

# **Guide to Board Governance**

***For Charter Schools Authorized by the  
State University of New York Board of Trustees***

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## INTRODUCTION

A charter school is either an education corporation or it is a part of such education corporation governed by the New York Education Law and parts of the New York General Municipal and Not-For-Profit Corporation Laws. Unlike school districts, which typically have publicly elected boards of education, an independent board of trustees (the “board”) governs a charter school, initially listed in the Charter Application, and then self-selected by the board members. The board has the overall, independent oversight responsibility of the all aspects of each charter school the education corporation has the authority to operate.

The board is charged with the responsibility to oversee both the school’s academic program, as well as its organizational viability including fiscal responsibility. With regard to organizational viability, the board must develop policies, monitor their implementation and revise accordingly. The corporation’s final Charter Application, which is part of the larger Charter Agreement, contains the foundations of these policies, or in some cases, the whole policies. Each trustee has a duty of loyalty and fiduciary responsibility to the education corporation.

This guidance provides an overview of certain components of board governance and the key documents and policies the board will be required to adopt and abide by including the following areas:

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This guidance breaks down each component by applicable charter agreement provision(s), applicable laws and regulations, discussion and responsible tasks. Responsible tasks include where and when the board is required to inform and/or seek the approval of the Institute regarding changes in board governance.

If you have any questions regarding the information provided in this guidance please contact the legal department of the SUNY Charter Schools Institute.

## 1. BOARD OF TRUSTEES

### A. Applicable Charter Agreement Provisions

The following images show applicable provisions from the Model Charter Agreement:

- Section 2.2, *Governance; Education Corporation Board; By-laws; and*,
- Section 2.3, *Selection of New Education Corporation Board Members;*

(available at: [www.newyorkcharters.org/model-charter-agreement/](http://www.newyorkcharters.org/model-charter-agreement/)), which are the same or very similar to those of each education corporation's Charter Agreement.

(d) The Education Corporation shall have the authority to operate such pre-Kindergarten and other programs specifically authorized by law subject to applicable laws, rules and regulations.

1.6 School Names. The names of the Education Corporation's school(s) shall be set forth in Schedule 1. The Education Corporation shall have the authority to amend or alter the name of any school it has the authority to operate provided that such school name is not already in use in the State, and further provided that such name change shall become effective only upon the approval of the Institute and upon notice to the Regents or their designee, which may require Charter revision.

#### SECTION 2. OPERATION OF EDUCATION CORPORATION

2.1 Code of Ethics. The Education Corporation, its trustees, officers and employees shall abide by the code of ethics of the Education Corporation set forth in the Terms of Operation, which must conform to those provisions of the Act and New York General Municipal Law made applicable by the Act, and include standards with respect to disclosure of conflicts of interest regarding any matter brought before board of trustees of the Education Corporation (the "Education Corporation Board") regardless of whether the matter may involve a for-profit or not-for-profit entity or transaction. The Education Corporation shall disseminate the code in written form to each of its trustees, officers and employees. Modifications to the code of ethics shall require prior written approval of the Trustees.

2.2 Governance; Education Corporation Board; By-laws. The Education Corporation shall continue to be governed by the Education Corporation Board, which shall consist of those individuals specifically named in the Terms of Operation (the "Corporate Trustees") as updated by subsequent election and approval, or resignation, in accordance with the By-laws and this Charter Agreement. The Education Corporation Board shall have final authority for policy and operational decisions of the Education Corporation Board shall have final authority for policy and operational decisions of the Education Corporation and each school although nothing herein shall prevent the Education Corporation Board from delegating decision-making authority to officers, employees and agents of the Education Corporation. The Education Corporation Board shall operate pursuant to the following requirements and restrictions.

(a) The Education Corporation Board shall initially operate pursuant to the by-laws set forth in the Terms of Operation. The Education Corporation Board shall meet within thirty (30) days of the Effective Date and duly ratify such by-laws. Thereafter the Education Corporation Board shall operate pursuant to the by-laws of the Education Corporation whether such by-laws be those initially set forth in the Terms of Operation or as amended pursuant to subsection (b) of this section 2.2 (initially or as amended, the "By-laws"), as well as the Act and applicable provisions of the Not-For-Profit Corporation, Education, and General Municipal Laws.

(b) The By-laws may not be amended in any material respect without the prior written approval of the Trustees, such approval not to be unreasonably withheld, and in no event can they conflict with any term of the Provisional Charter, Charter Agreement or law including provisions of the Education, General Municipal and Not-for-Profit Corporation Laws applicable to charter schools. In seeking modification of the By-laws, the Education Corporation Board shall submit to the Trustees a duly approved resolution of the Education Corporation Board setting forth the proposed material changes to the By-laws.

(c) The Education Corporation Board shall have as its members such total number of Corporation Trustees and shall reserve seats on the Education Corporation Board for such specified members or constituent groups in such numbers as is set forth in the Terms of Operation. In no event shall a person with an interest in a for-profit contract with the Education Corporation serve on the Education Corporation Board except to the extent permitted by the General Municipal and the Not-For-Profit Corporation Laws. The By-laws shall contain provisions consistent therewith.

(d) Notwithstanding any provision to the contrary in the Charter Agreement, Terms of Operation or By-laws, in no event shall the Education Corporation Board, at any time, be comprised of voting members of whom more than forty percent (40%) are directors, officers, employees, agents or otherwise affiliated with any single entity (with the exception of the Education Corporation or of another charter school education corporation), regardless of whether said entity is affiliated or otherwise partnered with the Education Corporation. For the purposes of this subsection, "single entity" shall mean any individual entity, as well as any and all related entities to such entity such as parents, subsidiaries, affiliates and partners. The Trustees may, at their sole discretion, waive this restriction upon a written request from the Education Corporation.

(e) Where the Education Corporation has engaged a not-for-profit educational service provider or other entity that provides comprehensive management services to the Education Corporation or any of its schools pursuant to a contract between such entity and the Education Corporation:

(i) no more than two (2) Corporate Trustees may be affiliated with such not-for-profit entity, or have immediate family members so affiliated; provided, however, that in such case the following restrictions shall apply and be contained in the By-laws:

(A) termination of the contract with the not-for-profit educational service provider or other entity shall constitute cause for removal of such person(s) from the Education Corporation Board, and upon such termination such person(s) may be removed from the Education Corporation Board by vote of a majority of the Corporate Trustees provided there is a quorum of at least a majority of the entire Education Corporation Board present at the meeting;

(B) ~~such~~ person(s) shall not hold the offices of chair or treasurer of the Education Corporation Board;

(C) when the Education Corporation Board has proper grounds to go into executive session pursuant to the New York Open Meetings Law (as defined herein), and the Education Corporation Board is to discuss or vote upon an issue related to the not-for-profit management company or entity, the personnel of such company or entity, or such person(s), the Education Corporation Board may, after such person(s) has had an opportunity to fully address the Education Corporation Board, continue such executive session outside of the presence of such person(s); and

(D) ~~the~~ number of Corporate Trustees shall not be less than seven (7) where two (2) Corporate Trustees are affiliated with the not-for-profit entity and not less than six (6) where one (1) Corporate Trustee is affiliated with the not-for-profit entity.

(f) The Education Corporation Board shall notify the Trustees within five (5) business days of any of the following Corporate Trustee actions: removal; resignation; expiration of term without re-election; or, otherwise leaving the Education Corporation Board.

(g) The Education Corporation Board shall require that each Corporate Trustee who has served during a school year shall file annually a disclosure report (the "School Trustee Disclosure Report") with the Trustees, the form and requirements of which shall be provided by the Trustees. The School Trustee Disclosure Report shall set forth and attest to transactions between the Education Corporation on the one hand and a Corporate Trustee and/or any entity with which such Corporate Trustee is affiliated on the other, as such transactions may be defined by the Trustees. As set forth in section 6.1 of this Charter Agreement, the School Trustee Disclosure Report for each Corporate Trustee shall be submitted yearly as part of each school's annual report (the "Annual Report"). In the event that any Corporate Trustee fails to file a School Trustee Disclosure Report within thirty (30) days of its due date of August 1, or such report is in material respects incomplete, misleading or untruthful, and the Trustees inform the Education Corporation Board of its determination in this regard, the Education Corporation, notwithstanding any provision of its By-laws, shall in a timely fashion remove such Corporate Trustee pursuant to a vote of the Education Corporation Board and the failure of the Education Corporation Board to so act shall be a material violation of the charter as described in the Act. Should a Corporate Trustee resign from or otherwise leave the Education Corporation Board without having submitted a School Trustee Disclosure Report for any year in which such Corporate Trustee served, the Education Corporation shall provide the Trustees with a record of the transactions required by the School Trustee Disclosure Report for that Corporate Trustee for each relevant school year, such reports to be signed by the Education Corporation and due on August 1 as part of the Annual Report.

2.3 Selection of New Education Corporation Board Members. All Corporate Trustees shall possess appropriate qualifications for membership on the Education Corporation

Board, as such qualifications are set forth in the Terms of Operation, and shall be seated pursuant to the following procedures. Prior to the appointment or final election of any new Corporate Trustee, the Education Corporation Board must submit to the Trustees (pursuant to a duly approved resolution of the Education Corporation Board) the name of the proposed Corporate Trustee and such individual must timely provide to the Trustees, in writing and/or in person, such background information as the Trustees shall require (the "School Trustee Background Information"). Within forty-five (45) days of receiving the name of the proposed Corporate Trustee and the School Trustee Background Information, the Trustees shall in writing reject or approve such individual. In the event that the Trustees do not provide in writing an approval or rejection within the forty-five (45) day time period, the proposed Corporate Trustee may be seated so long as such action would be consistent with the By-laws and any other applicable Terms of Operation. A failure by the Education Corporation or the proposed Corporate Trustee to timely provide the School Trustee Background Information to the Trustees shall be grounds for his or her rejection.

