote.
- ▶ Thus, this statute is, in most respects, the toughest standard to meet.
- ▶ Violation of GC 1090 is a felony and the contract void!

# Political Reform Act

directorship, stewardship, her  
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**integrity**  
noun 1. adherence to principles; soundness

D E C I S I O N S



# Political Reform Act



## Big Picture

1. Public official
2. Participating in or attempting to influence a governmental decision
3. Public official has qualifying financial interest  
*(Includes spouse and children)*
4. Financial interest is material

## The Official Must Recuse Him or Herself from All Parts of the Decision-Making Process

☞ Lots of very detailed regulations have also been adopted by FPPC.

# COI Code



## Conflict of Interest Code

- ▶ States who must file the Form 700
- ▶ Assigns disclosure categories





# Form 700

## Form 700

- ▶ Statement of Economic Interests
- ▶ When it must be filed:
  - ▶ Assuming or reappointment to office or position (within 30 days)
  - ▶ Once annually (by April 1<sup>st</sup>)
  - ▶ Leaving office or position (within 30 days)
- ▶ Penalties for failure to file:
  - ▶ Criminal charges by Atty General or District Atty for deliberate failure to file
  - ▶ Civil or administrative action by FPPC or private citizen

# Political Reform Act



## “Financial Interest” for Form 700

- ▶ Investment in business entity of \$2,000 or more
- ▶ Real property investment of \$2,000 or more
- ▶ Income of \$500 or more
- ▶ Business position in entity
- ▶ Gift of \$50 or more



# Form 700

Check the Conflict-of-Interest Code to Determine What You Must Report (Board members: broad disclosure).

- ▶ Typically, All Financial Interests
  - ☞ Not Your Residence
  - ☞ Not Income from a Public Agency
  - ☞ Half of Your Spouse's Income
  - ☞ Financial Interest within Your Jurisdiction
    - ▲ Property – within 2 miles of jurisdiction
    - ▲ Investments/Business in jurisdiction
    - ▲ Gifts – all gifts inside or outside of jurisdiction

**CALIFORNIA FORM 700**  
FAIR POLITICAL PRACTICES COMMISSION

STATEMENT OF ECONOMIC INTERESTS  
COVER PAGE  
A PUBLIC DOCUMENT

Please type or print in ink. Date Initial Filing Received (Month/Day/Year)

NAME OF FILER (LAST) (FIRST) (MIDDLE)

1. Office, Agency, or Court  
Agency Name (Do not use acronyms) \_\_\_\_\_ Your Position \_\_\_\_\_  
Division, Board, Department, District, if applicable \_\_\_\_\_  
▶ If filing for multiple positions, list below or on an attachment. (Do not use acronyms)  
Agency: \_\_\_\_\_ Position: \_\_\_\_\_

2. Jurisdiction of Office (Check at least one box)  
 State \_\_\_\_\_  Judge, Retired Judge, Pro Tem Judge, or Court Commissioner (Statewide Jurisdiction)  
 Multi-County \_\_\_\_\_  County of \_\_\_\_\_  
 City of \_\_\_\_\_  Other \_\_\_\_\_

3. Type of Statement (Check at least one box)  
 Annual: The period covered is January 1, 2020, through December 31, 2020.  
 Leaving Office: Date Left \_\_\_\_\_ (Check one circle)  
 The period covered is January 1, 2020, through the date of leaving office.  
 Assuming Office: Date assumed \_\_\_\_\_ through \_\_\_\_\_  
 The period covered is \_\_\_\_\_ through the date of leaving office.  
 Candidate: Date of Election \_\_\_\_\_ and office sought, if different than Part 1: \_\_\_\_\_

4. Schedule Summary (must complete) ▶ Total number of pages including this cover page: \_\_\_\_\_  
Schedules attached  
 Schedule A-1 - Investments - schedule attached  
 Schedule A-2 - Investments - schedule attached  
 Schedule B - Real Property - schedule attached  
 Schedule C - Income, Loans, & Business Positions - schedule attached  
 Schedule D - Income - Gifts - schedule attached  
 Schedule E - Income - Gifts - Travel Payments - schedule attached  
-or-  None - No reportable interests on any schedule

5. Verification  
BUSINESS ADDRESS: STREET \_\_\_\_\_ CITY \_\_\_\_\_ STATE \_\_\_\_\_ ZIP CODE \_\_\_\_\_  
(Business or Agency Address Recommended - Public Document) EMAIL ADDRESS \_\_\_\_\_  
BUSINESS TELEPHONE NUMBER \_\_\_\_\_  
I have used all reasonable diligence in preparing this statement. I have reviewed this statement and to the best of my knowledge the information contained herein and in any attached schedules is true and complete. I acknowledge this is a public document.  
I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct.  
Date Signed \_\_\_\_\_ Signature \_\_\_\_\_  
Print the original signed form. Attach with your filing official.  
1994 Form 700 - Cover Page (03/07/2021)  
submit@fppc.ca.gov • 800-275-8773 • www.fppc.ca.gov

# Form 700



## Gifts

- ▶ General rule is that you cannot accept more than \$500 from one source in a calendar year.
- ▶ General rule is that gifts worth more than \$50 must be reported (one gift or aggregate gifts from same source in a calendar year).
- 1. Many exceptions to both general rules, the most common being:
  - ☞ Special Occasions – Birthdays, Holidays:
    - ▲ Can be gifts from anyone (other than lobbyists) if the gift giving and taking is proportional.
- 2. Inheritance



