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# Improving Public Education Through Strengthened Local Control

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*“Asked whether he was meeting public expectations that he would help close the district’s racial achievement gap, [the superintendent] said school board members had not told him it was a priority.”*

—Schaarsmith 2004

Every state legislature implements its constitutional obligation to provide a free, public education through what voters typically view as purely *local* boards of education or municipal councils that are similarly responsible for education.<sup>1</sup> From constitutional and legal perspectives, however, these local school boards are agents of their parent state legislatures and are state, not local, officers.<sup>2</sup> This agency relationship contrasts with other forms of local governance. For example, city council members are inherently local officers since they direct municipal corporations that serve, in the view of state law and the courts, purely local interests. Because education is typically a constitutional obligation on a state legislature,<sup>3</sup> school board directors elected or appointed under state law are inherently *state* public officers. Although school board members are thus considered representatives of the state legislature, they are still accountable to the local electorate since it is fundamental in the United States that the imposition of local school taxes be effected directly or indirectly by an elected, local representative body authorized to levy such taxes and approve expenditures for hiring teachers, textbook purchases, etc.

What these agents of state government accomplish in educating our children has profound implications for our nation’s economic future. It is axiomatic throughout the world that the improvement in human capital through more effective education is the central mechanism to improve standards of living in an increasingly international and competitive economy. That there is widespread national concern that learning outcomes in our public schools are below expectations of parents, students, and state and national political and business leaders is an understatement. While both candidates for the presidency in 2004 promised to direct further federal attention and resources to K–12 education, we know that, historically, the federal ability to improve the

productivity of public education has been limited by the constitutional delegation to the states of authority over matters relating to “the general welfare.”<sup>4</sup>

Beginning in the 1950s, the federal role in public education expanded<sup>5</sup> through programs of targeted grants for special needs students and federal aid to serve populations of poor K–12 school children. Such federal aid, however, is only a small proportion of total spending for K–12 public education—still less than 8 percent.

The most recent federal legislation, the No Child Left Behind Act (NCLB), obligates the states to heavily monitor student achievement, with the objective that all students perform to high standards by 2010. Schools that fail to achieve this objective risk their districts being required to offer alternative, choice-based schools for students in underperforming schools.<sup>6</sup> States that do not comply with various aspects of the NCLB may lose various forms of flexibility accorded to a state by the U.S. secretary of education as well as 25 percent of federal funds granted to a state for administration. The presumption is that withdrawal of funds will force the states to pay close attention to what their agents achieve or fail to achieve in terms of improved student learning outcomes.

Whether the threatened withdrawal of state flexibility in the use of federal funds will realistically lead to improved school performance over the next few years remains an important and relatively underdiscussed public policy issue. Even if federal monies were withdrawn from the states, the impact in the aggregate would be relatively minor since, as already noted, such federal monies comprise no more than 8 percent of total spending for K–12 public education.

How local school boards and their school managers respond to the incentives and penalties contained in the federal law will ultimately determine how the latest federal initiative affects state educational policy. While there are many appearances of increased federal and state centralization of authority, some wonder if the lack of federal financial control and the historical tension between state education policymakers and local schools may ultimately frustrate large-scale changes and desired

improvements in student performance. Michael Kirst recently observed,

While the scope of state activity is wide, however, the effectiveness of state influence on local practice often has been questioned. Some think it is quite potent, while others see a “loose coupling” between state policy and local schools that leads to symbolic compliance at the local level. Still others believe that worries about federal dominance of education are greatly exaggerated precisely because NCLB is unlikely to be implemented as intended. (2004, 37)

This past July, the Government Accountability Office issued an interim evaluation of the NCLB and noted that only 28 states had their plans fully approved by the U.S. Department of Education and fully in place, while the remainder were still working out details and negotiating with the department (GAO 2004).

Our purpose is to examine comparatively the responsibilities of local school boards who are the predicate actors in the evolving drama surrounding the NCLB legislation. Our presumption is that because relatively little federal money is involved, it is very unlikely that improved learning, especially for the disadvantaged, will occur because most urban school districts simply do not face effective incentives to improve student learning, and have historically found grave difficulties in implementing changes. The question this paper addresses involves whether or not there are other, more expedient ways to effect improved learning outcomes through changes in the organization of local school governance that would move school governance mechanisms closer to those found governing widely held, publicly traded corporations.

To begin to address this question, the paper builds on an earlier comparative legal analysis of state ethics laws that apply to local boards of education (Kolb and Strauss 1999). The comparative analysis here is refocused by comparing the structure of duties and authority accorded to local school boards to the duties and authorities accorded to directors of publicly traded, for-profit corporations.

The comparative analysis reaches the fundamental conclusion that local boards of education have a great deal of discretion in allocating resources and supervising their management, but a very weak set of duties or responsibilities, especially in relation to student learning

outcomes. The paper then identifies limited but meaningful changes to existing mechanisms contained in state school laws that will plausibly improve student learning without additional expense.<sup>7</sup>

The suggested changes are consistent with state constitutional principles of state and local control over public education, and are consistent with existing collective bargaining agreements and the role of heavily unionized teacher corps in the major unionized states. The changes are also consistent with a continued public education monopoly over fulfillment of state constitutional requirements that legislatures provide free educational services that are “thorough and efficient” to school-age children. That is, expected improved outcomes are not wholly dependent on an initial or widespread introduction of charter schools or school vouchers, as suggested by many economists; rather, they are a series of changes that most would characterize as strengthening purposeful local control of public education can significantly improve educational outcomes by more closely defining the duties of local school boards and thereby creating liabilities for failures to perform such duties. The presumption, then, is that local school boards will begin to behave more consistently and act in the interests of their stakeholders, as their private-sector counterparts do, when allocating school resources and monitoring outcomes.

Another way to characterize the central finding of this paper is to simply assert that the failure of public schools to perform has been and will be the result of failing to obligate those in charge of local schools to perform. Publicly traded corporations maximize profits for their shareholders because the failure to do so creates liability and financial risk for the board and officers of the corporation. There is currently no counterpart in the public education realm.

The paper then addresses the design problem of creating a new system of duties and authority that may reasonably lead to widely desired outcomes for public education. The new mechanism begins with a more meaningful oath of office, and the creation of correlative incentives that will lead local boards of education to conduct their affairs solely in the interest of improving student learning. Moreover, such changes are largely within the reach of any local school board and with little delay. School boards may choose to implement the suggested changes now rather than wait for their parent state legislatures to act. Local school boards can adopt

certain school ordinances that will, through strengthened and refocused obligations on the allocation of school resources, improve student learning outcomes.

The suggested changes involve the establishment of mechanisms that create ethical, fiduciary, and educational performance standards as integral parts of the local control of education that currently do not exist. By implication, they create new liabilities for school board members and senior education leaders. A corollary to the adoption of these changes is the proper compensation and indemnification of school board members and senior education leaders in the same manner found in the governance of for-profit organizations.

This is not a paper about how to mandate or further regulate public education; rather, it is a paper about how to more effectively organize the local incentive structure to ensure that the distribution of learning outcomes shifts positively for everybody. As the reader will discover, this comparative analysis leads to some striking differences, such that common sense requires adjustment in the way interests are organized at the local level for school board directors. The thesis of the paper is that with a revised incentive structure, it is entirely reasonable to expect improved learning outcomes. However, systemic change through tweaks in state school codes/laws is required to enable local school boards to improve educational outcomes.