2.4 Contracting with Educational Service Providers. Any entity that provides all or a substantial subset of all services necessary to operate and oversee any school's educational program on a fee basis and pursuant to a fee-based contract shall be known as an educational service provider ("Educational Service Provider") and the contract under which such services are provided shall be referred to as a management contract ("Management Contract"). Any other contractual arrangements including, but not limited to, leases, subleases, lease-purchase agreements, credit facilities, loan agreements, promissory notes, negotiable instruments and other debt instruments, that are contemplated between the Education Corporation on the one hand and the Educational Service Provider, its partners, parents, subsidiaries, agents and affiliates (including any entity that holds an economic interest in the Educational Service Provider) on the other, shall be known collectively, together with the Management Contract, as ESP Contracts ("ESP Contracts"). The following requirements and provisions relating to Educational Service Providers, Management Contracts and ESP Contracts shall apply.

(a) The Trustees reserve the right to review and disapprove for good cause shown any and all ESP Contracts that the Education Corporation seeks to execute, amend or renew during the time that the Provisional Charter is in effect. Good cause shown includes, but is in no way limited to, a finding that the ESP Contract(s) at issue do not, under the totality of the circumstances, allow the Education Corporation effective and sufficient means to hold the Educational Service Provider accountable including means to terminate the Educational Service Provider without placing the Education Corporation's or the subject school(s)'s further existence in peril. The above terms are in addition to the requirements of sections 3.14 and 3.15 of the Charter Agreement.

(b) To facilitate the Trustees' rights of review and disapproval, the Education Corporation shall provide the Trustees with any proposed ESP Contract (or proposed material amendment of an ESP Contract) not later than thirty (30) days prior to the proposed date of execution. In addition to the foregoing, prior to a school's first year of operation, and

## **B. Applicable Laws and Regulations**

- New York Education Law (“Education Law”) §§ 226(1), 2853(1)(f)
- New York General Municipal Law (“GML”) §§ 800-806 (excluding § 805-b)
- New York Not-For-Profit Corporation Law (“N-PCL”) §§ 712, 713

## **C. Discussion**

The education corporation’s Provisional Charter (certificate of incorporation from the New York State Board of Regents (the “Board of Regents”)) shows the initial members of the board of trustees (“trustees”) as those persons listed in the Charter Application. After the education corporation is formed through the chartering process, no further action is needed to empower education corporation trustees. The education corporation’s by-laws, however, do need to be officially established, or ratified, even though contained in the Charter Application.

### *i. Number of Trustees*

A charter school board must have at least five trustees but not exceed 25 trustees.<sup>1</sup> Please note that the “entire board” is defined as the total number of trustees entitled to vote if there were no current board vacancies.<sup>2</sup> Therefore, if the by-laws state that the board shall consist of five board members, then the “entire board” would be five members. If the by-laws state a range for the number of members, then the “entire board” would be the total number of board members as “fixed” by the board, or if it has not been fixed, the number at the most recent election, or as set forth in the Provisional Charter. Therefore, if the by-laws state that the board shall consist of between five and 15 trustees and the board fixed the number at nine, then the “entire board” would be nine. If two trustees resigned since the last election (and were not replaced), the “entire board” would still be nine.

Per N-PCL § 702, an education corporation may increase its number of trustees or fix the number at a higher number by amendment of the by-laws or, by action of a majority of the entire board under the specific provisions of a by-law allowing a change in the number. Per Education Law § 226(1), additional requirements apply to any decrease in the number of trustees.

1. The board must provide notice of the fact that the education corporation board will consider reducing the number of trustees in the meeting notice (required by the New York Open Meetings Law (New York Public Officers Law (“POL”) § 104) and generally sent to all trustees per the by-laws or Education Law § 226(3)).
2. The board must approve the reduction in the number of trustees not only by a majority of the entire board, but also by a two-thirds (2/3) vote of the trustees present at a meeting where a quorum is present.
3. No decrease in the number of trustees may shorten the term of an incumbent trustee.

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<sup>1</sup> Education Law § 226(1). This differs from the N-PCL, which permits a minimum of three trustees for an ordinary not-for-profit corporation.

<sup>2</sup> N-PCL § 102(6-a) (The N-PCL formerly called this the “whole number” of the board. Many by-laws and parts of the Education Law still use that term.).

If the by-laws only delineate a range of trustees (e.g., 7-11) and when there is a change in the number of trustees but the number does not go outside this range, the education corporation only needs to notify the Institute regarding such change. Also, if the education corporation is reducing its set number of trustees by only a small amount (e.g., going from 9 to 7) that by-laws change is not likely to be a material change and will not likely require a formal revision of the education corporation's Charter Agreement. The education corporation must, however, notify the Institute of its intention to reduce the number of trustees and the Institute will inform the school whether or not a formal revision may be needed.

*ii. Board Make-Up*

The law requires no further qualification of an individual board member except that the person is at least 18 years of age. The board may provide for further qualifications in the by-laws and should reference the requirements laid out in the by-laws any time it is considering changes to the board.

As for the requirements for the total make-up of the board, no more than 40 percent of the trustees of an education corporation authorized by the SUNY Trustees may be affiliated with any other single entity, other than another charter school education corporation.<sup>3</sup> No more than two (2) trustees may be affiliated with not-for-profit charter management organizations ("CMOs"). In order for two trustees to be affiliated with a not-for-profit CMO, the minimum size of the education corporation board must be seven (7), and in order for one (1) trustee to be so affiliated the minimum size of the board must be six (6). If a person affiliated with such a CMO serves on the education corporation board, the following restrictions shall apply and be contained in the education corporation's by-laws:

- termination of the contract with the not-for-profit management organization shall constitute cause for removal of such person(s) from the education corporation board, and upon such termination such person(s) may be removed from the board by vote of the board provided there is a quorum of at least a majority of the entire board present at the meeting;
- such person(s) shall not hold the offices of education corporation board chair or treasurer;
- when the education corporation board has proper grounds to go into executive session pursuant to the Open Meetings Law (POL §105), and the board is to discuss or vote upon an issue related to the not-for-profit charter management organization or the personnel of such organization, the board may, after such person(s) has had an opportunity to fully address the board, continue such executive session outside of the presence of such person(s); and,
- such person(s) shall disclose the affiliation with the management entity each time an issue before the board involves the CMO, and such persons shall not vote on any matter involving the CMO. As the immediately foregoing provision is part of the GML restrictions on charter schools, it need not, but may, be included in the by-laws.

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<sup>3</sup> An applicant may request a waiver of this provision at the time of application, but needs to provide cogent reasons for the waiver.

The board should consider these restrictions any time a board member resigns or the board elects new members to ensure continued compliance.

Due to the GML's conflicts of interest provisions applicable to charter schools, generally no parent, teacher or school administrator who the education corporation employs may serve on the education corporation's board of trustees. There may be an exception to the GML for teachers who the school employs under a collective bargaining agreement. The Institute has requested a formal New York Attorney General's opinion on this issue and is awaiting a response. When the opinion is issued we will share the information. The GML does not prohibit teachers or school administrators from being non-voting school "trustees" or observers who would not count toward quorum. In any case no employee may serve as the board chair.<sup>4</sup>

*iii. Leaving and New Board Members*

The board *must notify the Institute within five (5) days of any resignation, removal, or vacancy on its board of trustees per section 2.2(f) of its Charter Agreement.* When the board sends its Annual Report to the Institute each year, the education corporation provides an updated list of board members. The Institute will compare it to the list it has on file and discuss any changes with the board. The Institute also monitors board minutes and takes note of any changes to the board make-up to ensure the board is following the appropriate process for filling vacancies by proper elections, and to ensure the board follows restrictions on board make-up in the by-laws or Charter Agreement. Simply putting entries in the minutes does not satisfy the Charter Agreement provision, which requires the education corporation to affirmatively notify the Institute of board changes.

In order for a charter school to add a trustee, it must follow the procedures in section 2.3 of its Charter Agreement. First, the board must vote to accept (elect or appoint per the school's by-laws) the proposed trustee. At this point the person is not an approved trustee and cannot vote or take any official action on behalf of the education corporation until the additional steps are complete. Second, the board must submit the following documents to the Institute and receive acknowledgement from the Institute that they were completed and received:

- the prospective trustee must submit a Request for Information from Prospective Board members (RFI) (available at: [www.newyorkcharters.org/operate/reporting-requirements/board-members-new](http://www.newyorkcharters.org/operate/reporting-requirements/board-members-new)) to the education corporation for forwarding to the Institute;
- a copy of the board resolution approving the proposed trustee or the minutes<sup>5</sup> showing such approval; and,
- a current list of school board members and other information on the *Current List of Board Members/Trustees Form* (available at: [www.newyorkcharters.org/operate/reporting-requirements/board-members-new](http://www.newyorkcharters.org/operate/reporting-requirements/board-members-new)).

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<sup>4</sup> N-PCL § 713(f) (An employee also cannot hold any position with similar responsibility under a different title).

<sup>5</sup> The Institute accepts unsigned or unapproved minutes or resolutions so long as they are followed by signed ones at a later date.



It is a good practice to have the RFI filled out in advance of the board election so that prospective trustees provide full and complete responses to each of the questions on the RFI as individual trustees assume a position, which requires a significant amount of public trust and responsibility.

Finally, within 45 days of receipt, the Institute will either approve or reject the proposed trustee in writing. If the Institute fails to provide a written response within 45 days, the proposed trustee may be seated. Failure to file materials with the Institute within this timeline is grounds for rejection of that trustee's nomination.

Please note that the education corporation's by-laws should be reviewed before electing a proposed member. The education corporation must know the number of trustees it is supposed to have and must not exceed without amending its by-laws, or voting to change the number, depending on the exact language of the school's by-laws. In cases where the by-laws contain an acceptable range of trustees (e.g. 7-11), the board must usually vote to change the number within the range in addition to electing a trustee. Otherwise, it will not be possible to properly determine a quorum or the number of trustee seats vacant on the board, which may be important for a number of governance reasons. Also, it is important to make certain that the correct "class" of trustee is being elected. In other words, if a parent or teacher representative must be elected to a board seat that should be known.

Please also note that a trustee who is replacing a trustee who has resigned takes over the term of the resigned trustee. For example, if a charter school's board is staggered into trustees with 1, 2, and 3 year terms, and a trustee with a 1 year term resigns, then the new trustee that replaces the resigning trustee will only have the remainder of that 1 year as a term, and will then have to be re-elected in order to continue serving. The board secretary should carefully track such terms because the extent to which a school follows its by-laws is a factor in reviewing organizational viability when a board seeks charter renewal for any of the schools it has the authority to operate.