# Form 700



## Gift (cont.)

### 3. Family Members:

- ☞ Spouse (or former spouse), child, parent, grandparent, great grandparent, grandchild, brother, sister, current or former parent-in-law, brother-in-law, sister-in-law, aunt, great aunt, uncle, great uncle, niece, great niece, nephew, great nephew, first cousin, or first cousin once removed, or the spouse of any such person. (other than a lobbyist)

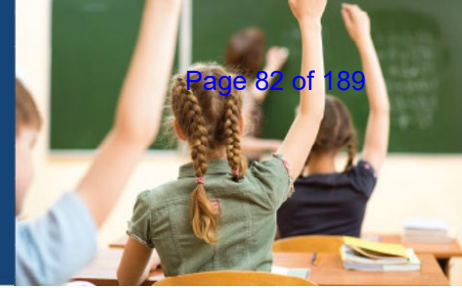
### 4. “BFF’s”- Long-term friendships:

- ☞ Friends for a “period of time” and gift giving and taking must be proportional. (other than a lobbyist)

### 5. Dating – “bona fide” relationship (other than a lobbyist)

- ☞ Returning or Donating Gifts vs. Reporting

# Common Law on Conflicts-of-Interest



## Prohibition Against Conflicts of Interest

- ▶ Public official engaging in transaction or influencing decision.
- ▶ Creating an appearance of impropriety (financial interest not necessarily required)

## Doctrine of Incompatible Offices

- ▶ Public official holding two public offices simultaneously
- ▶ Offices are incompatible with each other (creating divided loyalties); overlapping jurisdictions

# **AB 1505: New Charter School Renewal Standards**

# Mapping Out Charter Renewal



Section 1: Charter Submission and Action

Section 2: Renewal Criteria

Section 3: Charter Elements

Section 4: Approval/Denial Standards

Section 5: Charter Appeals



# Making the Best Case For Renewal Before and Beyond the Petition

- Anticipate and address the challenges that may arise at renewal
  - Financial/governance
  - Special education/EL programs
  - Previous complaints
- Start the renewal process early – preserve appeal options
- Look out for possible landmines, e.g., oversight requests during the renewal year
- Look for opportunities to be helpful to the authorizer

# Making the Best Case For Renewal Before and Beyond the Petition



- Know your audience, leverage relationships, shore up support
  - District staff
  - Board members
  - Community members
- Use the public hearing and decision meeting to show a high-level of organizational competency and parent/student support



# **Section 1: Charter Submission and Action**

# Charter Submission and Chartering Authority Action



- Charter is **deemed received** by the Board on the day submitted to District office with a **certification of completeness**
- **60 days for public hearing, 90 days for decision**
- Extension of 30 days with mutual agreement
- District Board shall publish staff recommendations, including recommended findings, 15 days before decision meeting
- Decision meeting is a public hearing
- **Equivalent time and procedures to present evidence and testimony** to respond to staff recommendations and findings



# **Section 2: Renewal Criteria**

# Renewal Criteria: Dashboard Alternative Status Schools (DASS)



- High-, middle-, and low-performing categories shall not apply to a DASS charter school.
- The chartering authority shall consider, in addition to the charter school's performance on the **state and local indicators on the Dashboard**, the charter school's performance on **alternative metrics** applicable to the charter school based on the **pupil population served**.

# Renewal Criteria: Dashboard Alternative Status Schools (DASS)



- The chartering authority shall meet with the charter school during the first year of the charter school's term to **mutually agree to discuss alternative metrics** to be considered pursuant to this paragraph and shall **notify the charter school of the alternative metrics** to be used within 30 days of this meeting.
- The chartering authority **may deny** a charter renewal pursuant to this paragraph only upon making written findings, setting forth specific facts to support the findings, that the **closure of the charter school is in the best interest of pupils.**
- No legal requirement specified for charter term.

# **Section 3: Charter Elements**

# Charter Elements



“Renewals and material revisions of charters are governed by the standards and criteria described in Section 47605, and **shall include**, but not be limited to, a **reasonably comprehensive description of any new requirement of charter schools enacted into law after the charter was originally granted or last renewed.**”

# Charter Elements: New Requirements



## Element 7/G:

“The means by which the charter school will achieve a balance of **racial and ethnic pupils, special education pupils, and English learner pupils**, including redesignated fluent English proficient pupils, as defined by the evaluation rubrics in Section 52064.5, that is reflective of the **general population** residing within the territorial jurisdiction of the school district to which the charter petition is submitted.”

# Charter Elements: New Requirements



Also provide **names and relevant qualifications** of all persons whom the **petitioner nominates** to **serve on the governing body** of the charter school.

# Charter Elements: Updating for New Law



- Governing law and Affirmations
- Health and Safety
- Admission
- Suspension and Expulsion



# **Section 4: Approval/Denial Standards**

# Standard for Approval



- Maintained Legislative intent.
- The governing board of the school district shall grant a charter for the operation of a school under this part if it is satisfied that granting the charter is consistent with sound educational practice **and with the interests of the community in which the school is proposing to locate.**
- The governing board of the school district **shall consider the academic needs** of the pupils the school proposes to serve.
- Renewals of charters are governed by the **standards and criteria** described in Section 47605.

# Standard for Denial: Academic Criteria



DASS: reviewed pursuant to alternative metrics;  
may deny with written findings that the closure of  
the charter school is in the best interest of pupils

# **Section 5: Charter Appeals**

# Charter Appeals



- *De novo* review by the County Board of Education.
- State Board of Education review only on an **abuse of discretion** standard.
- 30 days to appeal a denied establishment charter and a denied renewal charter.
- 180 days for judicial review if the county or SBE fail to act.