The paper is organized as follows. Section 2 discusses how publicly traded corporations are typically organized and typically governed under federal and state law. Section 3 describes how public education typically is effected through state law, and discusses the latitude accorded to local boards of education. Section 4 compares and discusses the two schemes—monitoring devices and activities that are observable in the case of school boards, and publicly traded private corporations—and describes remedy mechanisms that each system of governance faces from stakeholders who are dissatisfied with outcomes. Section 5 contains suggested solutions to findings of a determined lack of coherent incentives facing local school board members. Focusing and rationalizing the incentive structure facing local school boards constitutes the strengthening of local control that is the promise of this paper. Section 6 concludes.

## SECTION 2: THE DUTIES AND AUTHORITIES OF BOARDS AND OFFICERS OF WIDELY HELD, PUBLICLY TRADED CORPORATIONS<sup>8</sup>

### General

Corporations are instrumentalities of state law that were created in the nineteenth century to enable the assemblage of sufficient capital to create large, geographically dispersed infrastructures such as railroads, integrated steel facilities, and telegraph systems. In return for making a stock purchase, investors received partial ownership of the corporation and the prospect of dividends and capital gains on their investments, as well as limited liability for the activities of the company (as contrasted to investments through sole proprietorships or partnerships). Additionally, investors enjoyed new ease in purchasing and selling partial interests in the corporation via the stock market.

Since the purpose of the corporate mechanism was to intermediate between many investors and a single organization, mechanisms were designed to ensure that shareholders' interests were effected by the organization. The basic system that has evolved provides for the supervision of the organization by *directors* who are elected by the investors. State law typically requires annual shareholder meetings. The elected directors typically serve part time,<sup>9</sup> are paid, meet quarterly, and are responsible for hiring the full-time, day-to-day managers of the corporation. Voting rights of investors are typically proportional to the financial *stakes* or money that investors have at risk in the corporation.<sup>10</sup> State law, federal securities law, and state and federal court decisions govern the relationships between investors, their elected directors, the corporation composed of corporate managers and line employees and who are employed by the corporation, and customers of the corporation. The creation of a corporation occurs within a state and under state incorporation law, and includes a corporate charter that provides for corporate governance.

When shareholders believe the corporate charter is violated through decisions by the board of directors, there is recourse in state courts. Federal supervision of the conduct of corporations followed concerns over undue concentration (antitrust law), protection of shareholder interests from manipulation of stock prices by large shareholders in national stock markets, and the use of misleading or false information to prospective investors. Federal and state law also affects corporate

decision in other areas, for example, in the areas of contracts and commercial relations, product liability and consumer protection, personnel and labor relations, taxation, and the environment. Thus, management decisions running afoul of these standards can give rise to shareholder disputes about boards inadequately monitoring management decision making as well.

Since incorporation is an act specific to the state in which incorporation occurs, there is some variation in state laws governing corporations, case law, and, accordingly, in corporate governance patterns<sup>11</sup>. As a practical matter, however, most major U.S. and international corporations have chosen to incorporate in Delaware (for a variety of reasons), thus its laws and case law are generally viewed as most informative when describing corporate governance procedures.

Textbook microeconomics presumes that the primary motivating factor in business is profits. The courts have repeatedly affirmed this presumption when shareholders have questioned the conduct of management that strays from this maximand. In 1919, Henry Ford sought to lower the price of Ford automobiles to benefit society, and cut his dividend to finance this. The Ford Motor Company was by then a publicly traded corporation and subject to state securities law. Dodge, a shareholder, disputed the pecuniary wisdom of this act, and the court agreed and ordered Ford to pay the full dividend.<sup>12</sup>

In exercising its combined authority, the corporate board is expected to pursue the profits of the corporation through the exercise of care and loyalty to the corporation. Moreover, a *legal duty* of care and of loyalty backs these expectations. Failure to fulfill these duties subjects the individual director and the board in its entirety to personal liability, which liability insurance may not protect against. When a board decision vis á vis a corporate officer or single board member is made that shareholders take issue with, litigation will center around whether or not the decision reflected honoring the duty of care and/or duty of loyalty. If the issue between shareholders and the board or corporate officer entails board refusal to take corrective action against a corporate officer or board member, then litigation will take the form of a derivative law suit. Thus, the derivative lawsuit is the vehicle by which individual shareholders can bring disputes over the propriety of board inaction on behalf of the corporation as a whole.

## The Duty of Care and the Business

### Judgment Rule

The duty of care positively obligates a director to perform his duties with the diligence a reasonable person in similar circumstances would so perform. These circumstances are expected to vary according to the context in which the decision, action, or nonaction was taken. Whether or not a decision falls within the duty-of-care standard requires an initial analysis of the “business judgment rule.” This rule, in turn, proves a safe haven from liability and litigious second-guessing by interested third parties over every board decision. The basic idea of the business judgment rule is that a decision based on reasonable information and with *some* rationality does not create liability for a director even if the decision turns out badly for the corporation and its shareholders. Under the American Law Institute’s definition,

A director or officer who makes a business judgment in good faith fulfills the duty of care if the director or officer:

- (1) is *not interested* in the subject of the business judgment;
- (2) is *informed* with respect to the subject of the business judgment to the extent the director or officer reasonably believes to be appropriate under the circumstances; and
- (3) *rationaly believes* that the business judgment is in the best interests of the corporation.” (American Law Institute, Principles of Corporate Governance, §4.01[c])

These conditions, in turn, imply (1) a duty to monitor, (2) a duty of inquiry, (3) a duty to make prudent or reasonable decisions on matters that the board is obliged or chooses to act upon, and (4) a duty to employ a reasonable process to make decisions.

Case law indicates that the courts look for a failure to exercise due care as evidenced by boards failing to prudently examine alternatives, and by failing to seek an informed basis for action before making a decision. At the risk of stating the obvious, a decision that cannot be rationally explained is a decision that fails the rationality standard under the business judgment rule. Decisions that are reckless or improvident can fall outside the business judgment rule. The determination of whether a business judgment is informed depends on whether or

not the directors have informed themselves of all material information reasonably available to them. Eisenberg (2000) suggests that the standard for determining whether a board decision is an informed one is one of gross negligence.

### The Duty of Loyalty

The pledge that a director will fulfill the duty of loyalty, that is, act solely in the interests of the shareholders in supervising the conduct of the corporation, is violated when the director engages in self-dealing transactions that juxtapose the interests of the director against the interests of the corporation. This fiduciary responsibility is strongest for full-time employees in a position to exercise corporate authority, that is, the officers of the corporation. Self-dealing for a director occurs when a director's personal financial interests conflict with the interests of the corporation. Self-dealing problems can be avoided by disclosure of such conflict prior to the approval of a transaction, and/or by having a majority of disinterested directors or disinterested shareholders pre-approve the transaction after the initial disclosure of a conflict.

The duties of care and loyalty are not entirely separate, and there is case law from Delaware that obligates directors to provide true information to shareholders for consideration prior to important decisions. Thus, the duties of care and loyalty imply a duty to disclose, and failure to disclose fully can create liabilities for the directors.

### Standards of Conduct vs. Standards of Review

While the duty of care appears to impose stringent requirements on directors and officers of a corporation, the standards of review are less stringent than the standards of conduct on which they are based (Eisenberg 2000, 545). Eisenberg characterizes the business judgment rule as consisting of four conditions:

- (1) The director must have made a decision. So, for example, a director's failure to make due inquiry, or any other simple failure to take action (as opposed to a deliberative decision not to act) does not qualify for protection under the business judgment rule.
- (2) The director must have informed himself with respect to the business judgment to the extent he reasonably believes appropriate under the circumstances—that is, he must have employed a reasonable decision making process.