#### *iv. Organizational Meeting; Board Committees*

The first or organizational meeting of the board is a good time for the board to pass resolutions to set up committees (audit, finance, education, compensation, etc.), delineate the functions and powers of those committees, elect members of those committees and elect officers (chair, secretary, treasurer, vice-chair). Please note that an executive committee of a charter school must have a minimum of five (5) members,<sup>6</sup> and other standing committees (with authority of the board) must have at least three (3) trustees,<sup>7</sup> and be elected by a majority of the entire board. Note that the person serving as the board chair may not also serve as the secretary.<sup>8</sup> The Institute strongly encourages each board to review its by-laws with the board's own legal counsel as many of the legal responsibilities of the board and its trustees should be incorporated within the by-laws, and each trustee should have a full understanding of them.

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<sup>6</sup> Education Law § 226(2).

<sup>7</sup> N-PCL § 712(a).

<sup>8</sup> N-PCL § 713(a).



v. *Trustee Disclosure Report*

Once annually, all trustees will have to file a disclosure report (the “School Trustee Disclosure Report”) with the Institute by no later than August 1<sup>st</sup> with the Annual Report. The form and requirements can be found on the Institute’s website at:

[www.newyorkcharters.org/operate/reporting-requirements/board-trustee-financial-disclosure](http://www.newyorkcharters.org/operate/reporting-requirements/board-trustee-financial-disclosure).

The School Trustee Disclosure Report sets forth and attests to transactions between the education corporation on the one hand and the trustee and/or any entity with which such trustee is affiliated on the other, as such transactions may be defined by the board. In the event that any trustee fails to file a School Trustee Disclosure Report within 30 days of its due date of August 1, or such report is in material respects incomplete, misleading or untruthful, and the Institute informs the board of this, then the trustees are required to remove such trustee pursuant to a vote of the board in a timely fashion. If the board fails to remove such member in a timely fashion, then the board will be in material violation of its charter. If a trustee resigns from or otherwise leaves the board without having submitted a School Trustee Disclosure Report for any year in which the trustee served, then the board shall provide the Institute with a record of the transactions required by the School Trustee Disclosure Report for the trustee for each relevant school year. This report should be signed by the education corporation and is due on August 1 as part of the Annual Report.

vi. *Policies and Governance*

The board shall have final authority for policy and operational decisions of each school it has the authority to operate, but the board may delegate decision making authority to board committees, officers and employees at the school-level, or the CMO in accordance with the provisions of the charter.<sup>9</sup> The board should outline those decisions over which the board, as a general matter, intends to retain authority and those it intends to delegate.

The board should always be clear how the board is to be kept informed of each school’s progress including what sources of data it will use to assess that a school is meeting its educational and financial goals and whether a school is operating pursuant to the directives of the board. For education corporations working with CMOs or partner organizations, the board should be clear how it would hold the management or partner entity accountable for the commitments outlined in the proposal and discuss the education corporation board’s plans to address deficiencies should they arise.

Upon application, the board is required to provide the processes to be followed to promote staff and parental involvement in school governance. Education Law § 2851(2)(c). Accordingly, while the law requires an applicant to set out those processes, the law does not require any specific governance structure. Please note that charter schools in New York City are not automatically required to establish a parent association or a parent-teacher association. Like many other laws and regulations applicable to district schools, SUNY authorized charter schools need not follow this law but may choose to establish a parent organization as part of the charter, and the Institute notes that many successful schools have done so. However, the law does direct the New York City Schools Chancellor to ensure that such organizations are established. There are many ways for

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<sup>9</sup> Education Law § 2853(1)(f).

parents and staff to participate in the governance of the education corporation. These include having parents on the board, opportunities for parents and staff to interact with the board such as open comment time at board meetings, or parent committees or organizations that make reports to the board.

***D. Responsible Tasks***

- Update list of school trustees, as necessary.
- The education corporation *must notify the Institute within 5 days of any resignation, removal, or vacancy on its board of trustees per section 2.10 of its Charter agreement.*
- Adding Board Members:
  - Elect the prospective school trustee at a duly convened meeting of the school board with a quorum present.
  - Submit a signed copy of the resolution electing the prospective trustee or of the signed minutes showing such election to the Institute.
  - Have each prospective board member complete a *Request for Information from Prospective Board Members*, available at [www.newyorkcharters.org/schoolsBOT.htm](http://www.newyorkcharters.org/schoolsBOT.htm), which the school must submit to the Institute.
- Submit School Trustee Disclosure Report for each trustee on August 1<sup>st</sup> annually.
- Submit proposed changes to the by-laws, or board structure or management to Institute legal counsel for review as a material revision to the Charter Agreement.

## 2. BY-LAWS

### A. Applicable Charter Agreement Provisions

The following images show the applicable provision from the Model Charter Agreement:

- Section 2.2, *Governance; Education Corporation Board; By-laws;*

(available at: [www.newyorkcharters.org/model-charter-agreement/](http://www.newyorkcharters.org/model-charter-agreement/)), which are the same or very similar in each education corporation's Charter Agreement.

(d) The Education Corporation shall have the authority to operate such pre-Kindergarten and other programs specifically authorized by law subject to applicable laws, rules and regulations.

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#### SECTION 2. OPERATION OF EDUCATION CORPORATION

2.1 Code of Ethics. The Education Corporation, its trustees, officers and employees shall abide by the code of ethics of the Education Corporation set forth in the Terms of Operation, which must conform to those provisions of the Act and New York General Municipal Law made applicable by the Act, and include standards with respect to disclosure of conflicts of interest regarding any matter brought before board of trustees of the Education Corporation (the "Education Corporation Board") regardless of whether the matter may involve a for-profit or not-for-profit entity or transaction. The Education Corporation shall disseminate the code in written form to each of its trustees, officers and employees. Modifications to the code of ethics shall require prior written approval of the Trustees.

2.2 Governance; Education Corporation Board; By-laws. The Education Corporation shall continue to be governed by the Education Corporation Board, which shall consist of those individuals specifically named in the Terms of Operation (the "Corporate Trustees") as updated by subsequent election and approval, or resignation, in accordance with the By-laws and this Charter Agreement. The Education Corporation Board shall have final authority for policy and operational decisions of the Education Corporation Board shall have final authority for policy and operational decisions of the Education Corporation and each school although nothing herein shall prevent the Education Corporation Board from delegating decision-making authority to officers, employees and agents of the Education Corporation. The Education Corporation Board shall operate pursuant to the following requirements and restrictions.

(a) The Education Corporation Board shall initially operate pursuant to the by-laws set forth in the Terms of Operation. The Education Corporation Board shall meet within thirty (30) days of the Effective Date and duly ratify such by-laws. Thereafter the Education Corporation Board shall operate pursuant to the by-laws of the Education Corporation whether such by-laws be those initially set forth in the Terms of Operation or as amended pursuant to subsection (b) of this section 2.2 (initially or as amended, the "By-laws"), as well as the Act and applicable provisions of the Not-For-Profit Corporation, Education, and General Municipal Laws.

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(b) The By-laws may not be amended in any material respect without the prior written approval of the Trustees, such approval not to be unreasonably withheld, and in no event can they conflict with any term of the Provisional Charter, Charter Agreement or law including provisions of the Education, General Municipal and Not-for-Profit Corporation Laws applicable to charter schools. In seeking modification of the By-laws, the Education Corporation Board shall submit to the Trustees a duly approved resolution of the Education Corporation Board setting forth the proposed material changes to the By-laws.

(c) The Education Corporation Board shall have as its members such total number of Corporation Trustees and shall reserve seats on the Education Corporation Board for such specified members or constituent groups in such numbers as is set forth in the Terms of Operation. In no event shall a person with an interest in a for-profit contract with the Education Corporation serve on the Education Corporation Board except to the extent permitted by the General Municipal and the Not-For-Profit Corporation Laws. The By-laws shall contain provisions consistent therewith.

(d) Notwithstanding any provision to the contrary in the Charter Agreement, Terms of Operation or By-laws, in no event shall the Education Corporation Board, at any time, be comprised of voting members of whom more than forty percent (40%) are directors, officers, employees, agents or otherwise affiliated with any single entity (with the exception of the Education Corporation or of another charter school education corporation), regardless of whether said entity is affiliated or otherwise partnered with the Education Corporation. For the purposes of this subsection, "single entity" shall mean any individual entity, as well as any and all related entities to such entity such as parents, subsidiaries, affiliates and partners. The Trustees may, at their sole discretion, waive this restriction upon a written request from the Education Corporation.

(e) Where the Education Corporation has engaged a not-for-profit educational service provider or other entity that provides comprehensive management services to the Education Corporation or any of its schools pursuant to a contract between such entity and the Education Corporation:

(i) no more than two (2) Corporate Trustees may be affiliated with such not-for-profit entity, or have immediate family members so affiliated; provided, however, that in such case the following restrictions shall apply and be contained in the By-laws:

(A) termination of the contract with the not-for-profit educational service provider or other entity shall constitute cause for removal of such person(s) from the Education Corporation Board, and upon such termination such person(s) may be removed from the Education Corporation Board by vote of a majority of the Corporate Trustees provided there is a quorum of at least a majority of the entire Education Corporation Board present at the meeting;

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(B) ~~such~~ person(s) shall not hold the offices of chair or treasurer of the Education Corporation Board;

(C) ~~when the Education Corporation Board has proper grounds to go into executive session pursuant to the New York Open Meetings Law (as defined herein), and the Education Corporation Board is to discuss or vote upon an issue related to the not-for-profit management company or entity, the personnel of such company or entity, or such person(s), the Education Corporation Board may, after such person(s) has had an opportunity to fully address the Education Corporation Board, continue such executive session outside of the presence of such person(s); and~~

(D) ~~the~~ number of Corporate Trustees shall not be less than seven (7) where two (2) Corporate Trustees are affiliated with the not-for-profit entity and not less than six (6) where one (1) Corporate Trustee is affiliated with the not-for-profit entity.