# Charter Appeals

## Appeal to the County:

- At the same time the petition is submitted to the county board of education, the petitioner shall also provide a copy of the petition to the school district.
- The county board of education shall review the petition pursuant to Section 47605(b) and (c).

# Charter Appeals: State Board of Education



- Must include findings and documentary record from the district **and** county.
- Written submission must detail specific citations to the documentary record regarding how the district, **or** county, **or** both abused their discretion.
- Board of district and county must prepare the documentary record, including transcripts, no later than 10 business days after request.
- Provide a copy of the appeal to the district and county.
- If new or different material terms, State Board shall immediately remand to **district** for reconsideration (30 days).

# Charter Appeals: State Board of Education



Appeal to the State Board of Education:

- District or county may submit written opposition within 30 days of appeal with specific citations to the documentary record explaining how the entity did not abuse its discretion.
- ACCS shall hold a public hearing to review appeal and documentary record; ACCS shall submit a recommendation to the SBE whether there is sufficient evidence to hear the appeal or to summarily deny.
- If no ACCS recommendation, the SBE shall either hear the appeal or summarily deny review based on the documentary record.



# Charter Appeals: State Board of Education



- SBE may reverse district and county action only upon determination that there was an abuse of discretion.
- If SBE reverses denial, it will designate, in consultation with petitioner, authorization to the district or county.

# Revocation

# Revocation



Absent a severe and imminent threat to the health and safety of students, a chartering authority may only revoke a charter if it makes a written factual finding, specific to that charter school, and supported by substantial evidence that the charter school has:

- 1) Committed a material violation of any of the conditions, standards, or procedures set forth in the charter;
- 2) Failed to meet or pursue any of the pupil outcomes identified in the charter;
- 3) Failed to meet generally accepted accounting principles, or engaged in fiscal mismanagement;
- 4) Violated any law.

# Revocation Procedures



## Notice of Violation

- Before revocation, chartering authority must first take action to approve and deliver a Notice of Violation.
- Notice of Violation must identify: (1) alleged violation(s); (2) all evidence relied upon, including date and duration;
- Notice must show that each alleged violation is material and uncured and that it occurred within a reasonable period of time before the Notice of Violation was issued;
- Must include a reasonable time period for the charter school to remedy or refute the violations.

# Revocation Procedures



## Notice of Notice of Violation

- At least 72 hours prior to any meeting at which the chartering authority will consider issuing a Notice of Violation, they must provide the charter school with notice and all relevant materials to the proposed action

# Revocation Procedures



- Charter School Response: Charter school may submit detailed response with refutations, remedial action taken, or proposed remedial action.
- Chartering authority will then evaluate response and either:
  1. Discontinue revocation; or
  2. Continue revocation by issuing a Notice of Intent to Revoke to the charter school's governing body within 60 calendar days of the conclusion of the remedy period

# Revocation Procedures



- Appeal
  - If a school district is the chartering authority and it revokes a charter, the charter school may appeal the revocation to the county board.
    - County board's decision may be appealed to the SBE by either the charter school or the school district
  - If a county board is the chartering authority, and it revokes a charter, the charter school may appeal the revocation to the SBE.

# Avoiding Fiscal Malfeasance



# Big Picture



## Expenditures of Money by Charter Schools

- “General-purpose entitlement funding may be used for any public-school purpose determined by the governing board of the charter school.” – CA Education Code
- LCFF supplemental and concentration grant funds must be spent in accordance with each school’s LCAP plan – CA Education Code
- Funds received by your charter school, whether from the State of California or other sources, are generally considered “public funds”
  - Article XVI, Section 6 of the California constitution

# Money Matters



## Additional Legal Authority Regarding School Funds

- Nonprofit Integrity Act of 2004 (Government Code 12585 *et seq.*)
- Conflict of Interest Laws
  - Political Reform Act of 1974 (Government Code section 81000 *et seq.*)
  - Government Code sections 1090 and 1091
- Corporations Code
  - Self dealing rules: Section 5233

# Embezzlement



Avoid charges of embezzlement (Cal. Penal Code Section 503) – two elements:

Spending money outside the authority of its use;  
and

Fraudulent intent (an intent to put the money to use for a purpose other than that which it was authorized).

# Misappropriation



## Misappropriation of Public Funds (Cal. Penal Code Section 424)

A person charged with the receipt, safekeeping, transfer, or disbursement of public moneys, who either:

1. Without authority of law, appropriates the same, or any portion thereof, to his or her own use, or to the use of another; or,
2. Loans the same or any portion thereof; makes any profit out of, or uses the same for any purpose not authorized by law; or,

# Misappropriation



3. Knowingly keeps any false account, or makes any false entry or erasure in any account of or relating to the same; or,
4. Fraudulently alters, falsifies, conceals, destroys, or obliterates any account; or,
5. Willfully refuses or omits to pay over, on demand, any public moneys in his or her hands, upon the presentation of a draft, order, or warrant drawn upon these moneys by competent authority; or,
6. Willfully omits to transfer the same, when transfer is required by law; or,

# Misappropriation



7. Willfully omits or refuses to pay over to any officer or person authorized by law to receive the same, any money received by him or her under any duty imposed by law so to pay over the same;—

Is punishable by imprisonment in the state prison for two, three, or four years, and is disqualified from holding any office in this state.