- (3) The decision must have been made in good faith—a condition that is not satisfied if, among other things, the director knows that the decision violates the law.

- (4) The director may not have a financial interest in the subject matter of the decision. For example, the business judgment rule is inapplicable to a director's decision to approve the corporation's purchase of his own property.

If the previously mentioned four conditions of the business judgment rule are satisfied, then the quality of the decision that may be reviewed involves the limited standard about whether or not the director acted in good faith, or under the American Law Institute formulation, whether the decision was rational or rationally based. If, on the other hand, the four conditions of the business judgment rule are *not* satisfied, then the standard for review is broader, and entails both rationality *and* fairness.

The market for directors and officers' liability insurance provides a buffer between them and investors, customers, government, and other litigants, since such insurance, when triggered, will pay for the costs of litigation as well as settlements or judgments metered out by the courts. The market for such insurance also provides an additional oversight mechanism beyond investor oversight, since premium costs can be consequential. Further, when insurance carriers view classes of possible decisions and lines of business too risky to insure, corporate directors and officers may find themselves facing enormous personal liabilities which may deter risky decision making.

## SECTION 3: PUBLIC SCHOOL BOARDS AND THE CONDUCT OF PUBLIC EDUCATION

### General

State laws related to public education provide for the establishment of school boards through the election or appointment of school directors and the assignment of certain duties. Beyond providing for the establishment of the school boards and school districts they govern, state school codes provide for significant state financial support for the provision of school services and supervise the basic educational process via mandatory attendance laws for the students, definitions of minimum curricula, competency standards for employment, tenure, removal of teachers and administrators, and graduation

requirements. Because of significant state financial support to local school districts, budgeting, accounting, and financial reporting standards and independent local audit procedures are specified in state school codes, and state audits of annually generated school financial statements are routine. Because the subjects of public education are largely *minors*, considerable attention in state school codes is devoted to protecting the safety and health of students while they are under the control and supervision of the public schools. Because the employees of school districts are *public* employees, employer–employee relations are governed by separate state laws dealing with public employees on such matters as employment and termination procedures, employee health and retirement benefits, and the right to strike.

Historically, local tax support of public education was limited to only those with children in the public schools; however, in the early twentieth century general tax support of public education became and remains the dominant pattern. Since local tax support of public education is on average no more than 49 percent of total local school spending, school boards are typically dependent on state legislatures to provide annual appropriations, and in some states, both annual operating budgets and periodic bonded indebtedness are subject to referenda.

The issues of authorities and responsibilities of local school boards are complicated by the fact that they are in effect governed by multiple jurisdictions. That is, state legislatures appoint state boards of education (or they are elected), which are authorized to regulate public education and local school boards and their school districts; governors appoint secretaries of education (or they are elected), each of whom can issue policy directives that also affect local school boards and their school districts. In this complex policy environment, however, several things do stand out. State law governs state-level agencies and local school board organization and conduct to the extent that a state chooses to specify policy in these areas. If the state law language, however, is vague or contradictory, state and federal courts will tend to avoid meddling over particular decisions or policies unless state or federal laws or constitutional provisions are being directly appealed to. Federal law and decisions on matters of civil rights and federal funding for poor and special children create jurisdictional “hooks” that plaintiffs turn to. Nonetheless, absent clear violations of state law or policy rules, local school boards are free to interpret their authority with substantial latitude. To the

extent that state law is vague or there is no guidance, the courts have generally allowed local boards to legislate and make rules as they see fit. Areas such as the particulars of school discipline, extracurricular activities, the curricula per se, textbooks, the maximum number of school contact days, and the maximum length of the school day remain within the discretion of local boards of education (Russo 2004).

Duties facing local school board directors under state school codes usually entail the basics of the mechanical production of graduates; state law guides such matters as mandatory attendance, minimum contact days per year (typically 180), minimum classroom contact hours per year (typically 900), transportation, minimum curricula by grade level, health and safety, the hiring, retention, and dismissal of teachers, and correlative matters surrounding collective bargaining rights. Only recently have issues of testing or assessment become matters of state policy, and in most states this is largely due to the aforementioned federal legislation of 2001.

### **Becoming a School Board Member**

The overwhelming majority of local school board positions are filled through regular elections after a period of a few years but may be staggered. Since school districts typically have their own local taxing authority, school board elections are consistent with principles of local control. However, the qualifications for being a school board candidate are by and large identical to the qualifications for any other state elected office. That is, candidates must be residents of the jurisdiction where they seek office, must have domiciled in the district for a statutory period before the election, must be of age, and must be willing to take an oath of office upon election. Such nominal requirements suggest that the duty of vetting school board candidates lies entirely with the electorate. Interestingly, very few states have *candidate* conflict of interest or financial interest disclosure requirements.

A few states have additional requirements. Alabama, for example, mandates that members of the city school board “shall be chosen solely because of their character and fitness.”<sup>13</sup> Yet it is unclear as to what party is responsible for qualifying candidates under these restrictions or how the assessments are to be made. Possibly the strongest and most effective candidate requirements are found in Oklahoma, which flatly bars any candidate convicted of a felony or misdemeanor embezzlement. Furthermore, no candidate in Oklahoma may be currently employed or have any blood relatives currently

employed in the school district or board. Also, school director candidates in Oklahoma must pledge in writing to “complete at least twelve (12) hours of instruction on education issues, including school finance, Oklahoma education laws, and ethics, duties and responsibilities of district board of education members” shortly after election.<sup>14</sup> Such detailed and stringent candidate qualifications are certainly more the exception than the rule.

### Oaths of Office

School board oaths of offices are generally applied through state constitutional provisions covering requirements for all state elected officials. Many oaths of office are creatures of state code, while a small minority is provided for school district officials in particular. A common thread among oaths of office is their generality. The typical oath consists of a vow to<sup>15</sup>

- (1) Support the constitution of the United States
- (2) Support the constitution and laws of the officer’s state
- (3) Discharge one’s duties
  - a. faithfully or with fidelity
  - b. to the best of one’s ability
  - c. honestly (some states)
  - d. impartially (some states)

Oaths of office are commonly perceived as perfunctory and purely ministerial—more like a ceremony of initiation than the undertaking of serious duties. The generality of most oaths understandably gives rise to this impression. Still, oaths do serious work, and are especially binding the more specific they are. Courts and legislatures are certainly willing and able to hold state officers to their vows through the initiation and ratification of articles of impeachment.<sup>16</sup>

The obligation to support the constitutions of the United States and one’s home state extends to recognizing the jurisdiction of the courts and the laws of the land. It is difficult to interpret more restrictions much beyond that without running into constitutional trouble.<sup>17</sup>

To discharge one’s duty “faithfully” or with “fidelity” can arguably bind school board members to always act in the best interest of the school district in all their actions and inactions. That is, they are bound to proactively work to fulfill the school district’s mission. However, courts are loath to interpret affirmative duties

when they are not made statutorily explicit. It is more likely that faithfulness and fidelity merely requires a school board member to refrain from egregious abuses of power that harm the district, such as through embezzlement or other comparable acts.