(f) The Education Corporation Board shall notify the Trustees within five (5) business days of any of the following Corporate Trustee actions: removal; resignation; expiration of term without re-election; or, otherwise leaving the Education Corporation Board.

(g) The Education Corporation Board shall require that each Corporate Trustee who has served during a school year shall file annually a disclosure report (the "School Trustee Disclosure Report") with the Trustees, the form and requirements of which shall be provided by the Trustees. The School Trustee Disclosure Report shall set forth and attest to transactions between the Education Corporation on the one hand and a Corporate Trustee and/or any entity with which such Corporate Trustee is affiliated on the other, as such transactions may be defined by the Trustees. As set forth in section 6.1 of this Charter Agreement, the School Trustee Disclosure Report for each Corporate Trustee shall be submitted yearly as part of each school's annual report (the "Annual Report"). In the event that any Corporate Trustee fails to file a School Trustee Disclosure Report within thirty (30) days of its due date of August 1, or such report is in material respects incomplete, misleading or untruthful, and the Trustees inform the Education Corporation Board of its determination in this regard, the Education Corporation, notwithstanding any provision of its By-laws, shall in a timely fashion remove such Corporate Trustee pursuant to a vote of the Education Corporation Board and the failure of the Education Corporation Board to so act shall be a material violation of the charter as described in the Act. Should a Corporate Trustee resign from or otherwise leave the Education Corporation Board without having submitted a School Trustee Disclosure Report for any year in which such Corporate Trustee served, the Education Corporation shall provide the Trustees with a record of the transactions required by the School Trustee Disclosure Report for that Corporate Trustee for each relevant school year, such reports to be signed by the Education Corporation and due on August 1 as part of the Annual Report.

2.3 Selection of New Education Corporation Board Members. All Corporate Trustees shall possess appropriate qualifications for membership on the Education Corporation

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## **B. Applicable Laws and Regulations**

- New York Education Law §§ 216-a and 226
- New York Not-For-Profit Corporation Law §§ 712-717
- New York Public Officers Law §§ 103-106

## **C. Discussion**

### *i. Ratification of By-laws*

The first order of business for a new board is to meet and ratify its by-laws within 30 days of the charter being issued by the Board of Regents. To determine the date your school's charter will be or was issued, please contact the Institute. Before ratification, the board should verify that the proper version of the by-laws is being approved because proposed by-laws often are revised as part of the charter application process. If, for some reason, the board proposes to change its by-laws at

the time of ratification, it should first adopt the by-laws previously submitted within the 30 day time limit and then seek to change its by-laws as discussed below.

In drafting the proposed education corporation's by-laws, please review carefully (if possible, with an attorney familiar with this area of the law) Education Law §§ 216-a, 226 and 2853, noting in particular the relationship between Education Law and the N-PCL. In addition, please remember that charter school education corporations, pursuant to Education Law § 2854(1)(e), are subject to the Open Meetings Law, and the Freedom of Information Law (FOIL) (Articles 6 and 7 of the New York Public Officers Law, respectively). Accordingly, while many not-for-profit corporations' by-laws contain provisions that permit trustees to be present through telephonic means or to vote by proxy, the education corporation's legal requirement to follow the Open Meetings Law does not permit such practices. (The Open Meetings Law (POL § 104(4) does permit meetings to be held, with certain notice and public access restrictions and requirements, by video-conference.) Accordingly, in adapting by-laws from a not-for-profit corporation (or using a model by-laws), be sure that each provision is consistent with the laws applicable to charter school education corporations and their unique status.

- The by-laws should indicate the standing or other committees that the corporation would create, e.g., audit, finance, compensation, etc., and delineate the functions and powers of those committees in accordance with N-PCL § 712 and the above sections of the Education Law.
- The minimum number of trustees that may be on a standing committee is three (3), except for an Executive Committee, which must have five (5) trustees. Members of standing committees must be elected by a majority of the entire education corporation board and not appointed by the board chair. For this reason, alternate members may also be elected. Only education corporation trustees may serve on a standing committee or committee with the authority of the board.
- A majority of the entire number of trustees constitutes a quorum to conduct business; Education Law § 226(1) does not permit a lesser percentage.
- Material amendments to by-laws are not effective without the approval of the SUNY Trustees or their designee and may require formal revision of the education corporation's charter, so this information should appear in any by-laws amendment provision.
- Trustees and officers may only be removed in accordance with the notice and voting procedures in Education Law § 226(8), as opposed to "with or without cause."
- Provisions of the GML prohibit any person with an interest in a for-profit contract from serving on an education corporation board, unless one or more of the exemptions listed in GML § 802 are applicable. This restriction applies to contracts for consultants, commodities, services, as well as leases and other contracts but does not apply to contracts with not-for-profit entities, such as non-profit CMOs.
- Charter Agreement section 2.2(e) contains restrictions that permit only one (1) or two (2) trustees to be affiliated with a not-for-profit charter management organization. If the school will have at least six (6) trustees, then one (1) may be affiliated with the CMO. If the education corporation will have at least seven (7) trustees, then two (2) may be affiliated.

- Teachers, school administrators and other school employees generally may not serve on charter school education corporation boards of their employer. The Institute is seeking a determination from the New York Attorney General regarding whether administrators and employees who a collective bargaining agreement covers are exempt from this provision, and will keep applicants apprised.
- Under the New York Charter Schools Act of 1998 (as amended, the “Act”), education corporations created pursuant to the Request for Proposals process in Education Law § 2852(9-a) must have a procedure for conducting and publicizing monthly board of trustee meetings at the school. The publication of notice should include the name of the media outlet that the school would use as well as posting of the notice of meeting in a public place in the school. The notice does not have to be a “legal notice” in the newspaper. Also, include any web notice or other means of notice that the school would use. Please note that having a video-link at the school, satisfies the statute when properly noticed under the POL.

## ii. *Amending the By-Laws*

When contemplating amendment of the by-laws, review the education corporation’s Charter Agreement and by-laws regarding any restrictions on by-laws provisions or amendment of by-laws. In addition, consult Education Law §§ 216a, 226, and 2853 as well as the broader Act, and N-PCL § 602 as needed, noting the intersection between the Education Law and N-PCL, and noting the education corporation’s by-laws are subordinate to the Charter Agreement, provisional charter and all statutes. We highly recommend the use of counsel when amending by-laws.

Once the board decides to amend the by-laws, the education corporation must follow any special notice provisions in the school’s by-laws pertaining to amendment of the by-laws in addition to the notice provisions of the Open Meetings Law and Education Law § 226(3).<sup>10</sup> Then at the duly organized and noticed board meeting, the board may approve the proposed by-laws amendment.

Once approved, the education corporation must submit a copy of the amended and ratified by-laws to the Institute together with the signed resolution or minutes reflecting the same for review to evaluate whether or not the amendment is material; and if material, for approval by the Institute.<sup>11</sup> The Institute will then determine whether the change to the by-laws is a material change to the by-laws and notify the school. If the change is not material, the amendment is effective immediately. If the change is material, the Institute will decide whether or not it would approve or reject such proposed by-laws amendment. If it would approve such amendment, the Institute will seek to amend the by-laws through the full charter revision process including approval of the SUNY Trustees and Board of Regents, if necessary. If the Institute would not recommend the by-laws amendment it will contact the education corporation.

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<sup>10</sup> “Notice of the time and place of every meeting shall be mailed not less than five [5] nor more than ten [10] days before the meeting to the usual address of every trustee.” Education Law § 226(3). Unless waived, this provision should be followed for all trustees.

<sup>11</sup> For this reason, we recommend that you contact the Institute to discuss any proposed changes prior to making by-laws changes.

In all circumstances, boards are cautioned that the by-laws must conform to the education corporation's charter agreement, the Act, the Education Law and the provisions of the N-PCL made applicable by Education Law §216-a. The Education Law provisions do not, in general, apply to most non-profit organizations, but do apply to New York charter schools. Also, many by-laws contain supermajority or other provisions in order to amend the by-laws (2/3 or 3/4 vote of all trustees, etc.), which must be followed. The Institute strongly encourages each board of trustees to review proposed amendments to by-laws with the board's own legal counsel as changes to one section of by-laws may affect another.

***D. Responsible Tasks***

- Submit copy of initial ratified by-laws or a board resolution approving by-laws.
- Seek Institute review and approval any time the by-laws are amended. The education corporation must submit a copy of the amended and ratified by-laws to the Institute together with the signed resolution or minutes reflecting same for review to evaluate whether or not the amendment is material; and if material, for approval by the Institute.



### 3. CODE OF ETHICS

#### **A. Applicable Charter Agreement Provisions**

The following images show applicable provisions from the Model Charter Agreement:

- Section 2.1, *Code of Ethics*;
- Section 2.2, *Governance; Education Corporation Board; By-laws*;
- Section 2.3, *Selection of New Education Corporation Board Members*; and,
- Section 2.5, *Transactions with Affiliates*;

(available at: [www.newyorkcharters.org/model-charter-agreement/](http://www.newyorkcharters.org/model-charter-agreement/)), which are the same or very similar to those of each education corporation's Charter Agreement.

(d) The Education Corporation shall have the authority to operate such pre-Kindergarten and other programs specifically authorized by law subject to applicable laws, rules and regulations.

1.6 School Names. The names of the Education Corporation's school(s) shall be set forth in Schedule 1. The Education Corporation shall have the authority to amend or alter the name of any school it has the authority to operate provided that such school name is not already in use in the State, and further provided that such name change shall become effective only upon the approval of the Institute and upon notice to the Regents or their designee, which may require Charter revision.

#### **SECTION 2. OPERATION OF EDUCATION CORPORATION**

2.1 Code of Ethics. The Education Corporation, its trustees, officers and employees shall abide by the code of ethics of the Education Corporation set forth in the Terms of Operation, which must conform to those provisions of the Act and New York General Municipal Law made applicable by the Act, and include standards with respect to disclosure of conflicts of interest regarding any matter brought before board of trustees of the Education Corporation (the "Education Corporation Board") regardless of whether the matter may involve a for-profit or not-for-profit entity or transaction. The Education Corporation shall disseminate the code in written form to each of its trustees, officers and employees. Modifications to the code of ethics shall require prior written approval of the Trustees.

