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Current Charter Legal Issues

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Current Legal Issues Discussion

- Ethical Requirements – SB 278
- Due Process Requirements
- Facilities Issues
- Class Size



Current Legal Issues Discussion

- Federal Funds Issues
- Charter Contract Issues
- Current Cases Update
- Charters, Not Just Another Public School



Ethical Requirements

- Changes to the requirements both this year in SB 278, and last year with SB 1712, the Ethics in Education Act.
- Some of these changes have already been covered in the updates on legislation and governance training, so we will not dwell on these, but we do have a few items to consider.



Ethical Requirements

- Basic requirements of SB 278:
- SB 278 requires disclosure and prohibits a new employment agreement with relatives of the school owner, president, governing board member, principal, assistant principal other persons with hiring or promotion authority or similar decision-making authority.

Ethical Requirements

- Relative is defined as:
- Relative” means father, mother, son, daughter, brother, sister, uncle, aunt, first cousin, nephew, niece, husband, wife, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, stepfather, stepmother, stepson, stepdaughter, stepbrother, stepsister, half brother, or half sister.
- This is the same definition as used in Florida Statutes Sec. 112.3135 *Restriction on employment of relatives.*

Ethical Requirements

- Bottom line, since this restriction on employment of relatives uses the same terms and basic language of prohibition as existing Sec. 112.3135, the best initial place to go for guidance when questions arise will be existing ethical opinions interpreting 112.3135.
- Existing ethics opinions may be searched at www.ethics.state.fl.us/ethics/research.html



Ethical Requirements

- Plain Language Translation- a relative is not allowed to be employed under a new contract when another relative would be in a supervisory position over them.
- What about management companies if they are the employer, not the Board? Will depend on how the employment arrangement is structured.

Ethical Requirements

- New requirements now for members of governing boards.
- Training requirements initially and refresher course.
- Public board members, such as municipalities, have to file financial disclosure forms, including forms when they leave the board.
- A member of a governing board of a charter school, including a charter school operated by a private entity, is subject to ss. [112.313](#)(2), (3), (7), and (12) and [112.3143](#)(3).

Ethical Requirements

- Sections [112.313](#)(2), (3), (7), and (12) and [112.3143](#)(3) provide:
- (2) SOLICITATION OR ACCEPTANCE OF GIFTS.--No public officer, employee of an agency, local government attorney, or candidate for nomination or election shall solicit or accept anything of value to the recipient, including a gift, loan, reward, promise of future employment, favor, or service, based upon any understanding that the vote, official action, or judgment of the public officer, employee, local government attorney, or candidate would be influenced thereby.

Ethical Requirements

- 3) DOING BUSINESS WITH ONE'S AGENCY.--No employee of an agency acting in his or her official capacity as a purchasing agent, or public officer acting in his or her official capacity, shall either directly or indirectly purchase, rent, or lease any realty, goods, or services for his or her own agency from any business entity of which the officer or employee or the officer's or employee's spouse or child is an officer, partner, director, or proprietor or in which such officer or employee or the officer's or employee's spouse or child, or any combination of them, has a material interest. Nor shall a public officer or employee, acting in a private capacity, rent, lease, or sell any realty, goods, or services to the officer's or employee's own agency, if he or she is a state officer or employee, or to any political subdivision or any agency thereof, if he or she is serving as an officer or employee of that political subdivision. The foregoing shall not apply to district offices maintained by legislators when such offices are located in the legislator's place of business or when such offices are on property wholly or partially owned by the legislator. This subsection shall not affect or be construed to prohibit contracts entered into prior to:
 - (a) October 1, 1975.
 - (b) Qualification for elective office.
 - (c) Appointment to public office.
 - (d) Beginning public employment.