The requirement to act “to the best of one’s ability” seems to impose a duty of diligence on school board members, yet such clauses suffer from the fatal defect of subjectivity. First, knowing human nature, rarely do people put in their truly *best* efforts over a sustained period of time, particularly in volunteer or low-pay positions, as are typically found in school boards.<sup>18</sup> Moreover, it would be nearly impossible to make such a determination in particular cases, as only the person in question truly knows whether they have acted anywhere near their ability and capacity. A persistent drop in performance may be explained away by an equivalent drop in personal ability. In other words, “I’m doing the best I can” will always be a ready and effective defense as such subjective assessments are difficult to disprove.

An oath of honesty, found in a small number of states, at first glance appears to be subsumed by the oath to fidelity—after all, faithfulness and dishonesty seem incompatible. However, some states have decided to include both clauses in their oaths, thus suggesting a significant distinction. Indeed, a basic canon of statutory construction holds that, as far as possible, legislatures draft statutes without redundancies so to avoid rendering similar sounding clauses meaningless. It would not stretch the imagination to think of undesirable acts that are prevented by one clause and not the other. For example, absent a duty of honesty, a board member may lie to the other board members to influence a board decision if the lie is sincerely done “for the good of the school district.”

An oath of impartiality (also found in a small number of states) seems to target those acts that are inherently biased. But what bias is covered? It is quite possible that official actions motivated by nepotism would fall under such a clause alone, but the fact that most of these states felt required to prohibit nepotism explicitly in the school code suggests otherwise. Financial conflicts of interest may be covered, as that may be one of the few biases stronger than family interests, but we speculate the oaths may have been adopted to prevent invidious discriminatory actions such as discrimination by race or religion and possibly partisanship as well.

Finally, to complicate matters, some oaths explicitly require that officers agree to not have conflicts of interest while serving in office. Such additional requirements are relatively rare and when they do apply, and often apply only to a subset of state officers.

To summarize, most school board oaths are identical to the oaths taken by all state officers and thus very general. A minority of oaths are more restrictive regarding honesty and deal directly or obliquely with conflicts of interest. Of this minority, some consist of more restrictive state oaths that also apply to school boards; some are school-board-specific oaths that are more restrictive than their respective state oaths, while some other school board oaths are actually less restrictive than the general statewide oaths. These findings are compiled in table 1.

The oaths of office listed in table 1 set forth the overarching parameters (or duties) governing how public officials must discharge their specific duties of office. Those specific duties are generally fleshed out in the state ethics codes, election codes, and educational codes in particular. As an illustration, Rhode Island mandates the following duties for school board members:

#### **Rhode Island General Laws § 16-2-9.1**

Code of basic management principles and ethical school standards

(a)...The school committee accepts the obligation to operate the public schools in accordance with the fundamental principles and standards of school management, which principles include but are not limited to the following:

- (1) Formulate written policy for the administration of schools to be reviewed regularly and revised as necessary.
- (2) Exercise legislative, policymaking, planning and appraising functions and delegate administrative functions in the operation of schools.
- (3) Recognize their critical responsibility for selecting the superintendent, defining his or her responsibilities, and evaluating his or her performance regularly without directly engaging in administrative processes.
- (4) Accept and encourage a variety of opinions from and communication with all parts of the community.

(5) Make public relevant institutional information in order to promote communication and understanding between the school system and the community.

(6) Act on legislative and policymaking matters only after examining pertinent facts and considering the superintendent's recommendations.

(7) Conduct meetings with planned and published agendas.

(8) Encourage and promote professional growth of school staff so that quality of instruction and support services may continually be improved.

(9) Establish and maintain procedural steps for resolving complaints and criticisms of school affairs.

(10) Act only through public meetings since individual board members have no authority to bind the board.

(11) Recognize that the first and greatest concern must be the educational welfare of the students attending the public schools.

(12) Work with other committee members to establish effective board policies and to delegate authority for the administration of the schools to the superintendent.

(13) Avoid being placed in a position of conflict of interest, and refrain from using the committee position for personal gain.

(14) Attend all regularly scheduled committee meetings as possible, and become informed concerning the issues to be considered at those meetings.

Other states specify the duty to purchase school books, manage district budgeting, hire and fire teachers and support staff, ensure the health and safety of students, prevent racially/sexually discriminatory treatment of students, report attendance records to state authorities as well as many other duties. But interestingly, we have found that no state requires school board members to guarantee that the students under their care leave the education system *actually* and *demonstrably* educated. Rhode Island comes close by requiring that school board members "recognize that the first and greatest<sup>19</sup> concern must be the educational welfare of the students attending the public schools." Yet, through a closer reading, we see that the duty is largely illusory. A duty to "recognize" entails no concrete action once that recognition takes place. One is free to recognize

TABLE 1: STATE OATHS OF OFFICE APPLICABLE TO SCHOOL BOARD MEMBERS

<b>Requirement of Oath of Office</b>	<b>Support Federal Constitution</b>	<b>Support State Constitution</b>	<b>Perform to Best of Ability</b>	<b>Perform Faithfully or with Fidelity</b>	<b>Perform Impartially</b>	<b>Perform Honestly</b>	<b>Avoid Conflicts of Interest</b>
Alabama 1/	Yes	Yes	Yes	Yes	Silent	Yes	Silent
Alaska 2/+ +	Yes	Yes	Yes	Yes	Yes	Yes	Silent
Arizona 1/	Yes	Yes	Yes	Yes	Yes	Silent	Silent
Arkansas 2/+ +	Yes	Yes	Silent	Yes	Silent	Silent	Yes; in contracts
California 1/	Yes	Yes	Silent	Yes	Silent	Silent	Silent
Colorado 1/	Yes	Yes	Silent	Yes	Silent	Silent	Silent
Connecticut 1/	Silent	Silent	Yes	Yes	Silent	Silent	Silent
DC 1/	Yes	Silent	Silent	Yes	Silent	Silent	Silent
Delaware 2/*	Yes	Yes	Yes	Yes	Yes	Silent	*Silent (general oath forbids all conflicts)
Florida 1/	Yes	Yes	Silent	Silent	Silent	Silent	Silent
Georgia 1/	Yes	Yes	Silent	Silent	Silent	Silent	Silent
Hawaii 1/	Yes	Yes	Yes	Yes	Silent	Silent	Silent
Idaho 1/	Yes	Yes	Yes	Yes	Silent	Silent	Silent
Illinois	Yes	Yes	Yes	Yes	Silent	Silent	Silent
Indiana 2/	Yes	Yes	Silent	Yes	Silent	Silent	Silent
Iowa 2/	Yes	Yes	Yes	Yes	Yes	Silent	Silent
Kansas 1/	Yes	Yes	Silent	Yes	Silent	Silent	Silent
Kentucky 2/+ + must affirm eligibility for office	Yes	Yes	Silent	Yes	Silent	Silent	Yes; in contracts + hiring
Louisiana 1/	Yes	Yes	Yes	Yes	Yes	Silent	Silent
Maine 1/	Likely No	Yes	Yes	Yes	Silent	Silent	Silent
Maryland 1/	Yes	Yes	Yes & diligently	Yes	Yes & without prejudice	Only for State Treasurer	Only for judges & high officers
Massachusetts 1/	Silent	Yes	Silent	Silent	Silent	Silent	Silent
Michigan 1/	Yes	Yes	Yes	Yes	Silent	Silent	Silent
Minnesota 1/	Yes	Yes	Silent	Yes	Silent	Silent	Silent
Mississippi 1/ must affirm eligibility for office	Yes	Yes	Silent	Yes	Silent	Silent	Further research needed
Montana 1/ Constitution allows only one form of oath	Yes	Yes	Silent	Yes	Silent	Silent	Silent

TABLE 1: STATE OATHS OF OFFICE APPLICABLE TO SCHOOL BOARD MEMBERS (CONT.)