2.2 Governance; Education Corporation Board; By-laws. The Education Corporation shall continue to be governed by the Education Corporation Board, which shall consist of those individuals specifically named in the Terms of Operation (the "Corporate Trustees") as updated by subsequent election and approval, or resignation, in accordance with the By-laws and this Charter Agreement. The Education Corporation Board shall have final authority for policy and operational decisions of the Education Corporation Board shall have final authority for policy and operational decisions of the Education Corporation and each school although nothing herein shall prevent the Education Corporation Board from delegating decision-making authority to officers, employees and agents of the Education Corporation. The Education Corporation Board shall operate pursuant to the following requirements and restrictions.

(a) The Education Corporation Board shall initially operate pursuant to the by-laws set forth in the Terms of Operation. The Education Corporation Board shall meet within thirty (30) days of the Effective Date and duly ratify such by-laws. Thereafter the Education Corporation Board shall operate pursuant to the by-laws of the Education Corporation whether such by-laws be those initially set forth in the Terms of Operation or as amended pursuant to subsection (b) of this section 2.2 (initially or as amended, the "By-laws"), as well as the Act and applicable provisions of the Not-For-Profit Corporation, Education, and General Municipal Laws.

(b) The By-laws may not be amended in any material respect without the prior written approval of the Trustees, such approval not to be unreasonably withheld, and in no event can they conflict with any term of the Provisional Charter, Charter Agreement or law including provisions of the Education, General Municipal and Not-for-Profit Corporation Laws applicable to charter schools. In seeking modification of the By-laws, the Education Corporation Board shall submit to the Trustees a duly approved resolution of the Education Corporation Board setting forth the proposed material changes to the By-laws.

(c) The Education Corporation Board shall have as its members such total number of Corporation Trustees and shall reserve seats on the Education Corporation Board for such specified members or constituent groups in such numbers as is set forth in the Terms of Operation. In no event shall a person with an interest in a for-profit contract with the Education Corporation serve on the Education Corporation Board except to the extent permitted by the General Municipal and the Not-For-Profit Corporation Laws. The By-laws shall contain provisions consistent therewith.

(d) Notwithstanding any provision to the contrary in the Charter Agreement, Terms of Operation or By-laws, in no event shall the Education Corporation Board, at any time, be comprised of voting members of whom more than forty percent (40%) are directors, officers, employees, agents or otherwise affiliated with any single entity (with the exception of the Education Corporation or of another charter school education corporation), regardless of whether said entity is affiliated or otherwise partnered with the Education Corporation. For the purposes of this subsection, "single entity" shall mean any individual entity, as well as any and all related entities to such entity such as parents, subsidiaries, affiliates and partners. The Trustees may, at their sole discretion, waive this restriction upon a written request from the Education Corporation.

(e) Where the Education Corporation has engaged a not-for-profit educational service provider or other entity that provides comprehensive management services to the Education Corporation or any of its schools pursuant to a contract between such entity and the Education Corporation:

(i) ~~no~~ more than two (2) Corporate Trustees may be affiliated with such not-for-profit entity, or have immediate family members so affiliated; provided, however, that in such case the following restrictions shall apply and be contained in the By-laws:

(A) termination of the contract with the not-for-profit educational service provider or other entity shall constitute cause for removal of such person(s) from the Education Corporation Board, and upon such termination such person(s) may be removed from the Education Corporation Board by vote of a majority of the Corporate Trustees provided there is a quorum of at least a majority of the entire Education Corporation Board present at the meeting;

(B) ~~such~~ person(s) shall not hold the offices of chair or treasurer of the Education Corporation Board;

(C) when the Education Corporation Board has proper grounds to go into executive session pursuant to the New York Open Meetings Law (as defined herein), and the Education Corporation Board is to discuss or vote upon an issue related to the not-for-profit management company or entity, the personnel of such company or entity, or such person(s), the Education Corporation Board may, after such person(s) has had an opportunity to fully address the Education Corporation Board, continue such executive session outside of the presence of such person(s); and

(D) ~~the~~ number of Corporate Trustees shall not be less than seven (7) where two (2) Corporate Trustees are affiliated with the not-for-profit entity and not less than six (6) where one (1) Corporate Trustee is affiliated with the not-for-profit entity.

(f) The Education Corporation Board shall notify the Trustees within five (5) business days of any of the following Corporate Trustee actions: removal; resignation; expiration of term without re-election; or, otherwise leaving the Education Corporation Board.

(g) The Education Corporation Board shall require that each Corporate Trustee who has served during a school year shall file annually a disclosure report (the "School Trustee Disclosure Report") with the Trustees, the form and requirements of which shall be provided by the Trustees. The School Trustee Disclosure Report shall set forth and attest to transactions between the Education Corporation on the one hand and a Corporate Trustee and/or any entity with which such Corporate Trustee is affiliated on the other, as such transactions may be defined by the Trustees. As set forth in section 6.1 of this Charter Agreement, the School Trustee Disclosure Report for each Corporate Trustee shall be submitted yearly as part of each school's annual report (the "Annual Report"). In the event that any Corporate Trustee fails to file a School Trustee Disclosure Report within thirty (30) days of its due date of August 1, or such report is in material respects incomplete, misleading or untruthful, and the Trustees inform the Education Corporation Board of its determination in this regard, the Education Corporation, notwithstanding any provision of its By-laws, shall in a timely fashion remove such Corporate Trustee pursuant to a vote of the Education Corporation Board and the failure of the Education Corporation Board to so act shall be a material violation of the charter as described in the Act. Should a Corporate Trustee resign from or otherwise leave the Education Corporation Board without having submitted a School Trustee Disclosure Report for any year in which such Corporate Trustee served, the Education Corporation shall provide the Trustees with a record of the transactions required by the School Trustee Disclosure Report for that Corporate Trustee for each relevant school year, such reports to be signed by the Education Corporation and due on August 1 as part of the Annual Report.

2.3 Selection of New Education Corporation Board Members. All Corporate Trustees shall possess appropriate qualifications for membership on the Education Corporation

Board, as such qualifications are set forth in the Terms of Operation, and shall be seated pursuant to the following procedures. Prior to the appointment or final election of any new Corporate Trustee, the Education Corporation Board must submit to the Trustees (pursuant to a duly approved resolution of the Education Corporation Board) the name of the proposed Corporate Trustee and such individual must timely provide to the Trustees, in writing and/or in person, such background information as the Trustees shall require (the "School Trustee Background Information"). Within forty-five (45) days of receiving the name of the proposed Corporate Trustee and the School Trustee Background Information, the Trustees shall in writing reject or approve such individual. In the event that the Trustees do not provide in writing an approval or rejection within the forty-five (45) day time period, the proposed Corporate Trustee may be seated so long as such action would be consistent with the By-laws and any other applicable Terms of Operation. A failure by the Education Corporation or the proposed Corporate Trustee to timely provide the School Trustee Background Information to the Trustees shall be grounds for his or her rejection.

2.4 Contracting with Educational Service Providers. Any entity that provides all or a substantial subset of all services necessary to operate and oversee any school's educational program on a fee basis and pursuant to a fee-based contract shall be known as an educational service provider ("Educational Service Provider") and the contract under which such services are provided shall be referred to as a management contract ("Management Contract"). Any other contractual arrangements including, but not limited to, leases, subleases, lease-purchase agreements, credit facilities, loan agreements, promissory notes, negotiable instruments and other debt instruments, that are contemplated between the Education Corporation on the one hand and the Educational Service Provider, its partners, parents, subsidiaries, agents and affiliates (including any entity that holds an economic interest in the Educational Service Provider) on the other, shall be known collectively, together with the Management Contract, as ESP Contracts ("ESP Contracts"). The following requirements and provisions relating to Educational Service Providers, Management Contracts and ESP Contracts shall apply.

(a) The Trustees reserve the right to review and disapprove for good cause shown any and all ESP Contracts that the Education Corporation seeks to execute, amend or renew during the time that the Provisional Charter is in effect. Good cause shown includes, but is in no way limited to, a finding that the ESP Contract(s) at issue do not, under the totality of the circumstances, allow the Education Corporation effective and sufficient means to hold the Educational Service Provider accountable including means to terminate the Educational Service Provider without placing the Education Corporation's or the subject school(s)'s further existence in peril. The above terms are in addition to the requirements of sections 3.14 and 3.15 of the Charter Agreement.

(b) To facilitate the Trustees' rights of review and disapproval, the Education Corporation shall provide the Trustees with any proposed ESP Contract (or proposed material amendment of an ESP Contract) not later than thirty (30) days prior to the proposed date of execution. In addition to the foregoing, prior to a school's first year of operation, and

where no prior Management Contract has been in place for that school, the Education Corporation must submit the proposed Management Contract to the Trustees by no later than May 1 immediately preceding the start of the school year. When submitting an ESP Contract, the Education Corporation must include a written opinion of the Education Corporation Board's legal counsel stating that the ESP Contract has been reviewed by legal counsel to the Education Corporation Board. Within thirty (30) days of receiving the proposed ESP Contract, the Trustees shall notify the Education Corporation Board if the agreement is disapproved, except that the Trustees, at their discretion, may extend the review period an additional thirty (30) days. It is expressly understood that should the Trustees not disapprove an ESP Contract, the Trustees by such action are in no way endorsing or approving the contract, the fee arrangements if any or any other provisions contained therein.

(c) The Education Corporation shall not enter into a Management Contract with any Educational Service Provider not identified as such in the Terms of Operation without receiving prior written approval from the Trustees.

(d) To the extent that the Terms of Operation contemplate that any of the Education Corporation's schools would be operated with the assistance of an Educational Service Provider pursuant to a Management Contract, the Education Corporation shall obtain the prior written approval of the Trustees prior to operating the school without such Educational Service Provider's assistance. Notwithstanding the above, it is understood that circumstances may require the Education Corporation to terminate and/or not renew a Management Contract and thereafter operate a school without the services of the Educational Service Provider identified in the Terms of Operation (or otherwise subsequently approved by the Trustees) prior to obtaining the permission of the Trustees. Where the Trustees determine, at their sole discretion, that such circumstances exist, and the Education Corporation has made good faith efforts to timely inform the Trustees of the circumstances, the Trustees may waive the Education Corporation's breach of the prior permission requirement and allow the Education Corporation to seek permission *ex post facto*.