Ethical Requirements

- (7) CONFLICTING EMPLOYMENT OR CONTRACTUAL RELATIONSHIP.--
- (a) No public officer or employee of an agency shall have or hold any employment or contractual relationship with any business entity or any agency which is subject to the regulation of, or is doing business with, an agency of which he or she is an officer or employee, excluding those organizations and their officers who, when acting in their official capacity, enter into or negotiate a collective bargaining contract with the state or any municipality, county, or other political subdivision of the state; nor shall an officer or employee of an agency have or hold any employment or contractual relationship that will create a continuing or frequently recurring conflict between his or her private interests and the performance of his or her public duties or that would impede the full and faithful discharge of his or her public duties.
- 1. When the agency referred to is that certain kind of special tax district created by general or special law and is limited specifically to constructing, maintaining, managing, and financing improvements in the land area over which the agency has jurisdiction, or when the agency has been organized pursuant to chapter 298, then employment with, or entering into a contractual relationship with, such business entity by a public officer or employee of such agency shall not be prohibited by this subsection or be deemed a conflict per se. However, conduct by such officer or employee that is prohibited by, or otherwise frustrates the intent of, this section shall be deemed a conflict of interest in violation of the standards of conduct set forth by this section.
- 2. When the agency referred to is a legislative body and the regulatory power over the business entity resides in another agency, or when the regulatory power which the legislative body exercises over the business entity or agency is strictly through the enactment of laws or ordinances, then employment or a contractual relationship with such business entity by a public officer or employee of a legislative body shall not be prohibited by this subsection or be deemed a conflict.
- (b) This subsection shall not prohibit a public officer or employee from practicing in a particular profession or occupation when such practice by persons holding such public office or employment is required or permitted by law or ordinance.

Ethical Requirements

- (12) EXEMPTION.--The requirements of subsections (3) and (7) as they pertain to persons serving on advisory boards may be waived in a particular instance by the body which appointed the person to the advisory board, upon a full disclosure of the transaction or relationship to the appointing body prior to the waiver and an affirmative vote in favor of waiver by two-thirds vote of that body. In instances in which appointment to the advisory board is made by an individual, waiver may be effected, after public hearing, by a determination by the appointing person and full disclosure of the transaction or relationship by the appointee to the appointing person. In addition, no person shall be held in violation of subsection (3) or subsection (7) if:
 - (a) Within a city or county the business is transacted under a rotation system whereby the business transactions are rotated among all qualified suppliers of the goods or services within the city or county.
 - (b) The business is awarded under a system of sealed, competitive bidding to the lowest or best bidder and:
 1. The official or the official's spouse or child has in no way participated in the determination of the bid specifications or the determination of the lowest or best bidder;

Ethical Requirements

- 2. The official or the official's spouse or child has in no way used or attempted to use the official's influence to persuade the agency or any personnel thereof to enter such a contract other than by the mere submission of the bid; and
- 3. The official, prior to or at the time of the submission of the bid, has filed a statement with the Commission on Ethics, if the official is a state officer or employee, or with the supervisor of elections of the county in which the agency has its principal office, if the official is an officer or employee of a political subdivision, disclosing the official's interest, or the interest of the official's spouse or child, and the nature of the intended business.
- (c) The purchase or sale is for legal advertising in a newspaper, for any utilities service, or for passage on a common carrier.
- (d) An emergency purchase or contract which would otherwise violate a provision of subsection (3) or subsection (7) must be made in order to protect the health, safety, or welfare of the citizens of the state or any political subdivision thereof.

Ethical Requirements

- (e) The business entity involved is the only source of supply within the political subdivision of the officer or employee and there is full disclosure by the officer or employee of his or her interest in the business entity to the governing body of the political subdivision prior to the purchase, rental, sale, leasing, or other business being transacted.
- (f) The total amount of the transactions in the aggregate between the business entity and the agency does not exceed \$500 per calendar year.
- (g) The fact that a county or municipal officer or member of a public board or body, including a district school officer or an officer of any district within a county, is a stockholder, officer, or director of a bank will not bar such bank from qualifying as a depository of funds coming under the jurisdiction of any such public board or body, provided it appears in the records of the agency that the governing body of the agency has determined that such officer or member of a public board or body has not favored such bank over other qualified banks.
- (h) The transaction is made pursuant to s. [1004.22](#) or s. [1004.23](#) and is specifically approved by the president and the chair of the university board of trustees. The chair of the university board of trustees shall submit to the Governor and the Legislature by March 1 of each year a report of the transactions approved pursuant to this paragraph during the preceding year.
- (i) The public officer or employee purchases in a private capacity goods or services, at a price and upon terms available to similarly situated members of the general public, from a business entity which is doing business with his or her agency.
- (j) The public officer or employee in a private capacity purchases goods or services from a business entity which is subject to the regulation of his or her agency and:
 - 1. The price and terms of the transaction are available to similarly situated members of the general public; and
 - 2. The officer or employee makes full disclosure of the relationship to the agency head or governing body prior to the transaction.