# California False Claims Act



## Cal. Govt. Code Section 12650 et seq.

1. Knowingly presents or causes to be presented a false or fraudulent claim for payment or approval.
2. Knowingly makes, uses, or causes to be made or used a false record or statement material to a false or fraudulent claim.
3. Conspires to commit a violation of this subdivision.
4. Has possession, custody, or control of public property or money used or to be used by the state or by any political subdivision and knowingly delivers or causes to be delivered less than all that property.



# California False Claims Act

- 5. Is authorized to make or deliver a document certifying receipt of property used or to be used by the state or by any political subdivision and knowingly makes or delivers a receipt that falsely represents the property used or to be used.
- 6. Knowingly buys or receives as a pledge of an obligation or debt, public property from any person who lawfully may not sell or pledge the property.





# California False Claims Act

7. Knowingly makes, uses, or causes to be made or used a false record or statement material to an obligation to pay or transmit money or property to the state or to any political subdivision, or knowingly conceals or knowingly and improperly avoids, or decreases an obligation to pay or transmit money or property to the state or to any political subdivision.
8. Is a beneficiary of an inadvertent submission of a false claim, subsequently discovers the falsity of the claim, and fails to disclose the false claim to the state or the political subdivision within a reasonable time after discovery of the false claim.

# California False Claims Act



## Cal. Govt. Code Section 12650 et seq.

- Any person who commits any of these acts shall be liable to the government for:
  - Three times the amount of damages sustained
  - The costs of a civil action brought to recover any penalties or damages,
  - A civil penalty of not less than five thousand five hundred dollars (\$5,500) and not more than eleven thousand dollars (\$11,000) for each violation



# Additional Issues

## Private Inurement Limitations

- Nonprofit corporation funds must be devoted to charitable exempt purposes and NOT private use.

## Excess Compensation

- IRS allows tax-exempt organizations to pay executives “fair and reasonable” compensation.
  - Conduct comparability study
  - Review compensation for similar classifications for schools of similar size and geographic location
  - CA law: charter school boards must consider executive compensation during a regular board meeting and must take action during public session

# Case Studies



## Eugene Selivanov

- Founder/Executive/Board Member of Ivy Academia Charter School in LAUSD.
- Convicted of 24 felony counts in April 2013, including embezzlement, misappropriation of public funds, money laundering, and a false tax return statement.

### Convictions Stemmed From:

- Purchases made on school credit cards.
- Rental payments to entities controlled by Selivanov.

# Case Studies



## Jeremy Landau

- Former Board member, CA Virtual Education Partners.
- Charged with 16 felony counts including money laundering, misappropriation of public funds, and conflict of interest (Gov. Code sec. 1090).
- Faces over 14 years in prison if convicted.

### Charges Stem From:

- Allegedly asked to invest \$750,000 of charter school public funds and promised to make a speedy \$3 million return on investment.
- Funds never returned to charter school.
- Accused of laundering the money for personal gain.

# Case Studies



## Charles Steven Cox

- Founder of CA Charter Academy.
- At time of collapse, CCA had 36 schools in the state.
- Charged with 56 counts of misappropriation of public funds, 56 counts of grand theft, and one count of filing a false tax return.
- Still awaiting trial since 2007; settlement may include reimbursement of millions of dollars.

### Charges Stem From:

- State audit alleged he was owner of for-profit company that provided management services to schools, misused millions of public funds to “lavishly” pay himself, friends, and family and to buy concert tickets, spa services, etc.



# Case Studies

## Kendra Okonkwo

- Executive Director of Wisdom Academy of Young Scientists (WAYS).
- Stipulated with FPPC to two counts of using her position to influence governmental decisions in which she had a financial interest and two counts of signing contracts in which she held an economic interest.
- \$16,000 fine

### Charges Stemmed From:

- Allegedly negotiated and signed lease agreements for WAYS to lease property for two schools. She owned the property.
- Allegedly received over \$300,000 in rental payments in 18 months.

# Case Studies



## Vielka McFarlane

- Celerity Educational Group's Founder and CEO Pled guilty in Federal Court to one count of conspiracy to misappropriate and embezzle public funds.

### Charges Stemmed From:

- Allegedly misspent \$2.5 million in public funds – most of it re-directed to an office building in Ohio where she opened another charter school.
- Allegedly misused credit card for personal luxury goods, plane tickets for Obama Inauguration and trips to Miami and Panama, two customized recumbent bikes for her and spouse, and stays at high-end hotels.



# Potential Criminal Liability



Watch out for potential criminal liability or media/authorizer criticism arising from expenditures of public funds for these types of activities:

- First or Business Class travel
- Wine, beer or alcohol
- Expensive meals, hotels, entertainment
- Expenditures not directly related to school purposes (e.g. holiday party)
- Travel for staff or board members not directly related to school purposes
- Gifts (e.g., flowers)

# Potential Criminal Liability



- Purchasing personal items (Clothes, guns and ammo, jewelry)
- Car leases
- Loans to employees
- Renting an apartment/condo
- Large employee expense accounts
- Gym or golf club memberships
- Gift cards
- Payment of debts of other people/organizations
- Payments to vendors with familial ties to charter school employees
- Political contribution/donations

# Transfers of Funds



Transfers of funds between schools operated by the same nonprofit corporation under attack by some authorizers.

- State auditor said such transfers are OK so long as certain conditions are met (temporary, no impact to education program expenditures of loaning school board approved, etc.)
- FCMAT is more supportive of transfers than State auditor at least for independent study schools.

# Transfers of Funds



Transfers of funds and intellectual property from schools to CMO organizations under attack by some authorizers

Consult legal counsel before transferring funds to other charter schools or nonprofits, even nonprofits or school that are related through common governance or administration.