(e) Management Contracts shall set forth with particularity *inter alia*, the extent of the Educational Service Provider's participation in the organization, operation and governance of any school.

(f) To further and facilitate their review, the Trustees may require the Education Corporation to submit together with any ESP Contract, additional information or assurances.

(g) Upon the execution of an ESP Contract, and any extension or revision thereto, a copy of such contract or revised contract shall be promptly provided to the Trustees.

2.5 Transactions with Affiliates. In addition to the applicable requirements of the General Municipal and Not-For-Profit Corporation Laws, the Education Corporation shall

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not, directly or indirectly, enter into or permit to exist any transaction (including the purchase, sale, lease or exchange of any property or the rendering of any service) with any affiliate of the Education Corporation, any member past or present of the Education Corporation Board or any employee past or present of the Education Corporation, any immediate family member of the foregoing individuals, or any entity with which any such person is affiliated unless:

(a) the transaction, if with an entity, is with a not-for-profit entity;

(b) the terms of such transaction (considering all the facts and circumstances) are no less favorable to the Education Corporation than those that could be obtained at the time from a person or entity that is not such an affiliate, member or employee or an individual related thereto; and,

(c) the involved Corporate Trustee, officer or employee must recuse him/herself from voting on or deciding any matters related to such transaction;

it being understood that the Trustees may ask for third-party valuation of such transactions.

### SECTION 3. OPERATION OF SCHOOLS

3.1 Planning Years and Prior Actions. The Education Corporation shall continue or commence instruction, as the case may be, in conformity with the schedule set forth in the Terms of Operation for each school it is permitted to operate.

(a) Subject to the foregoing limitation, planning years applicable to any school or schools set forth in the Terms of Operation shall not require further approval of the Trustees or constitute a revision to the Charter. The Education Corporation may also seek the Trustees' approval to take one (1) to two (2) additional planning years for any school(s), which approval shall not be unreasonably withheld.

(b) In the event the Education Corporation is unable to open a school or schools by such date(s) including taking and completing the Prior Actions (as described immediately below) to the satisfaction of the Trustees to permit the school(s) to open, the charter(s) issued that permitted the Education Corporation to operate such school(s) shall be deemed to be void *ab initio*, and, if necessary, the Education Corporation shall cooperate with the Institute to transfer, re-use or restructure such charter or right to operate such school(s).

(c) Notwithstanding the foregoing subsections of this section 3.1 of the Charter Agreement, the Education Corporation shall not permit any schools to provide instruction to any student until and unless the Trustees issue a written statement to the Education Corporation, with a copy to the Regents, attesting that said school has completed all or substantially all of the Prior Actions published on the website of the Institute (the "Prior Actions") to the satisfaction of the Trustees with such conditions as they may require. Upon

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## **B. Applicable Laws and Regulations**

- New York Education Law § 2851(2)(v)
- New York Education Law § 2854(1)(f)
- New York General Municipal Law §§ 800-804, 804-a, 805, 805-a, 805-b, 806
- New York Not-For-Profit Corporation Law §§ 715, 715-a

### ***C. Discussion***

The Act requires a charter school education corporation's code of ethics to be subject to three sets of legal rules. We discuss each line of authority, and try to help education corporations draft one code of ethics that also fulfills the statutory requirements of a conflicts of interest policy. No matter how many schools an education corporation operates, it needs only one code of ethics and/or conflicts of interest policy as such policies pertain to the corporation as a whole.

Per Education Law § 2851(2)(v), a charter school must have a code of ethics that sets forth guidance for the board, officers and employees of the education corporation regarding the standards of conduct expected of them "including standards with respect to disclosure of conflicts of interest regarding any matter brought before the board." Note that the code of ethics does not just apply to board members and does not just apply to financial matters. While the code of ethics may differ from a conflicts of interest policy, (see the Conflicts of Interest section, below, for discussion of the conflicts of interest policy), the code of ethics must include a definition of a conflict of interest, and conform to the GML provisions applicable to charters by the Act (discussed immediately below). For these reasons, the code of ethics and conflict of interest policy can be combined into one consistent code of ethics, and replace any such codes or conflicts of interest policies that may be set forth in the by-laws, or separately. The Institute suggests boards consult an attorney to assist in drafting and/or amending the code of ethics. Once adopted, the board must ensure the code of ethics is distributed to every trustee, officer and employee of the education corporation.

Per Education Law § 2854(1)(f), the conflict of interest provisions of the GML are applicable to charter school education corporations to the same extent those provisions (GML §§ 800-804, 805, 805-a, 806)<sup>12</sup> are applicable to school districts. The GML defines what constitutes an "interest" in a "contract" (§§ 800(2),(3)), prohibits conflicts of interest (§ 801), provides exceptions to that prohibition (§ 802), requires public disclosure in writing of conflicts of interest (§ 803), makes contracts entered into in violation of the GML "null, void and wholly unenforceable" (§ 804), makes a violation of the GML a crime (misdemeanor) (§ 805), and mandates that each charter school education corporation have a code of ethics with certain provisions (§ 806).

Changes to the N-PCL in 2014 added related party transaction restrictions (N-PCL § 715) and mandatory conflict of interest policy and provisions (N-PCL § 715-a) for all not-for-profit corporations (including charter school education corporations). Education Law § 216-a generally makes the N-PCL applicable to education corporations so long as the N-PCL does not conflict with the Education Law. As described in detail in the Conflicts of Interest section, below, the N-PCL adds certain mandatory provisions to any combined code of ethics/conflicts of interest policy.

#### ***i. Requirements***

Per the GML § 806, the code of ethics must provide standards of conduct reasonably expected of trustees, officers and employees with respect to:

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<sup>12</sup> GML §§ 804-a and 805-b are largely inapplicable to charter schools; the first is only applicable in limited cases in Nassau County, and the second only applies to the solemnization of marriages.



- “Holding of investments in conflict with official duties;”
- “Private employment in conflict with official duties;”
- “Future employment;” and,
- “Other standards relating to the conduct of officers and employees as may be deemed advisable,” such as adoption of regulations, policies and decisions where the education corporation trustee, officer or employee has a conflicting or competing interest.

The code of ethics should include provisions that address the following prohibitions from GML § 805-a:

- No trustee, officer or employee shall:
  - directly or indirectly, solicit any gift, or accept or receive any gift having a value of seventy-five dollars (\$75) or more, whether in the form of money, service, loan, travel, entertainment, hospitality, thing or promise, or in any other form, under circumstances in which it could reasonably be inferred that the gift was intended to influence him [or her], or could reasonably be expected to influence him [or her], in the performance of his [or her] official duties or was intended as a reward for any official action on his [or her] part;
  - disclose confidential information acquired by him [or her] in the course of his [or her] official duties or use such information to further his [or her] personal interests;<sup>13</sup>
  - receive, or enter into any agreement, express or implied, for compensation for services to be rendered in relation to any matter before any [charter education corporation school, committee or] agency of which he [or she] is an officer, [trustee] or employee or of any [school, committee or] agency over which he [or she] has jurisdiction or to which he [or she] has the power to appoint any member, officer or employee; or,
  - receive, or enter into any agreement, express or implied, for compensation for services to be rendered in relation to any matter before [the education corporation or] any [school, committee or] agency of his [or her] [corporation], whereby his [or her] compensation is to be dependent or contingent upon any action by such [corporation, committee or] agency with respect to such matter, provided that this paragraph shall not prohibit the fixing at any time of fees based upon the reasonable value of the services rendered.

Trustees, officers or employees who knowingly and intentionally violate any of the above prohibitions may be fined, suspended or removed from office or employment by the

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<sup>13</sup> This prohibition goes beyond the federal Family Educational Rights and Privacy Act (FERPA) restrictions discussed in the Institute’s guidance, Confidentiality of Student Records, available at: [www.newyorkcharters.org/category/operational-resources/compliance/](http://www.newyorkcharters.org/category/operational-resources/compliance/).

education corporation.

The code of ethics should specifically address conflicts of interest including:

- the definition of a conflict of interest;
  - N-PCL § 715-a(b) contains this provision; and,
  - Per GML §800, “interest” means a direct or indirect pecuniary or material benefit accruing to [an education corporation trustee,] officer or employee as the result of a contract with the [education corporation] which such officer or employee serves. [A] municipal officer or employee shall be deemed to have an interest in the contract of (a) his [or her] spouse, minor children and dependents, except a contract of employment with the municipality which such [trustee,] officer or employee serves, (b) a firm, partnership or association of which such [trustee,] officer or employee is a member or employee, (c) a corporation of which such [trustee,] officer or employee is an officer, director or employee and (d) a corporation any stock of which is owned or controlled directly or indirectly by such [trustee,] officer or employee.
- the procedure for disclosing the conflict;
  - See GML§ 803 (below); and
  - N-PCL § 715-a(b)(2) requires the disclosure to be to a board audit committee or, if there is no audit committee, to the board. Any committee with a similar function to that of an audit committee or a committee to specifically handle this function, such as a governance committee, may be used.
- the requirement that the conflicted person not be present at or participate in the board or committee deliberation or vote (N-PCL § 715-a(b)(3);
- a prohibition against the conflicted person from attempting to improperly influence the deliberation or vote(N-PCL § 715-a(b)(4);
- the requirement that the conflict and resolution of the conflict be documented in the corporate records (see GML§ 803 below);
  - N-PCL §715-a(b)(5) requires the disclosure must also be in the corporate minutes of any meeting where the conflict is discussed or voted upon, which requirement goes beyond the New York Open Meetings Law minutes requirements;
- procedures for disclosing, addressing, and resolving related party transactions;
  - Per N-PCL § 715-a(b)(6) this must be done in accordance with N-PCL § 715 (see Conflicts of Interest Policy section, below);
- a statement that education corporation trustees, officers and employees cannot have an interest in any for-profit contract with the education corporation;
  - Contracts with not-for-profit entities, such as charter management organizations, partners and founding organizations must be disclosed but are not necessarily prohibited.
- a statement reflecting the requirements of GML § 801 as follows:
  - (1) no [education corporation] officer or employee shall have an interest in any contract with the [education corporation] of which he [or she] is an officer or employee, when such officer or employee, individually or as a member of a board, has the power or duty to (a) negotiate, prepare, authorize or approve the

contract or authorize or approve payment thereunder (b) audit bills or claims under the contract, or (c) appoint an officer or employee who has any of the powers or duties set forth above and (2) no chief fiscal officer, treasurer, or his [or her] deputy or employee, shall have an interest in a bank or trust company designated as a depository, paying agent, registration agent or for investment of funds of the municipality of which he [or she] is an officer or employee. The provisions of this section shall in no event be construed to preclude the payment of lawful compensation and necessary expenses of any [education corporation] officer or employee in one or more positions of public employment, the holding of which is not prohibited by law.