Ethical Requirements

- 112.3143(3)(3)(a) No county, municipal, or other local public officer shall vote in an official capacity upon any measure which would inure to his or her special private gain or loss; which he or she knows would inure to the special private gain or loss of any principal by whom he or she is retained or to the parent organization or subsidiary of a corporate principal by which he or she is retained, other than an agency as defined in s. [112.312\(2\)](#); or which he or she knows would inure to the special private gain or loss of a relative or business associate of the public officer. Such public officer shall, prior to the vote being taken, publicly state to the assembly the nature of the officer's interest in the matter from which he or she is abstaining from voting and, within 15 days after the vote occurs, disclose the nature of his or her interest as a public record in a memorandum filed with the person responsible for recording the minutes of the meeting, who shall incorporate the memorandum in the minutes.



Ethical Requirements

- Bottom Line: these are prohibitions on self dealing and transactions that are not arms length transactions.
- Again, when in doubt, best source for guidance on these issues will be legally reviewing existing ethics opinions, or even seeking a new ethics opinion from the Florida Commission on Ethics.

Ethical Requirements

- Ethics in Education Act
- As a refresher, this was the law passed last year that required background checks on all individuals having student contact and prohibited employment of individuals convicted of certain offenses, and contained reporting requirements.
- A good TAP on this is found at www.fldoe.org/edstandards/pdfs/SB1712TAP.pdf

Due Process Requirements

- No, we are not talking about ESE cases, that is a subject unto itself 😊
- Talking about what process is due in the context of terminations or immediate terminations of a charter school.
- Statutes and Regulations are not clear on what is required.
- Statute was amended this year to specify that for an immediate termination, “the Sponsor’s determination is not subject to an informal hearing under subparagraph b or pursuant to 120.”

Due Process Requirements

- Unfortunately that leaves the due process that might be constitutionally required for an immediate termination as clear as mud, and the process for a normal termination not much better.
- However, at least we know that 120 does not apply to either process- based on *Survivors* case and statutory change.



Due Process Requirements

- Some of us thought that *Survivors* might clarify this issue on remand, but the 4th DCA found none of the due process arguments had been preserved below, and the Florida Supreme Court just declined review of the case a week or so ago.
- So what do we know about immediate terminations?



Due Process Requirements

- Well, some notice and opportunity is constitutionally required, but that can be given post determination and still pass muster.
- Some suggestion has been made that the charter appeal process provides notice and an opportunity to be heard that will satisfy the due process requirements, but I find this unlikely particularly if it is correct in that no new evidence can be considered before the Charter Appeal Commission



Due Process Requirements

- The proposed rule on appeals does not really help to clarify this, suggesting that the school board shall “conduct a hearing that satisfies the basic tenets of due process” whether for immediate or normal termination.
- And, the statutory term of “informal hearing’ is again of not much help, because that term is not normally used in the statutes, but in practice describes a hearing that was held under 120 when there were not material facts in dispute – not really relevant to this context.



Due Process Requirements

- Suggestion - this needs to be clarified by statute, rule or even by model contract inclusion.
- A further consideration, in addition to notice and an opportunity to be heard- due process normally requires that the tribunal not be biased before the hearing- will be a concern in some cases.

Suggested Due Process Inclusions

- Notice and an opportunity to be heard provided after the termination, but before charter appeal must be taken.
- School Board burden to prove grounds for immediate termination.
- Charter opportunity to question any witnesses and receive any documents relied upon by the school board a reasonable time before hearing.
- Charter ability to put on evidence and witnesses, and to examine any SB witnesses, with the School Board having the same ability.

Facilities Issues

- Three quick points under this topic:
- 1002.33 18(c) Any facility, or portion thereof, used to house a charter school whose charter has been approved by the sponsor and the governing board, pursuant to subsection (7), shall be exempt from ad valorem taxes pursuant to s. [196.1983](#). **Library, community service, museum, performing arts, theatre, cinema, church, community college, college, and university facilities may provide space to charter schools within their facilities under their preexisting zoning and land use designations.**

Facilities Issues

- This language has been held to mean that a locality cannot review the zoning of a church when it will be used for a school by a circuit court in Sarasota, 2007-CA-009117.
- However, an informal DCA opinion seems to take a different tact, and Indian River has gone the other way.
- Best interpretation is that no additional zoning review may be done.

Facilities Issues

- Other additional facilities issue to note –particularly when student populations are still decreasing in some Districts:
- 1002.33(18)(e) If a district school board facility or property is available because it is surplus, marked for disposal, or otherwise unused, it shall be provided for a charter school's use on the same basis as it is made available to other public schools in the district. A charter school receiving property from the school district may not sell or dispose of such property without written permission of the school district.
- Also, a Sponsor may now approve application before space **identified**, previously was **secured**, if needed to raise funds.