Requirement of Oath of Office	Support Federal Constitution	Support State Constitution	Perform to Best of Ability	Perform Faithfully or with Fidelity	Perform Impartially	Perform Honestly	Avoid Conflicts of Interest
Nebraska 1/ for class V districts only	Yes	Yes	Silent	Yes	Silent	Silent	Silent
Nevada 1/	Yes	Yes	“Well”	Yes	Silent	Silent	Silent
New Hampshire 1/	Yes	Yes	Yes	Yes	Yes	Silent	Silent
New Jersey 2/+ +	Silent	Silent	Yes	Yes	Yes & justly	Silent	Silent
New Mexico 1/	Yes	Yes	Yes	Yes	Yes	Silent	Yes; in contracts + official positions
New York 1/	Yes	Yes	Yes	Silent	Silent	Silent	Silent
North Carolina 1/	Yes	Yes	Silent	Yes	Silent	Silent	Silent
North Dakota	Yes	Yes	Yes	Yes	Silent	Silent	Silent
Ohio 2/	Yes	Yes	Silent	Yes	Silent	Silent	Silent
Oklahoma 2/*	Yes	Yes	Yes	Yes	Silent	Silent	Silent (general oath forbids financial conflicts)
Oregon 2/+ + Oaths adopted by each school district	Yes	Yes must, also support policies of the school district	Yes	Yes	Yes	Silent	Silent
Pennsylvania	Yes	Yes	Silent	Yes	Silent	Silent	Silent
Rhode Island 1/	Yes	Yes	Yes	Yes	Yes	Silent	Silent
South Carolina Must affirm eligibility for office	Yes	Yes	Yes	Silent	Silent	Silent	Silent
Tennessee	Silent	Silent	Silent	Yes	Silent	Silent	Silent
<b>Total Yes</b>	<b>36</b>	<b>37</b>	<b>23</b>	<b>35</b>	<b>10</b>	<b>2</b>	<b>3</b>
<b>Total Silent</b>	<b>4</b>	<b>2</b>	<b>16</b>	<b>5</b>	<b>29</b>	<b>37</b>	<b>37</b>
<b>Percent Yes</b>	36/41= <b>87.80%</b>	37/41= <b>90.20%</b>	23/41= <b>56.10%</b>	36/41= <b>87.80%</b>	10/41= <b>24.40%</b>	2/41= <b>4.90%</b>	3/41= <b>7.30%</b>

\* Denotes that the school board oath is less restrictive than the state’s general public officer oaths.

+ + Denotes that the school board oath is more restrictive than the state’s general public officer oaths.

1/ Denotes that the school board oath is governed by or relies exclusively on a state’s general oath.

2/ Denotes that the oath applies specifically to school boards.

Source: Appendix 1 State and Federal Oaths of Office

and then ignore. This choice of loose words is likely not by chance as Rhode Island chose to use much stronger (in terms of binding) terms such as “attend,” “avoid,” “work,” “act,” “encourage and promote,” “establish,” “formulate,” “make,” “exercise,” and “conduct” to specify practically every other duty in the code<sup>20</sup>

### **Sovereign Immunity and the Duty of Care and the Standard of Care**

Historically, government entities, including school districts, were able to claim immunity from civil actions against them for intentional and nonintentional acts through the assertion of sovereign immunity. The theory of sovereign immunity derives from the notion that governmental authority, because it derives from the people, can do no (recoverable) wrong against the people. Alternatively, it has been asserted that since a local board does not have the authority to commit a tort so that, were it intentionally to do so, it would be acting beyond its legal authority. The courts have been unwilling to recognize the notion of “educational malpractice” (Russo (2004, chap. 4, 7), which has its counterpart in civil negligence suits. Angry parents and disappointed students have not been able to effectively argue that graduation without commensurate skills at basic levels constituted professional negligence on the part of teachers and administrators.<sup>21</sup>

That said, there are numerous exceptions to the safe haven that school districts and their directors have from civil suits that claim negligence. Activities that are classified as *proprietary*, or those actions that are other than governmental or promoting the cause of education in nature, create liability for a school district. Thus, were a school district to lease a facility for an extracurricular activity, and a student was injured at the activity, then the district would be liable for injury claims. If, on the other hand, the injury occurred at a school-owned facility that was constructed and managed in accordance with state guidelines, the district would not be liable for injury claims. Those suffering personal injury due to a failure of a local board can circumvent the assertion of governmental immunity by demonstrating that the district maintained or allowed a public nuisance to occur, although the determination of whether or not a particular hazard was a nuisance has been a difficult matter for the courts to rule on. Whether or not the board’s act of obtaining liability insurance eliminates the safe haven of governmental immunity, which prevents a plaintiff from recovering monetary damages from the district, has been an issue

in a variety of states. Given recent trends in the courts of finding districts liable, risk-averse districts have increasingly taken out liability insurance, even when the act of obtaining such insurance may contradict school code budgeting requirements.

Beginning in the late 1950s, some state courts held districts liable when students were injured while being transported by school buses. Most states positively obligate districts to follow elaborate, state-specified building codes, and some state legislatures have statutorily put school districts on the same basis as private corporations and individuals for broad classes of health and safety matters.<sup>22</sup> It is settled law, however, that a legislature can prospectively reestablish nonliability in an area that was affected by a court decision.

School board members are usually not individually liable for the exercise of judgment. However, individual liability flows when the negligent act or failure to act was corrupt or malicious, or when the act was outside the scope of enumerated school board duties. School board members face personal liability for duties that are explicit and ministerial as contrasted with duties involving discretion. The issue with a board decision then typically involves the liability of the *entire* board, and whether or not sovereign immunity is applicable.

School boards often are not themselves liable for injuries to students that occur while the students are under the supervision of employed personnel. Liability may flow, however, to the individual teacher whose actions were inconsistent with state or local policy. And that liability may flow back to the district and board if state law, conditions of an insurance policy or school policy implementing state law requires the active supervision of the errant teacher.<sup>23</sup>

When an educator fails to act when there is a statutory duty or regulatory obligation to act, liability may result due to this nonfeasance. When an educator fails to act properly, liability may result as a consequence of malfeasance. Liability may flow to the school board as well if the board fails to monitor dangerous activities that teachers must supervise (athletics are a common problem area), and fail to proscribe rules and guidelines that show reasonable care, then they too may be liable for damages that parents may seek to recover.

### Conflict of Interest

Representative democracy assumes that the policy choices of elected representatives (and their motivations) can, and sometimes should, diverge from their constituents.<sup>24</sup> However, the very possibility of diverging motivations can lead to a host of undesirable conflicts of interests and outcomes. Widespread corruption in all levels of government sparked the Progressive Era efforts to clean up decidedly *un*representative politics nearly a century ago (Levine 2000). The lessons learned from that era have certainly influenced the many state codes of ethics we have today such that state conflict of interest prohibitions are found in elections codes, ethics codes, government (public officer) codes, education codes and even in constitutionally mandated oaths of office.<sup>25</sup>

Turning specifically to school boards, we note that conflict-of-interest prohibitions vary widely by kind and character, but some general patterns emerge. First, the prohibited interests are usually categorized as either personal, financial, and/or familial. Second, the prohibitions are typically confined to certain contexts, usually employment and contracting decisions. Finally, the prohibition's enforcement requires either disclosure, abstention from voting, or resignation from office and covers direct or indirect violations. We shall consider each variation in turn.

