



Governing As Though You Can Be Personally Liable--Because You Might Be

The thought of being personally liable for the deeds or failures of the school or board can be disconcerting. Even if a lawsuit against you is resolved in your favor, merely having to defend oneself in court is stressful. Yet, many boards I meet, govern their schools as if they have no potential liability. By this, I mean they:

- fail to do anything to confirm whether management is operating according to board policies (where the board even has policies),
- focus their meetings on minutia such as dress code violations, Brownie Troop meetings, and book fairs
- don't know if the school's Director and Officer/Errors and Omissions insurance is up to date or that it has adequate limits of liability (i.e., enough to protect the personal assets of board members),
- don't require board members to sign an annual statement disclosing potential conflicts of interest,
- don't pursue training that would help them understand the raft of statutory and regulatory requirements to which their school must adhere,
- don't require management to present thorough financial reports on a regular basis (i.e., balance sheet, income and expense statement, budget vs. actual, and cash-flow statement),
- don't take the lead in selecting the school's auditor (i.e., they delegate it to management),
- fail to vote in order to make the board's will known

- don't bond (insure) people with access to material amounts of money, and
- don't have clear policies separating management responsibilities from board responsibilities (especially where the board chair and treasurer are concerned), giving rise to board members performing management responsibilities.

In some states, board members are shielded from personal liability arising from claims against the school, at least in theory. The reason I say, "at least in theory," is because the protection extends only as far as a court says it does, as in this month's Case in Point, where the Ohio Supreme Court ruled that a charter school board treasurer can be held personally liable for \$1.4 million that the school was overpaid due to submitting an inflated enrollment report to the state. Board members also supposedly enjoy some level of personal immunity under what's called the Federal Volunteer Protection Act¹ -- but again, only until some court decides that you don't.

What all of this means is that your board would be wise to govern as though its members might be held personally liable for its decisions (and omissions--things a court determines that the board *should have known* or done).

¹ http://www.doi.ne.gov/shiip/volunteer/pl_105.19.pdf

Board Self-Appraisal Questions/Recommendations

1. As an agenda item, evaluate each of the bullet points in this month's article to determine *how well* your board is minimizing its own risk. *Vote to take action* on anything the board decides to improve.
2. Consider engaging the board's attorney to conduct a risk assessment of your board's oversight. This will cost the school some money, but you know the expression, "Penny wise, but pound foolish."

Case in Point

THAT WILL BE \$1.4 MILLION PLEASE

In a court decision with far-reaching implications for board members of Ohio charter schools, the State Supreme Court ruled in December, 2010 that the former treasurer of a now defunct charter school can be held *personally liable* for \$1.4 million the state had overpaid the school due to inflated enrollment reports. Essentially, the court ruled that Hasina Shabazz was, as a member of The International Preparatory School (TIPS) Board of Directors, a public official, and therefore liable for “lost public money.”

Though the Court’s jurisdiction is, of course, limited to Ohio (and other courts have ruled differently), the case has instructive points that are worthy of meriting the consideration by charter school boards everywhere. Here are five of those points:

1. The treasurer was married to the board chair (now deceased). This kind of family relationship exemplifies the potential for diminished oversight because the board’s **independence** is compromised.
2. In defending herself in the court, Shabazz “claim[ed] that other people were hired as treasurer for the school, but also admits that she occasionally filled in as interim treasurer when the school lacked a treasurer.” This appears to mean that as board treasurer, she also occasionally carried out management responsibilities. In remanding the case back to the trial court, the Supreme Court said “The label ‘treasurer’ is less important than the character of the position she

held. We remand the matter to the trial court for a determination of whether Shabazz’s responsibilities at TIPS included the receipt or collection of public money, or whether she supervised employees who received or collected public money under color of office.” The take-away here is that board treasurers should never be involved in financial management. The treasurer’s job is to assist the board with *the oversight of financial management*. (Make sure your bylaws state this division of responsibility clearly. Most bylaws assign business manager or CFO duties to the board treasurer!)

3. The board should have made a reasonable effort to ensure that the enrollment figures sent to the state were accurate. A good first step for doing so is to direct management to submit a written monthly report to the board reflecting all changes in enrollment since the previous reporting period. Like all management reports, the board should attach it to its minutes.
4. The board should ensure that everyone with access to material amounts of school money is bonded.
5. Board members might be individually liable for the board’s decisions and omissions. They should govern accordingly.

Sources:

<http://www.sconet.state.oh.us/rod/docs/pdf/0/2010/2010-ohio-6136.pdf>

<http://legalclips.nsba.org/?p=3819>

About This Publication & The Author

BoardWiser™ is a publication of Brian L Carpenter PhD & Associates, LLC. It is available on an annual subscription basis and is intended to strengthen charter school performance by helping boards evaluate and excel at governance while refraining from entanglement in operations. To subscribe, visit www.BrianLCarpenter.com. While *BoardWiser™* is intended to provide reliable governance training, it is not intended as legal advice, for which boards should consult a qualified attorney as well as the specific laws of the state in which their chartered school operates.

Dr. Brian L. Carpenter is widely regarded as one of the foremost authorities on charter school governance. Both of his books, *Charter School Board University* and *The Seven Outs: Strategic Planning Made Easy for Charter Schools* are used by schools, associations, and universities. For information on engaging Dr. Carpenter to conduct a board development retreat or to speak at your conference, call (989) 205-4182 or email him at Brian@BrianLCarpenter.com.

Subscribing schools are hereby granted a limited license to store and reproduce this document and the accompanying audio podcasts for use within their school.