Do not use charter school funds for purposes other than operating a California public charter school

Use segregated private funds to develop out-of-state schools

# Developing Appropriate Safeguards



The Top Ten Internal Controls Your School Must Have:

1. Checks and balances through proper segregation of duties
2. Reconciliation reports should be issued and reviewed/approved timely by management.
3. Do not allow school credit cards, or strictly control them
4. Board of Directors oversight, especially of Executive Director/Principal expenses
5. Fiscal policies and procedures

# Developing Appropriate Safeguards



6. Limits on use of school assets
7. Strict controls on petty cash funds and other cash funds
8. Protect checks against fraudulent use
9. Protect cash and check collections through solid internal controls
10. Avoid related party transactions

# **Incorporating a Nonprofit Corporation and Maintaining Tax Exempt 501(c)(3) Status**

# Incorporation



- Education Code § 47604 authorizes charter schools to operate as or by a nonprofit public benefit corporation.
- Authorizer is entitled to a single representative on the Board of Directors.
- Provides liability protection for authorizer if authorizer complies with its oversight responsibilities.

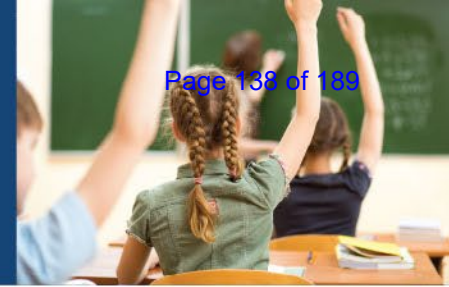


# 501(c)(3) Designation



To be a tax-exempt 501(c)(3), an organization must be organized and operated exclusively for exempt purposes set forth in section 501(c)(3), and none of its earnings may inure to any private shareholder or individual.

# Jeopardizing Tax-Exempt Status



5 types of activities that can jeopardize 501(c)(3) status:

1. Private benefit/inurement
2. Lobbying
3. Political campaign activity
4. Activities generating excessive unrelated business income (UBIT)
5. Failure to comply with annual reporting obligations (Form 990)

# Jeopardizing Tax-Exempt Status: Private Benefit



## Private Benefit / Inurement

- Intended to ensure that the tax-exempt organization is serving exempt interests and not private interests.
- Compensation: Establish a rebuttable presumption of reasonableness by complying with IRS requirements. (26 CFR 53.4958-6.)

# Jeopardizing Tax-Exempt Status: Lobbying



## Lobbying

- An activity designed to influence legislation.
- If lobbying activities are **substantial**, a 501(c)(3) may fail the operational test and risk losing its tax-exempt status.

# Jeopardizing Tax-Exempt Status: Political Campaign



## Political Campaign Activity

- 501(c)(3)s are prohibited from engaging in any “political campaign activity”—directly or indirectly participating or intervening in any political campaign on behalf of or in opposition to any candidate for public office.

# Jeopardizing Tax-Exempt Status: Reporting Failure



## Failure to Comply With Reporting Obligations:

- Although exempt from Federal income tax, 501(c)(3)s have *information* reporting obligations (Form 990).
- Schools should determine who will be responsible for filing returns (e.g., business manager, accountant, back-office services provider).
- File annually beginning in year of formation
- **Failure to file for 3 consecutive years results in automatic revocation of exempt status. The IRS provides a process to seek reinstatement of tax-exempt status. (Revenue Procedure 2014-11.)**

# **Critical Updates on Recent Case Law and Administrative Decisions**

# School Funding



# Funding for Each Student



## *Reyes v. State of California*

- Under SB 820, all LEAs except for nonclassroom-based charter schools were eligible for funding for enrollment growth in 2020-21;
- Tens of thousands of students wishing to attend a nonclassroom-based school are stuck on waitlists, and nonclassroom-based schools served approximately 25,000 students that they weren't funded for;
- Class action lawsuit filed as a first impression case to secure nonclassroom-based charter school's contractual, statutory, and constitutional rights to funding parity with all other public schools;
- **Opening Brief in Appeal has been filed.**

# Labor & Employment

# Liability for Workplace Hazards



## ***Matilde Ek v. See's Candies Inc. (2021)***

- In California, the workers' compensation system shields employers from claims and liability stemming from workplace injuries or illnesses – those claims are exclusively resolved the no-fault system and covered by workers' compensation insurance; liability is capped.
- A superior court judge created significant uncertainty by announcing an exception to that “exclusive remedy” – and potentially unlimited liability.
- Case involved an employee who worked at a distribution center for See's Candy. The employee alleged that she contracted COVID-19 at the worksite and passed it on to her 72-year-old husband, who died.

# Liability for Workplace Hazards



- Wrongful death lawsuit alleges that the company is liable for her husband's death because it failed to implement sufficient health and safety protocols and safeguards; the court refused to dismiss the case as subject to the workers' compensation scheme. Case was appealed.

## Takeaway:

Implementing/enforcing appropriate workplace safety measures is critical not just to protect employees and students, but to mitigate third-party legal risk that may not be covered by workers' compensation.

# Joint Employment Liability



## ***Santiago Medina vs Equilon Enterprises, LLC (2021)***

- Do contractors provide employees that work under your supervision? Are there non-profits in your school management structure that share/supply employees?
- Your school or CMO might be considered a “joint employer” with the other entities/contractor liable for wage and hour or other employment claims even though your school/CMO does not pay the employee’s wages.
- Directly supervising/directing a contractor’s employee can trigger joint employee status.
- Court broadened the test for “joint employer” liability, lowering the bar for what constitutes sufficient control by the organization over its vendor’s employees’ wages and working conditions and opening these businesses up to potential liability.

