Charter Schools and their Mission Affiliated Organizations: Organization, Operation & Fundraising

KROKIDAS & BLUESTEIN LLP AND AAFCPAs PRESENTATION

Today's Presenters

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Presentation Overview

I. Why have a Mission Affiliate?
II. Is the Mission Affiliate a Public or Private Entity?
III. If the Mission Affiliate is a Private Entity:
    A. Board Composition
    B. Flows of Funds between the Mission Affiliate and Charter School
IV. Fundraising Considerations for All Mission Affiliates
V. Mission Affiliate Governance

Why have a Mission Affiliate?

Why Have a Mission Affiliate?

A. Fundraising
   1. 501(c)(3) status
   2. Risk of reversion
B. Financing Requirements
   1. Segregate fundraising by charter/facility
   2. Special purpose entity

Why Have a Mission Affiliate? (cont.)

C. Government Entity Requirements
   1. Construction-related
      a. Public procurement
      b. Prevailing wage
      c. Designer selection
   2. Operational
      a. Open meeting
      b. Public records
      c. State ethics

Why Have a Mission Affiliate? (cont.)

D. Non-charter public school activities:
   1. Dissemination to:
      a. MA private schools
      b. Public and private schools outside MA
   2. College scholarships
   3. MA non-charter public school management

Is the Mission Affiliate a Public or Private Entity?

Is the Mission Affiliate a Public or Private Entity?

A. State Ethics/Public Records Test
   1. Creation – legislative, administrative or other government action
   2. Function – performance of some essentially governmental function
   3. Public Funds – receipt or expenditure
   4. Control – by governmental entity
   5. Private interests –Are these significant? Or does government entity act as owner

Is the Mission Affiliate a Public or Private Entity? (cont.)

B. Benefits of Being a Public Entity
   1. Complete control permitted
   2. Simplified relationship with Charter School
      a. Transfers to Mission Affiliate
      b. State Ethics considerations

Is the Mission Affiliate a Public or Private Entity? (cont.)

C. Disadvantages of Being a Public Entity
   1. Construction – public procurement, prevailing wage and designer selection always required
   2. Risk of asset reversion – potentially greater
   3. Financing – not eligible for NMTC
   4. Operational – Public records law, state ethics, open meeting law (likely)

Is the Mission Affiliate a Public or Private Entity? (cont.)

D. Benefits of Being a Private Entity

1. Construction – public procurement, prevailing wage and designer selection might not apply
2. Risk of asset reversion – minimized
3. Financing – might require a private entity
4. Operational – Public records, state ethics, open meeting (likely) do not apply

Is the Mission Affiliate a Public or Private Entity? (cont.)

E. Disadvantages of Being a Private Entity
   1. No Charter School control
   2. Complicated relationship
      a. Flows of funds (discussed below)
      b. State ethics considerations (discussed below)

If the Mission Affiliate is a Private Entity: Board Composition

If the Mission Affiliate is a Private Entity

A. Mission Affiliate Board Composition – State Ethics Considerations

1. **School Trustees serving on Mission Affiliate Board**

- Trustees of school board are considered special state employees (assuming they are not compensated)

a) **<u>Current School Trustees serving on Mission Affiliate Board</u>**: We advise against <u>shared board members</u>

- **<u>Reason #1</u> (G.L. c. 268A, § 4(c)):**

Special state employee cannot act as agent for anyone other than the commonwealth or state agency in connection with any particular matter in which the state agency is a party or has a <u>direct and substantial interest</u> ;

Examples: School Trustee acting as an agent of the Mission Affiliate by serving as a spokesperson for the Mission Affiliate; signing correspondence on behalf of the Mission Affiliate; or signing a contract on behalf of the Mission Affiliate.

If the Mission Affiliate is a Private Entity (State Ethics Considerations, cont.)