#### Personal Interest Prohibitions

Some statutes regulate conflicts in very broad terms. For example, Alabama prohibits a school board member from using "his or her official position or office to obtain personal gain" (Section 36-25-5). Similarly, the Delaware Constitution obligates public officers "to place the public interest above any special or personal interests."<sup>26</sup> These restrictions certainly cover the most egregious conflicts—such as bribery in exchange for school board action—but it is unclear how much farther they extend. What if a school board member undertakes an action that results in a personal benefit but was not a quid pro quo? What if a school board member undertakes a conflicted action but sincerely believes he/she is still voting in the best interests of the district?<sup>27</sup> These general prohibitions might prevent membership in potentially conflicting organizations such as teachers' unions, book publishers, and overlapping government offices. They also could preclude board members from maintaining their positions while suing their own board, although this prohibition is often made explicit by statute.<sup>28</sup>

Precedent suggests this broad language may be very powerful, but further research into court explications of these general obligations is needed.<sup>29</sup>

#### Financial Interest Prohibitions

The most common and extensively regulated conflict of interest centers squarely on money and its equivalents. This comes as no surprise.<sup>30</sup> Bribery, graft, embezzlement, corruption, and self-dealing have accompanied the institution of government from its inception. Government agencies and programs are particularly exposed to theft and abuse because, unlike in the market, returns on investment are notoriously difficult to measure and benchmark. The public school context compounds the problem as it remains largely monopolized and tax financed, thus at relatively greater risk to undetected "leakage" than market-based counterparts.<sup>31</sup>

Legislatures have responded by erecting systematized ethics rules and enforcement apparatuses, coupled with criminal penalties, to ferret out abuses. Embezzlement and bribery—conflicts of interest so obvious they are usually considered just crimes in themselves—are explicitly prohibited for virtually all state elected offices. Softer official malfeasance such as "self-dealing" is often added to the list of prohibited acts, but, it can be much more difficult to spot as it has the air of complying with the law. Montana's public ethics statutes are good illustrations of the multifaceted nature of financial conflict of interests and how they can be addressed.

#### **2-2-121. Rules of conduct for public officers and public employees.**

- (1) Proof of commission of any act enumerated in subsection (2) is proof that the actor has breached a public duty.
- (2) A public officer or a public employee may not:
  - a. use public time, facilities, equipment, supplies, personnel, or funds for the officer's or employee's private business purposes;
  - b. engage in a substantial financial transaction for the officer's or employee's private business purposes with a person whom the officer or employee inspects or supervises in the course of official duties;
  - c. assist any person for a fee or other compensation in obtaining a contract, claim, license, or other economic benefit from the officer's or employee's agency;

d. assist any person for a contingent fee in obtaining a contract, claim, license, or other economic benefit from any agency;

e. perform an official act directly and substantially affecting to its economic benefit a business or other undertaking in which the officer or employee either has a substantial financial interest or is engaged as counsel, consultant, representative, or agent; or for evaluating proposals or vendor responsibility, or renders legal advice concerning the contract.

**20-1-201. School officers not to act as agents.**

The superintendent of public instruction or members of his staff, county superintendent or members of his staff, trustee, or district employee shall not act as an agent or solicitor in the sale or supply of goods or services to a district... Any such person violating this section shall be deemed guilty of a misdemeanor and, if convicted by a court of competent jurisdiction, shall be fined not less than \$50 or more than \$200 and shall be liable to removal from his position.

**Familial Interest (Nepotism) Prohibitions**

Nepotism is defined as the “bestowal of patronage in consideration of relationship, rather than of merit or of legal claim.”<sup>32</sup> It appears that nepotism is a recurring threat to school boards, as it is often singled out and banned in the school board context but not under the states’ more generally applicable ethics guidelines. School boards’ members (by law) work in the same district they live in. Assuming there is some geographic stability to families, this fact alone will tend to concentrate potential nepotism beneficiaries around a school board member’s district. An election in the family of a school board member has the potential of becoming a family full employment act, depending on how one defines family. Statutes vary their antinepotism language widely so that some cover only spouses,<sup>33</sup> others cover immediate family,<sup>34</sup> and some cover “any person related or connected by consanguinity within the fourth degree or by affinity within the second degree”<sup>35</sup> or an equivalent.

**Prohibitions on Interests in Contracts**

When it comes to school boards, we have found the most common conflict-of-interest prohibition deals with interests in contracts. Indeed, in about 10 percent of the states such prohibitions are written straight into the oaths of office.<sup>36</sup> This is an interesting fact because, as mentioned earlier, financial interests are usually *already* prohibited in other provisions in state law such as under

the state ethics or public officers code. Why the need for overlapping provisions? Most likely, the states have learned through hard experience that because school board officials have broad contractual authority they are relatively more likely to face these particular conflicts. For example, a school board member could, with little trouble, steer a construction or accounting or textbook contract to a business that he or she has an interest in, opening the door to significant abuse. The added specificity removes any potential ambiguity and puts school board members on notice.

**Interest in Employment Prohibitions**

The final category of prohibitions concerns the filling or holding of government positions by a board member. As illustrations, compare Kentucky, which commands that a board member cannot “in any way influence the hiring or appointment of district employees,”<sup>37</sup> and New Jersey, which mandates that no board member “shall [] hold office as mayor or as a member of the governing body of a municipality.”<sup>38</sup> As to the latter, the rationale is easy to discern. School boards are designed to be healthily independent of the local executive and might be compromised by board members who wear dual hats. In the words of the National School Boards Association, “in the majority of districts, school boards have taxing authority. That direct oversight—and responsibility—should not be given to politicians whose first priority is something other than education” (NSBA 2003).

As to the ban on influencing the employment decisions of all other persons in the district, the danger is more difficult to see. This might explain why few states have as sweeping a prohibition as Kentucky. Still, one can imagine situations where the persons in charge of setting school policy and budget allocations should be separated from the nitty-gritty of hiring decisions. In other words, the separation limits the temptation of patronage hiring by school board members. For example, school board members in Kentucky are prevented from “rewarding” a political supporter by hiring his son as head custodian of a school.

**Scope of Enforcement**

Many, but not all, state codes prevent conflict of interests when the interest is either “direct or indirect.” This broad language is necessary to close an otherwise large loophole. If a board member steers a contract to a company in which he is merely a stockholder, he or she would indirectly benefit from a potential rise in stock price or increase in future dividend distributions. While

the money would not go directly into the board member's pocket (at least not immediately), these conflicted actions would be allowed, but for the ban on indirect self-dealing.

"Ban" may be too strong a word, as the states do not enforce prohibitions on conflicts of interest equally. While some states indeed disqualify conflicted members from office, others are not nearly as strict.<sup>39</sup> Some states only prohibit voting or deliberating on issue while interested, while others merely require disclosure of interest either before an election or to the board after an election. Finally, some of the conflicts of interest mentioned above are not regulated by school districts at all.