The code of ethics must include a statement reflecting the disclosure requirement of GML § 803 as follows:

- Any officer or employee who has, will have, or later acquires an interest in—or whose spouse has, will have, or later acquires an interest in any actual or proposed contract, purchase agreement, lease agreement or other agreement, including oral agreements, with the [education corporation] of which he or she is an officer or employee, shall publicly disclose the nature and extent of such interest in writing to his or her immediate supervisor and to the governing body thereof as soon as he or she has knowledge of such actual or prospective interest. Such written disclosure shall be made part of and set forth in the official record of the proceedings of such body.

The code of ethics must include procedures for an initial and annual disclosure statement per N-PCL § 715-a(c).

- Prior to election and annually thereafter, all [trustees] will be required to file with the board secretary a written statement identifying any entity for which the corporation has a relationship with and for which the [trustee] is an officer, director, trustee, member, owner or employee. The [trustee] will also be required to identify any transaction with which the [trustee] may have a conflict. Conflict statements by [trustees] must be submitted to the chair of the audit [or similar] committee, or if there is no audit committee, to the chair of the board.
  - Charter Agreement section 2.3 regarding School Trustee Background Information takes care of the disclosure part of the above requirements for new trustees.
  - The School Trustee Disclosure Report in Charter Agreement section 2.2(g), which is required as part of the Annual Report for each trustee handles the disclosure portion of the N-PCL § 715-a(c) requirement.

The education corporation's adoption of a policy pursuant to the Act, GML and those portions of the N-PCL set forth above should make the adoption of an additional conflicts of interest policy under the N-PCL unnecessary. Therefore, a code of ethics and conflicts of interest policy may be combined into one policy.

#### **D. Responsible Tasks**



- Once adopted, the board must ensure the code of ethics is distributed to every trustee, officer and employee of the education corporation. Material amendments should also be distributed in a like manner.
- Education corporations that have not updated their codes of ethics since July of 2014, should review N-PCL §§ 715 and 715-a and update the codes accordingly.

## 4. CONFLICTS OF INTEREST

### A. Applicable Charter Agreement Provisions

The following images show applicable provisions from the Model Charter Agreement:

- Section 2.2, *Governance; Education Corporation Board; By-laws* (prohibits any person affiliated with a for-profit educational service provider from serving on a charter school education corporation board); and
- Section 2.5, *Transactions with Affiliates*;

(available at: [www.newyorkcharters.org/model-charter-agreement/](http://www.newyorkcharters.org/model-charter-agreement/)), which are the same or very similar to those of each education corporation's Charter Agreement.

(d) The Education Corporation shall have the authority to operate such pre-Kindergarten and other programs specifically authorized by law subject to applicable laws, rules and regulations.

1.6 School Names. The names of the Education Corporation's school(s) shall be set forth in Schedule 1. The Education Corporation shall have the authority to amend or alter the name of any school it has the authority to operate provided that such school name is not already in use in the State, and further provided that such name change shall become effective only upon the approval of the Institute and upon notice to the Regents or their designee, which may require Charter revision.

#### SECTION 2. OPERATION OF EDUCATION CORPORATION

2.1 Code of Ethics. The Education Corporation, its trustees, officers and employees shall abide by the code of ethics of the Education Corporation set forth in the Terms of Operation, which must conform to those provisions of the Act and New York General Municipal Law made applicable by the Act, and include standards with respect to disclosure of conflicts of interest regarding any matter brought before board of trustees of the Education Corporation (the "Education Corporation Board") regardless of whether the matter may involve a for-profit or not-for-profit entity or transaction. The Education Corporation shall disseminate the code in written form to each of its trustees, officers and employees. Modifications to the code of ethics shall require prior written approval of the Trustees.

2.2 Governance; Education Corporation Board; By-laws. The Education Corporation shall continue to be governed by the Education Corporation Board, which shall consist of those individuals specifically named in the Terms of Operation (the "Corporate Trustees") as updated by subsequent election and approval, or resignation, in accordance with the By-laws and this Charter Agreement. The Education Corporation Board shall have final authority for policy and operational decisions of the Education Corporation Board shall have final authority for policy and operational decisions of the Education Corporation and each school although nothing herein shall prevent the Education Corporation Board from delegating decision-making authority to officers, employees and agents of the Education Corporation. The Education Corporation Board shall operate pursuant to the following requirements and restrictions.

(a) The Education Corporation Board shall initially operate pursuant to the by-laws set forth in the Terms of Operation. The Education Corporation Board shall meet within thirty (30) days of the Effective Date and duly ratify such by-laws. Thereafter the Education Corporation Board shall operate pursuant to the by-laws of the Education Corporation whether such by-laws be those initially set forth in the Terms of Operation or as amended pursuant to subsection (b) of this section 2.2 (initially or as amended, the "By-laws"), as well as the Act and applicable provisions of the Not-For-Profit Corporation, Education, and General Municipal Laws.

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(b) The By-laws may not be amended in any material respect without the prior written approval of the Trustees, such approval not to be unreasonably withheld, and in no event can they conflict with any term of the Provisional Charter, Charter Agreement or law including provisions of the Education, General Municipal and Not-for-Profit Corporation Laws applicable to charter schools. In seeking modification of the By-laws, the Education Corporation Board shall submit to the Trustees a duly approved resolution of the Education Corporation Board setting forth the proposed material changes to the By-laws.

(c) The Education Corporation Board shall have as its members such total number of Corporation Trustees and shall reserve seats on the Education Corporation Board for such specified members or constituent groups in such numbers as is set forth in the Terms of Operation. In no event shall a person with an interest in a for-profit contract with the Education Corporation serve on the Education Corporation Board except to the extent permitted by the General Municipal and the Not-For-Profit Corporation Laws. The By-laws shall contain provisions consistent therewith.

(d) Notwithstanding any provision to the contrary in the Charter Agreement, Terms of Operation or By-laws, in no event shall the Education Corporation Board, at any time, be comprised of voting members of whom more than forty percent (40%) are directors, officers, employees, agents or otherwise affiliated with any single entity (with the exception of the Education Corporation or of another charter school education corporation), regardless of whether said entity is affiliated or otherwise partnered with the Education Corporation. For the purposes of this subsection, "single entity" shall mean any individual entity, as well as any and all related entities to such entity such as parents, subsidiaries, affiliates and partners. The Trustees may, at their sole discretion, waive this restriction upon a written request from the Education Corporation.

(e) Where the Education Corporation has engaged a not-for-profit educational service provider or other entity that provides comprehensive management services to the Education Corporation or any of its schools pursuant to a contract between such entity and the Education Corporation:

(i) ~~no~~ more than two (2) Corporate Trustees may be affiliated with such not-for-profit entity, or have immediate family members so affiliated; provided, however, that in such case the following restrictions shall apply and be contained in the By-laws:

(A) termination of the contract with the not-for-profit educational service provider or other entity shall constitute cause for removal of such person(s) from the Education Corporation Board, and upon such termination such person(s) may be removed from the Education Corporation Board by vote of a majority of the Corporate Trustees provided there is a quorum of at least a majority of the entire Education Corporation Board present at the meeting;

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(B) ~~such~~ person(s) shall not hold the offices of chair or treasurer of the Education Corporation Board;

(C) when the Education Corporation Board has proper grounds to go into executive session pursuant to the New York Open Meetings Law (as defined herein), and the Education Corporation Board is to discuss or vote upon an issue related to the not-for-profit management company or entity, the personnel of such company or entity, or such person(s), the Education Corporation Board may, after such person(s) has had an opportunity to fully address the Education Corporation Board, continue such executive session outside of the presence of such person(s); and

(D) ~~the~~ number of Corporate Trustees shall not be less than seven (7) where two (2) Corporate Trustees are affiliated with the not-for-profit entity and not less than six (6) where one (1) Corporate Trustee is affiliated with the not-for-profit entity.

(f) The Education Corporation Board shall notify the Trustees within five (5) business days of any of the following Corporate Trustee actions: removal; resignation; expiration of term without re-election; or, otherwise leaving the Education Corporation Board.

(g) The Education Corporation Board shall require that each Corporate Trustee who has served during a school year shall file annually a disclosure report (the "School Trustee Disclosure Report") with the Trustees, the form and requirements of which shall be provided by the Trustees. The School Trustee Disclosure Report shall set forth and attest to transactions between the Education Corporation on the one hand and a Corporate Trustee and/or any entity with which such Corporate Trustee is affiliated on the other, as such transactions may be defined by the Trustees. As set forth in section 6.1 of this Charter Agreement, the School Trustee Disclosure Report for each Corporate Trustee shall be submitted yearly as part of each school's annual report (the "Annual Report"). In the event that any Corporate Trustee fails to file a School Trustee Disclosure Report within thirty (30) days of its due date of August 1, or such report is in material respects incomplete, misleading or untruthful, and the Trustees inform the Education Corporation Board of its determination in this regard, the Education Corporation, notwithstanding any provision of its By-laws, shall in a timely fashion remove such Corporate Trustee pursuant to a vote of the Education Corporation Board and the failure of the Education Corporation Board to so act shall be a material violation of the charter as described in the Act. Should a Corporate Trustee resign from or otherwise leave the Education Corporation Board without having submitted a School Trustee Disclosure Report for any year in which such Corporate Trustee served, the Education Corporation shall provide the Trustees with a record of the transactions required by the School Trustee Disclosure Report for that Corporate Trustee for each relevant school year, such reports to be signed by the Education Corporation and due on August 1 as part of the Annual Report.