- **<u>Reason #2</u> (G.L. c. 268A, §6)**: a state employee is prohibited from participating as such employee in a particular matter in which to his knowledge he, his immediate family or partner, a business organization in which he is serving as officer, director, trustee, partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest.
  - Any state employee whose duties would otherwise require him to participate in such a particular matter shall advise the official responsible for appointment to his position and the state ethics commission of the nature and circumstances of the particular matter and make full disclosure of such financial interest, and the appointing official shall thereupon either:

    (1) assign the particular matter to another employee; or

    (2) assume responsibility for the particular matter; or

    (3) make a written determination that the interest is not so substantial as to be deemed likely to affect the integrity of the services which the commonwealth may expect from the employee, in which case it shall not be a violation for the employee to participate in the particular matter. Copies of such written determination shall be forwarded to the state employee and filed with the state ethics commission by the person who made the determination.

If the Mission Affiliate is a Private Entity (State Ethics Considerations, cont.)

Participation: is broader than acting as an agent or attorney and includes any discussion, recommendation or vote (binding or nonbinding) and includes both participation at or outside of board meetings.

Recusal: School Trustee must recuse him or herself from any discussion and/or vote at any School board or committee meeting regarding any particular matter in which the Mission Affiliate has a financial interest, such as a lease or a services contract.

Additional Considerations:

1. Mission Affiliate's Conflict of Interest Policy
2. Appearance of Conflict
   - **G.L. c. 268A, § 23 Disclosure:** Recommended if School Trustee is engaged in Mission Affiliate activities. Not needed if a Section 6 Integrity Determination is obtained for that Trustee and filed with the State Ethics Commission.

If the Mission Affiliate is a Private Entity (State Ethics Considerations, cont.)

b) Former Trustees of School serving on Mission Affiliate Board

General principle: a former School Trustee may serve on Mission Affiliate Board but must be aware of certain restrictions (**G.L. c. 268A, § 4**).

- Once a Charter School Trustee ceases to serve on the charter school board they are considered to be a "former state employee"

One-Year Ban: For one year after an individual ceases to serve as a School Trustee, he or she may not:

1. Appear before the School or any court or agency of the Commonwealth,
2. As agent or attorney,
3. For anyone other than the School or the Commonwealth,
4. Regarding any particular matter in which the School or the Commonwealth is a party or has a direct and substantial interest,
5. Which was under his or her official responsibility as School Trustee,
6. Within two years before the end of his or her service on the School's board of trustees.

If the Mission Affiliate is a Private Entity (State Ethics Considerations, cont.)

<u>Forever Ban:</u> A former state employee must refrain from acting as agent or attorney for anyone other than the School on any particular matter in which the School has <u>a direct and substantial</u> interest or is a party, <u>and in which the former state employee participated while serving as School trustee</u>.

- *Example:* If a former School Trustee discussed and voted on a services agreement between the School and the Mission Affiliate, and subsequently serves as a member of the Mission Affiliate's board, this former School Trustee will not be able to speak as a spokesperson for the Mission Affiliate regarding this services agreement or otherwise act as agent of the Mission Affiliate regarding that services agreement.

If the Mission Affiliate is a Private Entity (State Ethics Considerations, cont.)

2. School officers serving on Mission Affiliate Board **(School Board Chair or Treasurer)**
   - General Principle: We assume it is <u>not</u> possible for school officers to serve on the board of the Mission Affiliate.
   - DESE has provided informal guidance to charter schools contracting with public school districts that suggests that because Mission Affiliates are separate legal entities from their associated charter schools, their respective boards of trustees must act accordingly.
     - The boards must hold separate meetings, **have different officers**, and operate under different bylaws.

If the Mission Affiliate is a Private Entity (State Ethics Considerations, cont.)

3. School employees serving on Mission Affiliate Board

a. General Principal: School employees may serve on board of a Mission Affiliate so long as certain steps are taken to address State Ethics considerations.
   - Employees of charter schools are considered state employees
   - Cannot be compensated by both School and Mission Affiliate.

b. Generally, a School employee will be prohibited from acting as “agent or attorney” of the Mission Affiliate regarding any particular matter in which the School is a party or has a direct and substantial interest. **(G.L. c. 268A, § 4)**.