### Immunity and Indemnification

Both corporate boards, through their charters and state laws governing immunity, and school boards, under the theory of sovereign immunity, seek to isolate or exempt themselves from various kinds of liability. Federal law and court decisions, however, in both examples can override these safe havens if federal constitutional or statutory assurances are breached because of the supremacy clause in the U.S. Constitution (Russo 2004, chap. 8). Similarly, state courts can encroach upon or abrogate such immunities if state law is silent on a matter, or until state legislatures override a prior court decision reaching that result.

Some state legislatures have enacted caps or limits on set maximum amounts for recovery for various kinds of claims as another way to limit the risk exposure to school districts, and in reaction to the long-run trend in the courts to limit immunity.

School boards may also seek to lay blame on other parties who contribute to the liability that may arise. More recently, states have enabled school districts to apportion negligence among parties so that each carries a comparative burden of the liability. It is common now for students and parents to sign consent forms that indicate that they, rather than the school board and staff, assume the risk of a particular activity.

Corporate boards are typically indemnified from the costs of a wide variety of lawsuits, but there are limits. For example, indemnification is generally not available for fraudulent acts or in the derivative lawsuit context, as such protection from liability is deemed contrary to public policy.

### Compensation for School Directors

As a general proposition, school directors are reimbursed for out-of-pocket and travel expenses related to attending board meetings; however, actual compensation is typically quite modest. Of the 41 states reviewed above vis á vis their oaths of office, only 23 allowed their school board directors to take any direct compensation or salary for their work. Given that school directors are state agents, obligating them to impose local taxes to compensate themselves for their time spent on behalf of the local school district is curious. In Maryland, not only are the specifics of oaths of office up to each local district, so too are the compensation schemes. The largest salary we were able to find was \$2,000 per month.

## SECTION 4: COMPARISON OF GOVERNANCE OBLIGATIONS FOR CORPORATE AND SCHOOL BOARD DIRECTORS

### Selection

Our review of the structure of duties incumbent on directors of publicly traded corporations and local school boards brings to light a number of similarities as well as a number of significant differences.

In both cases there is federal and state interest in the financial oversight of these organizations, and mechanisms have been devised to reflect immediate stakeholders' interests. Thus, both corporate directors and school board directors are elected by their immediate constituents: shareholders or residents of the school district. Voting by shareholders is weighted by the extent of their financial interest in the corporation while voting by taxpayers follows the principal of "one man, one vote." However, besides the fact that shareholders interests are weighted by their economic interests in the corporation, and voters in a school district may or may not be directly taxpayers,<sup>40</sup> there is the initial disconnect that *children*, who are the immediate subject of education and thereby the immediate beneficiaries of education, are not able to vote for school board directors until they reach age 18. Reaching age 18 typically occurs during the senior year, so the notion of accountability between the school board and their immediate customers is remote. Further, those who are of age and reside in the district, and thereby are eligible to vote in local school board elections, may be far less interested in the activities of the local school district because they currently have no children in the public schools or send their children to nonpublic schools.<sup>41</sup>

Another difference between the two forms of election is their frequency. Corporate directors are typically elected annually, whereas school board directors stand for election for staggered terms that are usually four years in duration. This means that accountability in the case of school board directors is much more indirect, and the opportunity to express ones support or lack of policy through the ballot box is so infrequent to make it unlikely.

Perhaps more important than the nature of the electoral differences is the difference in exit strategies available to unhappy stakeholders. A corporate investor who is unhappy about the decisions made by the current board of directors can immediately show his displeasure with the conduct of the corporation by selling his shares in the corporation and investing in another whose prospects are more appealing. Residents in a school district who may be unhappy with the results of the district's educational policies vis á vis their children do not have the same sort of immediate redress. As every parent knows, finding a suitable alternative school requires search, and uncertainty about whether or not the next school will be truly better than the current school. Further, the practicalities of changing residences may also militate against immediate or prompt solutions to perceived educational shortcomings of the current school.

What an investor knows about his corporation's progress in terms of quarterly earnings and dividends, and what a resident knows about his school district's progress, are also very different. While both directors must monitor and disclose systematic information about the financial position of the organization, school board members are not nearly as informed as their corporate counterparts about the educational progress of their students. Moreover, in most states, until very recently school board directors were not required to monitor the educational progress of their students. Even now under the requirements of the NCLB, comparative information about the progress of one's own child in meeting various goals is quite qualitative, and the standards of evaluation are really not comparable from state to state. While statistics on graduation rates and the percentage going on to postsecondary education are collected and disclosed by state agencies, districts do not systematically report on the type of education and employment that their graduates attain so that an interested parent can, on the basis of public information, make an informed location decision. Thus, while monitoring occurs in both

the corporate and school situations, the quality and nature of information is quite disparate.

### **Assertion and Acceptance of Responsibilities**

Corporate responsibilities are positively asserted through governance statutes that set standards of conduct and review, while school board responsibilities are minimal, and particular topics that have arisen are dealt with negatively through prohibitions. However, high standards may be frustrated by the adverse self-selection of candidates for school board office. Since these positions are largely unpaid, some school board members may be tempted to seek monetary compensation in other ways. In fact, in the corporate context, many of the ethical duties of loyalty bind boards of directors *precisely because* they are paid positions. According to standard corporate law interpretation, "corporate officers and agents owe a fiduciary duty to the corporation. The common law standard imposed involves a high degree of honesty, good faith, and diligence *because corporate officers and agents render services for pay*, and are often full-time employees" (Hamilton 1996, 277-78; emphasis added). It is harder to justify imposing these high corporate obligations on public officers when they remain uncompensated. In fact, the imposition of obligations and liabilities pose additional risks that would normally demand additional compensation. After the *Smith v. Van Gorkom* decision in Delaware (488 A. 2d 858 [1985]), which increased corporate liability by weakening the business judgment rule, corporate directors demanded a shield for their personal exposure. One noted commentator recounted the wake of the decision as follows:

Some outside directors began to reassess their decision to be directors, and isolated instances of resignations were reported. The number of lawyers serving on the board of directors of their clients declined. And some people reported that it was becoming increasingly difficult to persuade desirable persons to serve on boards because of the potential risks involved, despite the level of compensation and the availability of indemnification and insurance. The response in Delaware to the decision in *Van Gorkom* was prompt. In 1986, § 102(b)(7) of the Delaware General Corporation Law was amended to authorize corporations to amend their certificates of incorporation to eliminate or limit the personal liability of directors for monetary damages, with certain exceptions. These exceptions are (i) for breach of directors' duty of loyalty to the corporation, (ii) for acts or omissions "not in good faith or which involve intentional misconduct

or knowing violation of law,” and, (iii) for any transaction from which the director derived an improper personal benefit. Thousands of Delaware corporations promptly amended their articles of incorporation to take advantage of this new provision, which was quickly adopted in many other states. (Hamilton 1996, 390–91)

A lack of compensation is likely already having a detrimental effect on local school board recruiting today. A survey conducted by the New York State School Boards Association in 2001 found that almost one-third of all school board candidates in New York ran unopposed. Similarly, the National School Boards Association reports that,

School boards across the nation are finding fewer people are interested in running for the board. School board leaders attribute the dearth of candidates to a variety of factors, ranging from increasing demands on school boards to stronger accountability measures for schools and students. Shrinking school district budgets force board members to make unpopular decisions about closing schools and cutting staff. Some potential candidates are discouraged by the extensive workload, which leaves less time for family and other activities. (Chmelynski 2003)

Under these circumstances compensation seems to be a reasonable predicate to the imposition of additional duties.