# Joint Employment Liability



- It is enough that “the putative joint employer ... exercises enough control over the [contractor] to indirectly dictate the wages, hours, or working conditions of the employee.”

## Takeaway:

- Consider whether your school contracts with outside firms that supply employees within your school that might expose your school to “joint employer” status.
- If so, ensure that contracts are sufficiently clear to limit potential liability and set clear boundaries on employment roles.

# Student Rights/School Operations

# Off-Campus Speech



## U.S. Supreme Court Case – *Mahanoy Area School District v. B.L.*

- Student posted an angry and profane Snapchat message off-campus after failing to make the varsity cheerleading squad: “f\*\*\* school f\*\*\* softball f\*\*\* cheer f\*\*\* everything.”
- Student shared it with 250 friends; administration became aware of the messages and suspended the student from cheerleading in the next year for violating the school’s social media policy and cheerleading code of conduct. Parents sued the school district, alleging wrongful punishment for constitutionally-protected speech.



# Off-Campus Speech



- Court held 8-1 in favor of the student: “The school itself has an interest in protecting a student's unpopular expression, especially when the expression takes place off campus,” because “America's public schools are the nurseries of democracy.”

# Off-Campus Speech



## Takeaway:

Schools should be vigilant in addressing harassment and bullying consistent with their policies but must be careful in penalizing off-campus speech.

# COVID-19

# COVID-19 – Vaccination Mandate Lawsuits



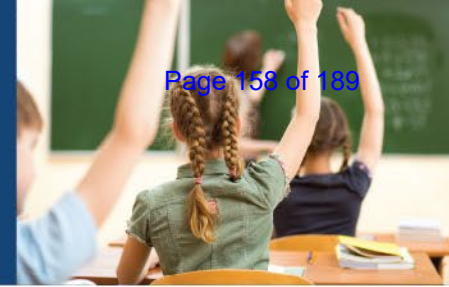
- U.S. Supreme Court Case challenging Biden Administration OSHA Rules (*National Federation of Independent Businesses v. U.S. Department of Labor*)
  - The Secretary of Labor issued a rule on November 5, 2021, that businesses with 100 or more workers were required to either be vaccinated or be tested weekly.
  - Sole issue in the case was whether under the federal statutes governing OSHA, the Secretary of Labor had the power to issue that type of regulation.

# COVID-19 – Vaccination Mandate Lawsuits



- The U.S. Supreme Court invalidated the rule on the basis that federal law as passed by Congress did not authorize the Secretary of Labor to issue the rule.
- Decision does not constrain states from implementing their own vaccine mandates.
- Decision does not constrain individual employers from implementing their own vaccine mandates.

# COVID-19 – Vaccination Mandate Lawsuits



## State of California's vaccine mandates

- No actual Statewide student vaccine mandate
  - Public statements by the Governor indicate that any future Executive Order would be subject to religious, personal belief, and medical exemption.
  - Action by legislature would not necessarily be subject to religious or personal belief exemptions.
  - Anticipated vaccine mandate delayed until at least July 2023.

# COVID-19 – Vaccination Mandate Lawsuits



- Lawsuits challenging K-12 mandates
  - *Let Them Choose v. San Diego Unified School District*
    - Key issue was whether State law on student immunization requirements for school admission “preempts” school districts from adopting their own vaccination requirements in addition to what is required under State law, i.e., vaccination against COVID-19
    - Court held that State law on student vaccination “fully occupies” the regulatory field on vaccinations for students and that SDUSD had no legal authority to enact any kind of vaccine beyond the State schedule as a condition for enrollment in school.

# COVID-19 – Vaccination Mandate Lawsuits



## *G.F. v. Los Angeles Unified School District*

- Court noted that in an earlier case, *Children’s Health Defense v. LAUSD*, the court had been persuaded that the vaccine mandate merely addressed the method of instruction and affected those who may be physically present on school grounds, and thus, LAUSD’s vaccine mandate did not conflict with any existing law.
- However, the petitioners’ evidence in the *G.F. v. LAUSD* case persuaded the court that the vaccine mandate also dictates which students may be enrolled in a particular school within LAUSD, and the curriculum that those students may receive.
- Court therefore concluded that the vaccine mandate exceeded LAUSD’s authority.



# COVID-19 – Vaccination Mandate Lawsuits



*Let Them Breathe v. New West Charter School; Let Them Breathe v. Granada Hills Charter School; Fennell v. Granada Hills Charter School*

- Court held the validity of the charter schools’ student COVID-19 vaccine policies.
- Court recognized the authority of charter schools to adopt campus-wide health and safety policies, held that charter schools are not subject to the law of preemption, and for Granada Hills Charter School (“GHC”), determined that GHC was not a “state actor” for purposes of a freedom of religion challenge under the U.S. Constitution to its policy
- Decisions recognize charter schools’ broad discretion in setting policies for their campuses and instructional programming



# Governance

# Ban on For-Profit Operation



- AB 406 was signed into law to prohibit for profit companies from operating non-profit charter schools.
- Renewal petition for an NCB (100% virtual) was denied in May 2021 by the Bradley Union School District, followed by an appeal which was denied by the Monterey County Board of Education.
- Denial was based on staff findings that the NCB's for-profit back-office provider was impermissibly operating the charter school in violation of AB 406.

# Ban on For-Profit Operation



## Takeaway:

Beware of vendor contracts and vendor relationships that may be construed as or give the appearance of the charter school ceding certain charter school functions or control to third-party for-profit entities, even if seemingly indirect.