2.3 Selection of New Education Corporation Board Members. All Corporate Trustees shall possess appropriate qualifications for membership on the Education Corporation

where no prior Management Contract has been in place for that school, the Education Corporation must submit the proposed Management Contract to the Trustees by no later than May 1 immediately preceding the start of the school year. When submitting an ESP Contract, the Education Corporation must include a written opinion of the Education Corporation Board's legal counsel stating that the ESP Contract has been reviewed by legal counsel to the Education Corporation Board. Within thirty (30) days of receiving the proposed ESP Contract, the Trustees shall notify the Education Corporation Board if the agreement is disapproved, except that the Trustees, at their discretion, may extend the review period an additional thirty (30) days. It is expressly understood that should the Trustees not disapprove an ESP Contract, the Trustees by such action are in no way endorsing or approving the contract, the fee arrangements if any or any other provisions contained therein.

(c) The Education Corporation shall not enter into a Management Contract with any Educational Service Provider not identified as such in the Terms of Operation without receiving prior written approval from the Trustees.

(d) To the extent that the Terms of Operation contemplate that any of the Education Corporation's schools would be operated with the assistance of an Educational Service Provider pursuant to a Management Contract, the Education Corporation shall obtain the prior written approval of the Trustees prior to operating the school without such Educational Service Provider's assistance. Notwithstanding the above, it is understood that circumstances may require the Education Corporation to terminate and/or not renew a Management Contract and thereafter operate a school without the services of the Educational Service Provider identified in the Terms of Operation (or otherwise subsequently approved by the Trustees) prior to obtaining the permission of the Trustees. Where the Trustees determine, at their sole discretion, that such circumstances exist, and the Education Corporation has made good faith efforts to timely inform the Trustees of the circumstances, the Trustees may waive the Education Corporation's breach of the prior permission requirement and allow the Education Corporation to seek permission *ex post facto*.

(e) Management Contracts shall set forth with particularity *inter alia*, the extent of the Educational Service Provider's participation in the organization, operation and governance of any school.

(f) To further and facilitate their review, the Trustees may require the Education Corporation to submit together with any ESP Contract, additional information or assurances.

(g) Upon the execution of an ESP Contract, and any extension or revision thereto, a copy of such contract or revised contract shall be promptly provided to the Trustees.

2.5 Transactions with Affiliates. In addition to the applicable requirements of the General Municipal and Not-For-Profit Corporation Laws, the Education Corporation shall

not, directly or indirectly, enter into or permit to exist any transaction (including the purchase, sale, lease or exchange of any property or the rendering of any service) with any affiliate of the Education Corporation, any member past or present of the Education Corporation Board or any employee past or present of the Education Corporation, any immediate family member of the foregoing individuals, or any entity with which any such person is affiliated unless:

- (a) the transaction, if with an entity, is with a not-for-profit entity;
  - (b) the terms of such transaction (considering all the facts and circumstances) are no less favorable to the Education Corporation than those that could be obtained at the time from a person or entity that is not such an affiliate, member or employee or an individual related thereto; and,
  - (c) the involved Corporate Trustee, officer or employee must recuse him/herself from voting on or deciding any matters related to such transaction;
- it being understood that the Trustees may ask for third-party valuation of such transactions.

### **SECTION 3. OPERATION OF SCHOOLS**

3.1 **Planning Years and Prior Actions.** The Education Corporation shall continue or commence instruction, as the case may be, in conformity with the schedule set forth in the Terms of Operation for each school it is permitted to operate.

(a) Subject to the foregoing limitation, planning years applicable to any school or schools set forth in the Terms of Operation shall not require further approval of the Trustees or constitute a revision to the Charter. The Education Corporation may also seek the Trustees' approval to take one (1) to two (2) additional planning years for any school(s), which approval shall not be unreasonably withheld.

(b) In the event the Education Corporation is unable to open a school or schools by such date(s) including taking and completing the Prior Actions (as described immediately below) to the satisfaction of the Trustees to permit the school(s) to open, the charter(s) issued that permitted the Education Corporation to operate such school(s) shall be deemed to be void *ab initio*, and, if necessary, the Education Corporation shall cooperate with the Institute to transfer, re-use or restructure such charter or right to operate such school(s).

(c) Notwithstanding the foregoing subsections of this section 3.1 of the Charter Agreement, the Education Corporation shall not permit any schools to provide instruction to any student until and unless the Trustees issue a written statement to the Education Corporation, with a copy to the Regents, attesting that said school has completed all or substantially all of the Prior Actions published on the website of the Institute (the "Prior Actions") to the satisfaction of the Trustees with such conditions as they may require. Upon

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## **B. Applicable Laws and Regulations**

- New York Education Law § 2851(2)(v)
- New York Not-For-Profit Corporation Law §§ 715, 715-a

## **C. Discussion**

The Act and GML already require education corporations operating charter schools to adopt a code of ethics that addresses disclosure of conflicts of interest regarding any matter brought before the board of trustees.<sup>14</sup> The N-PCL also requires all nonprofit organizations adopt a conflict of interest policy to ensure directors, officers and key employees act in the best interests of the corporation,<sup>15</sup> and that addresses related party transactions in accordance with N-PCL § 715. These

<sup>14</sup> NY Educ. Law § 2851(2)(v).

<sup>15</sup> NPCL § 715-a.

two requirements can be combined into one code of ethics / conflicts of interest document or the two may be separate but consistent.

*i. Requirements*

The N-PCL § 715 conflict of interest policy must include the following provisions:

- The definition of the circumstances that create a conflict of interest;
- The procedure for disclosing the conflict to the audit committee or the board;
- A conflicted person may not be present at or participate in the board or committee deliberation or vote;
- A conflicted person may not attempt to improperly influence the deliberation or vote;
- The existence of the conflict and resolution of the conflict must be documented in the corporate records including in the minutes of any meeting at which the conflict was discussed or voted upon;
- Procedures for disclosing, addressing, and resolving related party transactions; and,
- Prior to election and annually thereafter, all [trustees] will be required to file with the board secretary a written statement identifying any entity for which the corporation has a relationship with and for which the [trustee] is an officer, director, trustee, member, owner or employee. The [trustee] will also be required to identify any transaction with which the [trustee] may have a conflict. Conflict statements by [trustees] must be submitted to the chair of the audit committee or the board chair.

Please note that if the corporation has adopted a policy pursuant to federal, state or local law that is substantially consistent with these requirements, the adoption of an additional policy is not necessary. Therefore, a code of ethics and conflicts of interest policy may be combined into one policy.

*ii. Related Party Transactions*

Section 715 of the N-PCL dealing with interested directors and officers, provides for *Related party transactions*.<sup>16</sup> There is a ban on all related party transactions unless it is determined by the board to be fair, reasonable and in the corporation's best interest at the time of the decision. This comports with the Charter Agreement section 2.5 requirement that such transactions be at fair market values or better for the education corporation. An interested director, officer or key employee will be required to disclose all material facts. (Note that the GML makes the code of ethics applicable to *all* employees.) Where the transaction involves a charitable organization and the related party has a substantial financial interest, the board or board committee must:

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<sup>16</sup> Defined as any transaction, agreement or other arrangement in which the related party has a financial interest and the corporation or affiliate is a participant.

- consider alternative transactions prior to entering the transaction;
- approve the transaction by majority vote of those present; and,
- document the basis for approval and considered alternatives contemporaneous with the final decision.

Related parties may not participate in the deliberations or voting related to the transaction; however, they may be asked by the board to make a presentation about the transaction prior to any deliberations or vote. (This is consistent with the Charter Agreement's handling of CMO-affiliated board members in section 2.2(e)(iv)). The by-laws may provide further restrictions to such transactions.

### *iii. Attorney General Involvement*

The Attorney General may bring an action to enjoin, void or rescind any proposed or approved related party transaction that the Attorney General has determined to violate the N-PCL or simply has determined is not in the best interests of the corporation.<sup>17</sup> The Attorney General also has the power to seek restitution and remove directors or officers for violations. Finally the Attorney General may require any person or entity to:

- account for any profits made from the transaction and pay them to the corporation;
- pay the corporation the value of the use of any of its property;
- return or replace any property or other assets lost as a result of transaction together with any income or appreciation lost or account for any proceeds for the sale of the such property for which the proceeds will be paid the corporation with interest; and,
- where there was willful and intentional conduct, to pay double the sum of any benefit back to the corporation.

This gives great deference and discretion to the Attorney General to intervene into corporate matters.

### **D. Responsible Tasks**

- Education corporations that have not updated their codes of ethics or conflicts of interest policies since July of 2014, should review N-PCL §§ 715 and 715-a and update the codes accordingly.
- Education corporations should review their by-laws and remove any provisions contrary to the above N-PCL provisions.

## 5. WHISTLEBLOWER POLICY

### **A. Applicable Charter Agreement Provisions**

No charter agreement provisions specifically apply.

### **B. Applicable Laws and Regulations**

- Not-for-Profit Corporation Law §715-b

### **C. Discussion**

An education corporation with 20 or more employees **and** annual revenue (not income) of over one million dollars (\$1,000,000.00) must enact a whistleblower policy.<sup>18</sup> While some education corporations may not be required to adopt this policy in start-up years, most education corporations with at least one operating charter school will hit these thresholds during their first charter term. Therefore, all education corporations will have to adopt such policy. The whistleblower policy must include the following provisions:

- a statement that no trustee, officer, employee or volunteer who reports actions he/she believes, in good faith, are fraudulent, illegal or against policy will suffer intimidation, harassment, discrimination or other retaliation, or, in the case of employees, adverse employment action;
- procedures for reporting;
- the requirement that someone be designated to administer the policy who shall report to the board or a board committee; and,
- the requirement that a copy of the policy be distributed to all trustees, officers, employees and volunteers who provide substantial services.

### **D. Responsible Tasks**

- Include a Whistleblower Policy in the personnel or board policies that covers all trustees, officers and employees.
- Distribute the policy to all trustees, officers and employees.

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<sup>18</sup> NPCL §715-b.