Class Size

- Before we totally leave Facilities, lets not forget that, barring a new constitutional amendment, the class size requirements will apply to all charter schools at a classroom level. Really big deal!
- The Constitution provides that:
to assure that children attending public schools obtain a high quality education, the legislature shall make adequate provision to ensure that, by the beginning of the 2010 school year, there are a sufficient number of classrooms so that:

Class Size

- (1) The maximum number of students who are assigned to each teacher who is teaching in public school classrooms for prekindergarten through grade 3 does not exceed 18 students;
- (2) The maximum number of students who are assigned to each teacher who is teaching in public school classrooms for grades 4 through 8 does not exceed 22 students; and
- (3) The maximum number of students who are assigned to each teacher who is teaching in public school classrooms for grades 9 through 12 does not exceed 25 students.

The class size requirements of this subsection do not apply to extracurricular classes. Payment of the costs associated with reducing class size to meet these requirements is the responsibility of the state and not of local schools districts. Beginning with the 2003-2004 fiscal year, the legislature shall provide sufficient funds to reduce the average number of students in each classroom by at least two students per year until the maximum number of students per classroom does not exceed the requirements of this subsection. This is without regard to statutes or rules, so no rule relief this time.



Federal Funds Issues

- This potentially is a huge topic in and of itself, but as more funds potentially flow to charters by way of the federal stimulus package and even potentially the race to the top- this will be a very important issue.
- Will just touch on briefly, but both authorizers and charter schools need to be aware of some requirements.

Federal Funds Issues

- There are many requirements, both Program Specific and General
- Statutes
 - Program statutes (NCLB, IDEA, Perkins)
 - General Education Provisions Act (GEPA)
- Regulations
 - Program regulations (Title I, Part A, IDEA, Part B)
 - Education Department General Administrative Regulations (EDGAR)
- OMB Circulars (most relevant: A-87)

Federal Funds Issues

- Where to find some of the general provisions:
- General Education Provisions Act (GEPA):
http://straylight.law.cornell.edu/uscode/html/uscode20/usc_sup_01_20_10_31.html
- Education Department General Administrative Regulations (EDGAR):
<http://www.ed.gov/policy/fund/reg/edgarReg/edgar.html>
- Office of Management & Budget Circulars
 - <http://www.whitehouse.gov/omb/circulars/>
 - OMB Circulars A-21, A-87, A-122 Cost Principles (A-87 relevant to charter schools, applied by OIG)
 - OMB Circular A-133 Single Audit
 - OMB Circular A-133 Compliance Supplement

Some General Federal Principles

- **Funds awarded =**
 - Consistent with statute
 - Using proper application and administrative procedures
- **Funds budgeted=**
 - In state-admin programs, typically required under LEA application – application is control tool, required to follow or amend
 - Budgets must align to program purposes and fiscal/admin requirements, academic priorities
- **Funds expended=**
 - Consistent with rules (A-87, program rules, financial management, procurement, inventory rules)
 - Consistent with budget (as internal control)
 - Internal controls to ensure proper **EXPENDITURE**

Thanks to Melissa Junge, Esq, for this summary of general principles.



Federal Funds Issues

- Why to be concerned? Well audits are of course always an issue
- There are also situations in which claims could be made under the Federal False Claims Act – newly strengthened to the point that someone could report an overpayment, and, if as a charter school you did not self report and received an overpayment, you may be subject to sanctions and damages.



Charter Contract Issues

- Don't forget about the ability to request mediation from DOE on contracts.
- Also, make sure to have input into the model contract that DOE is working on.



Current Cases Update

- Talked already about *Survivors*
- Pembroke Pines 2 mill Case
- Pembroke Pines Unpromulgated Rule Challenge.
- Cases Audience is aware of?
- Continued ESE concerns /issues?



Not Just Another Public School

- Conference theme – looking into the future of charters.
- Student results key – will be litigated over more.
- Ways to have a competitive advantage- calls for a completely new dynamic.
- Performance will probably be tied to increased funding eventually.

Wrap Up

- Questions? Other Topics?
- Can contact me at Daniel@woodringlawfirm.com
- Or 850 – 567- 8445
- Conference materials available at law firm website WoodringLawFirm.com. Click on client login and enter “charter” as the username and “woodring” as the password.
- Thank you all for not snoring during the presentation.