# Audit Issues



## **CAVA v. EAAP (2020)**

- CAVA schools received over \$2M of Common Core funds;
- CAVA retroactively determined it had qualifying expenditures and restated its audit in following year to reflect expenditure of Common Core funds;
- SCO auditors made finding that funds were not contemporaneously given correct accounting treatment and therefore were not "encumbered" before statutory deadline;
- Accordingly, CDE (who had contracted with SCO to conduct audit) sought return of \$2M;

# Audit Issues

- CAVA appealed to EAAP; ALJ (to whom EAAP had delegated appeal) agreed with CAVA as to the two appealed findings, but found there was a third audit finding regarding a failure to timely report expenditures to CDE, and upheld audit report on that basis;
- EAAP adopted ALJ's proposed judgment;
- CAVA filed lawsuit and trial court overturned EAAP finding as an abuse of discretion.

## Takeaway:

Schools ultimately may need to resort to the courts to challenge erroneous audit findings; EAAP is more problem than solution.

# **Risk Management in the Era of COVID-19**

# The Mask Requirement Latest Rules



## February 15, 2022

- For the general public, State ended its indoor mask mandate for **vaccinated** individuals
- Did not end mask mandate in schools

## February 28, 2022 Announcement

- New state requirements/guidelines
- Impact on local orders
- Impact on school-specific policies

## New State Guidance

- <https://schools.covid19.ca.gov/>
- No longer any requirements, only recommendations



# Liabilities Related to Masks



Now that there is no mask requirement...

- Personal liability for Board members?
- What if a student or staff person becomes sick with COVID?

Individuals who still want to wear masks...

- What if you want to keep a mask requirement in place?

# Student Vaccine Requirement



## **Governor Newsom's order of October 1, 2021, called for a student vaccine mandate through the regulatory process:**

- The vaccine will be added to the list of required vaccines in H&S Code 120335(b), only when full FDA approval is received for each grade range.
- CDPH must consult with the Advisory Committee on Immunization Practices of the United States Department of Health and Human Services, the American Academy of Pediatrics, and the American Academy of Family Physicians," then approve regulations.
- This requirement will not apply to a pupil in a home-based private school or a pupil who is enrolled in an independent study program and does not receive classroom-based instruction.

# How to Manage COVID-19 Exposures and Positive Tests



- Depends on where you're located. You should have an exposure management plan that you follow.
- Universal requirements:
  - ✓ You are required by law to report any COVID-19 positive cases to the local health department.
  - ✓ Continue to consult with local health department.
- If you are on a school district site, especially if co-located, report to the school district.
- Isolate and quarantine symptomatic individuals on site, until they can be picked up or go home.
- Notify all close contacts and explain quarantining requirements.
- Send notification to community regarding the positive case.

# How to Manage COVID-19 Exposures and Positive Tests



- California now recommends the notification-based approach of Group Tracing.
- Schools should notify students who spent more than a cumulative total of 15 minutes (within a 24-hour time period) in a shared indoor airspace (e.g., classroom) with someone with COVID-19 during their period of infectiousness.
- Notification should occur to "groups" of exposed students (e.g., classmates, teammates, cohorts, etc.) rather than contact tracing to identify individual "close contacts" (e.g., those within 6 feet).
- Notifications should be provided to all individuals considered exposed, including those who are vaccinated and/or recently infected.

# What Policies and Procedures Should You Have In Place?



## Employees:

- COVID-19 Testing and/or Vaccination Policies

## School:

- Safe Return to In-Person Instruction and Continuity of Services Plan
- COVID Health and Safety Policy (incorporated)
- Independent study policy and documents
- Specific policies required by authorizer/local health dept.
- Procurement policies for spending federal dollars

# Cleaning and Safety Protocols



## **CDC and CPDH have numerous recommendations:**

- Cleaning of surfaces
- Water fountains
- Shared objects/school supplies
- Social distancing
- Special events
- Campus visitors
- Isolation spaces
- Hand washing

# Managing Communications from Parents Regarding Mask/Vaccine Policies



- Generally, three kinds of communications:
  - Copy-paste cease and desist letters found on the internet objecting to school mask/vaccine policies
    - Typically, no response is necessary, but best to confirm with legal counsel.
  - Letters seeking medical exemptions, opposing quarantine requirements, alleging harassment/retaliation related to policy enforcement
    - Important to respond to demonstrate that the school is taking the matter seriously, providing policy information, and outlining and following through with the procedural requirements for handling the particular request, e.g., is a 504 appropriate?.
  - Letters from attorneys addressing the same
    - Same considerations as above, but important to be on the lookout for litigation, which can move very quickly.

# Managing Disruptive Parents/Visitors



- Publish, maintain, and lean in on a visitor policy
- Send a warning/cease and desist letter, which can address legal consequences for disruptive behavior
- Penal Code Section 626.8 allows schools to issue notices to leave the campus and stay away for a period of seven days as a consequence of acts that interfere with the peaceful conduct of the activities of the school or disrupt the school or its students or school activities.
- Penal Code Section 626.4 allows schools to “withdraw consent” for an individual to enter onto campus where there is reasonable cause to believe that such person has willfully disrupted the orderly operations of such campus or facility.
- As applicable, call the police, and seek a restraining order from court for egregious behavior.