If the Mission Affiliate is a Private Entity (State Ethics Considerations, cont.)

- *Examples:* School employee serving as the spokesperson for the Mission Affiliate, signing correspondence on behalf of the Mission Affiliate, or signing a contract on behalf of the Mission Affiliate.
- However, a School employee will not be subject to this prohibition if his or her <u>appointing authority</u> requires him or her to act as agent of the Mission Affiliate as part of his or her job responsibilities and the performance of these duties will serve a “distinct institutional interest” of the School.
  - <u>Note</u>: For the school leader the appointing authority is the **Board of Trustees**. For school employees, the appointing authority is likely the **school leader**. For a School Trustee, the appointing authority is **DESE** for purposes of § 6.
  - <u>Advisory Opinion</u>: The State Ethics Commission expressly reserves the right to decide whether a state agency does, in fact, have a distinct institutional interest in having a particular state employee serve on the board of the Mission Affiliate.
  - <u>Participation</u>: Any employee who will serve on the board of directors of the Mission Affiliate will also generally be prohibited from participating in any matter in which the Mission Affiliate has a financial interest unless a Section 6 Integrity Determination is made and filed with the State Ethics Commission.

c. <u>Additional Considerations</u>:

1. Mission Affiliate’s Conflict of Interest Policy
2. Appearance of Conflict - G.L. c. 268A, § 23 Disclosure

If the Mission Affiliate is a Private Entity: Flows of Funds

If the Mission Affiliate is a Private Entity (cont.)

B. Flows of Funds

1. Fundraising by Mission Affiliate – optimize, to reduce risk of reversion.
2. Avoid investment limitations?

If the Mission Affiliate is a Private Entity (cont.)

3. Payments from Mission Affiliate to School for use of space and services:
    a. Best practice: Document
    b. FMV or more (Anti-Aid Amendment)
    c. MTRS issues (public or private)
    d. Dual employment (public or private)

If the Mission Affiliate is a Private Entity (cont.)

4. Payments from Charter School to Mission Affiliate
   a. Surplus funds calculation
   b. Loans
   c. Use of space and services
      i. Best practice: Document
      ii. At or below FMV
         - Anti-Aid Amendment
         - Non-commerciality

Fundraising Considerations

Fundraising Considerations for All Mission-Affiliates

Optimize contributions to Mission Affiliate

1. Qualify Mission Affiliate as non-private foundation
2. Avoid restricted fundraising
   a. Restrictions remain on transfer from Mission Affiliate to Charter School
   b. Avoid duplicating Charter School expenditures
   c. Permit payment of Mission Affiliate expenses
   d. Unrestricted donations do not reduce permitted surplus carryover

Practice Tip: If restricted funds are received by Mission Affiliate, transfer to Charter School as restrictions lapse.

Mission Affiliate Governance

Mission Affiliate: Governance Responsibilities (Public or Private)

1. Fiduciary duties
   a. Duty of care
   b. Duty of loyalty
2. Meeting fiduciary obligations
   a. Attend Board meetings
   b. Review detailed information
   c. Use your own judgment

Mission Affiliate: Governance Responsibilities (cont.)

d. Pay close attention to financial matters
   i. Adopt a realistic budget
   ii. Ensure adequate internal accounting systems and controls
      - Who keeps the books?
      - Who authorizes payments?
   iii. Confirm required filings

Mission Affiliate: Governance Responsibilities (cont.)

e. Use of restricted gifts
f. Board training
g. Ensure a vital and diverse Board
h. Beware conflicts of interest
    i. Annual written disclosure
    ii. Disclosure and recusal prior to final discussion and vote
    iii. Outside valuation or appraisal of interested transactions
    iv. Intermediate Sanctions

Questions & Answers

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Thank you for Attending!