# HVAC Options/Ventilation



- Introduction of outdoor air: open outdoor air dampers, windows and doors
- Use fans to increase the effectiveness of open windows; fan placement is important
- Ensure ventilation systems operate properly and provide acceptable indoor air quality
- Rebalance or adjust HVAC systems to increase total airflow to occupied spaces
- Turn off demand-controlled ventilation controls that reduce air supply based on occupancy
- Improve central air filtration
- Ensure restroom exhaust fans are functional and operating at full capacity

# HVAC Options/Ventilation



- Inspect and maintain exhaust ventilation systems in areas such as kitchens
- Use portable HEPA fan/filtration systems, ultraviolet germicidal irradiation
- Can use ESSER funds to install new HVAC units, purchase filters, other facility improvements

# Federal Procurement Requirements



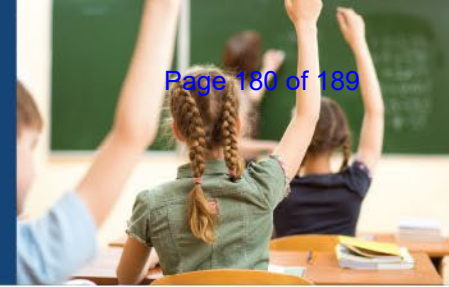
ESSER funds are authorized for construction projects and related compliance costs, as long as the project in question is needed to prevent, prepare for, and respond to COVID-19. Allowable uses of ESSER funds also specifically include testing, repairing, and upgrading projects to improve air quality in school buildings.

You also need to have an ESSER III Expenditure Plan

If you use federal funds to purchase goods or services, you must comply with federal procurement and other requirements (2 CFR 200):

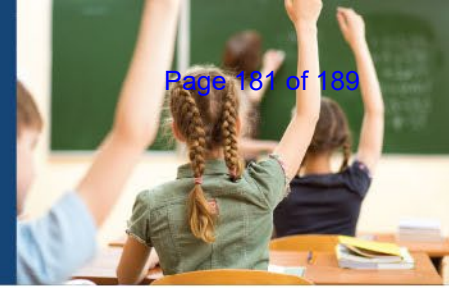
- Bidding
- Prevailing wage
- Recommend adoption of board policy
- Administrative, contractual, and legal remedies
- Equal Employment Opportunity
- Work hours and Safety Standards Act
- Clear Air Act
- Debarment and Suspension
- Byrd Anti-Lobbying Amendment
- Davis-Bacon Act

# Auditing of Expenditure of Federal/State Dollars



- All federal dollars received and spent are subject to audit (CARES, ESSER I, ESSER II, American Rescue Plan/ESSR III, GEER)
  - Subject to federal audit (Office of Inspector General)
  - The single audit required if you received more than \$750,000
- The Single Audit is an audit guided by the Federal Office of Management and Budget's (OMB) Uniform Guidance. The Single Audit's objective is to provide assurance to the U.S. federal government as to the management and use of such funds by recipients. Examines the school's financial records and statements, award expenditures, operational management, and internal controls.

# Auditing of Expenditure of Federal/State Dollars



- It audits both compliance (study, understanding, testing, and evaluation of the school with respect to use of federal funds, operations, and compliance with laws and regulations specifically related to the federal awards received and spent) and financial aspects of the school.
- California relief dollars:
  - In-Person Instruction and Expanded Learning Opportunities Grants
  - Audit Procedures will be added to the audit guide

# County Rules



- County public health departments are generally empowered to issue guidance and requirements that is more stringent than statewide guidance and requirements.

# Independent Study



- Charter schools may offer independent study but are subject to numerous legal requirements. The below are a highlight of the key requirements and is not exhaustive.
- Charter schools must adopt a board policy on independent study before claiming ADA/apportionment generated through independent study
- Students must execute independent study agreements compliant with legal requirements no later than 30 days after the first day of independent study instruction
- Synchronous instruction must occur daily for TK-3 students, weekly for 4-8 students (along with daily live interaction), and weekly for 9-12 students.

# Independent Study



- Schools are responsible for applying tiered reengagement strategies for students who are not participating.
- Certificated teacher must supervise independent study, maintain written attendance records, record daily engagement and time-value of student work products. (ADA can only be claimed to the extent of the time value of student work products, provided the student performed work on a day school was in session.)
- Schools must maintain 25:1 teacher : student ratio to claim apportionment for independent study, or the same ratio as the largest unified school district.



# Independent Study



- Charter schools that generate more than 20% of ADA through independent study are considered a nonclassroom-based charter school.
- Nonclassroom-based charter schools must have a State Board-approved funding determination to claim apportionment.
- Quarantine-related independent study ADA is not counted towards the 20% ratio.
- Classroom-based schools at risk for exceeding 20% nonclassroom-based ADA should evaluate seeking a funding determination as a prophylactic matter.

# Field Trips



- Consider masking/vaccination/testing requirements of field trip venues
- Consider risk that students may be exposed to members of the public, businesses, field trip venues that may not follow the same safety guidelines as the school
- Consider whether insurance would cover a claim relating to a COVID-19-related incident related to a field trip
- Consider whether changed circumstances, e.g., positivity rates, new variants, etc., justifies changing

# Campus Visitors/Volunteers



- Should you allow visitors? Volunteers?
- What specific visitors are more operationally important?
- Implement and enforce a policy, consistently
  - Will proof vaccination be required?
- Volunteers allowed in the classrooms?



# Insurance

- Check with your insurer whether you have any coverage for COVID-related liability.
- Even if you have coverage, if you are not complying with laws (e.g. mask requirements), your policy will not cover you.
- Make sure your E&O policy will cover any lawsuits against your Board members related to COVID mandates.
- Recent demands for oaths of office and surety bonds.



# QUESTIONS AND RESPONSES

# THANKS FOR ATTENDING TODAY!

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