### **Monitoring and Detection Devices in the Private and Public Sectors**

Both publicly traded corporations and public schools are monitored by various external auditors to ensure that directors and officials do not abuse their governance positions to the disadvantage of stakeholders, and to ensure that the organizations, overall, are financially transparent. However, whereas publicly traded corporations are subject to substantial federal oversight through federal securities law, and the standardizing influences of a national capital market, the preponderance of monitoring and oversight for public school officials occurs in state capitals, which necessarily implies greater heterogeneity in oversight and subsequent conduct.

Under the duty of care, corporate boards are responsible for maintaining systematic internal controls, and, to remain within the safe harbor of the business judgment rule, must reasonably inform themselves prior to making board decisions. Personal liability for individual board members usually involves questions about loyalty

and engaging in self-dealing. Typically articles of incorporation obligate an interested board member to actively disclose to the entire board potential conflicts ahead of time. Counterpart mechanisms for public school board members involve financial disclosure while a board member, and prohibitions against approving certain kinds of transactions as a board member that might be self-interested. As noted, however, state laws vary substantially in whether indirect self-dealing through a relative, or on behalf of a relation, is effectively precluded. This issue is especially evident during board voting on personnel matters and teacher hires. Even if an interested school board member abstains from a vote on the decision to hire a relative, most state statutes do not prevent *quid pro quos* from occurring. When we compare the *scope* of self-dealing limitations that govern school board directors vis á vis their private-sector counterparts, we note that it is frequently far more narrow. Recall that prohibitions may be limited to contracts and personnel decisions, and may be silent with respect to the sale and purchase of real property, the issuance of debt, related legal and accounting fees, and so forth.

External stakeholders in the private and public sectors require and obtain reliable, independent audits of the financial position of publicly traded corporations and publicly supported school districts. In both cases, this information provides valuable monitoring information to respective private and public boards, and is used by capital markets and state legislatures to serve their respective interests to monitor the financial positions of the organizations. For current and potential investors, federal securities law requires the annual disclosure of identically prepared and publicly reported financial information in compliance with Regulation 10-K. This public disclosure helps corporate directors maintain their fiduciary relationship to the capital market. Overall, school districts finance through taxes and fees 42.8 percent of total K–12 spending. Federal aid totals 7.8 percent and state aid 49.4 percent.<sup>42</sup> Accordingly, the federal government, through the U.S. Department of Education, promulgates standard financial classification and accounting rules for public school districts. The states obligate their delegated agents, local school boards, to not only maintain their books and records in accordance with federal and state strictures, but also require local independent audits that are confirmed by state audits as well. It should be emphasized that in both cases, the monitoring and independent information involves the *financial* position of the corporation or school district.

Until the enactment of No Child Left Behind in January 2002, the federal government did not require each state, as a condition of receiving federal aid, to assess students in its public schools with federally approved standardized tests. Section 1111 of the NCLB requires states, through the required state plans, to devise a statewide system of assessment that must be approved by the federal government prior to the state receiving federal monies to implement the law. Even so, the required system of assessments is phased in over a period of time.

Of course, measuring the academic progress of all children in public education is in many respects more difficult than measuring the profitability of a publicly traded corporation. While both activities are subject to systematic measurement, measuring profitability is a far less controversial undertaking than measuring the learning of children of different ages. This difference no doubt reflects the lack of agreement on what constitutes adequate yearly progress of students in reading, mathematics, and so forth.

### Sanctions for Conflicts of Interest

Regular elections are seen as the ultimate antidote for unethical board members, both in the corporate and public contexts, but this assumes every misbehaving board member can be caught and thrown out of office. Since unethical board members are quite easily able to hide malfeasance for a time (and sometimes forever) stronger deterrents are needed. Personal liability for unethical board members, in some form or another, is required.

But, as we have seen, conflict-of-interest governance differs greatly when comparing boards for publicly traded companies and boards for public school districts (as well as differing greatly among school districts). Some state school codes at first glance seem to exceed the duty of loyalty in the corporate sector through bans on conflicted persons from running for office or continuing to hold office. However, these limits are typically narrow and include exceptions. In any event, these somewhat diluted “total” bans are only found in a few states.

More commonly, school board members are typically prohibited from voting on self-interested matters, which appears to closely parallel the corporate duty of loyalty. However, upon closer inspection, significant differences do emerge and revolve around the issue of scope. To begin with, school board prohibitions typically focus on contracts and are not always exhaustive at that.<sup>43</sup>

Moreover, if there is adequate disclosure or if a contract is subject to an open public bidding process, interested board members are in some states allowed to actually vote on the contract. This latter practice differs from the corporate norm where a majority of *disinterested* directors are required to approve transactions after a conflict is disclosed.

The scope of prohibited interests is further narrowed in those states that do not cover both direct and indirect interests. Whereas the duty of loyalty in the corporate context has been interpreted broadly, states that do not prohibit indirect interests open a wide door to abuse. Creative accounting and the help of seemingly disinterested accomplices can make many direct conflicts look rather indirect indeed.

The mechanism for remedying violations is probably the single largest area of difference between the corporate board and school board ethics regimes. Once an undisclosed, executed, conflicted contract is discovered, school districts often handle the matter through state ethics commissions. Corporate malfeasance is typically handled directly through the courts. Board members may bring civil actions on behalf of the corporation against conflicted board members in order to “unwind” interested contracts. Similar unwinding is available in the school board context, but is typically initiated through ethics commissions and such claims may be time barred<sup>44</sup> or limited only to the profits or commissions arising from the contract.<sup>45</sup>

But what if a school board or an ethics board fails to pursue ethics complaints against a school board member? In the corporate context, individual shareholders may file derivative lawsuits, that is, suits on behalf of the corporation in the face of board of directors’ inaction.<sup>46</sup> Moreover, the costs of instigating such lawsuits are reimbursable by the corporation if the plaintiffs prevail. It is unlikely that any comparable mechanism exists for ordinary citizens desiring to hold school board members accountable in the public school context.<sup>47</sup>

While school board ethics mechanisms may not be as robust as the corporate board counterpart, the state laws do have one clear advantage. Since state ethics transgressions are usually categorized as misdemeanors, fines and even short-term incarceration are punishment options. This compares favorably to the corporate context, where prison time is typically not available outside of stock insider trading, embezzlement, and fraud.

Further research is needed to uncover just how often prison time has been meted out in school board conflict-of-interest cases, but we suspect such prosecutions are rare. The single largest factor contributing to this result is likely the strict requirement of *mens rea*, or criminal intent. School board members must *knowingly* violate the conflict-of-interest prohibitions before facing criminal sanctions, and ignorance of the law is for once a good defense. A strengthening of oaths of office to include a vow to avoid (or disclose) conflicts of interest will serve to put board members on notice as to their positive obligations and erase many ignorance defenses.

## SECTION 5: IMPROVING PUBLIC SCHOOLS THROUGH STRENGTHENED LOCAL CONTROL

### General

School board directors' responsibilities contrast starkly with their publicly traded corporate counterparts. While the former are typically obligated to merely uphold the federal and state constitutions, the latter must demonstrate a standard of care that depends on principles of prudence and ordinary judgment. Even though there is widespread concern about the state of public education in our urban schools, national and state pressures for improved performance remain, in our judgment, essentially unheeded. What we observe when we look closely at the obligations public school board directors must honor is that they are vague and, in many respects, unmeasurable. The question we address here is what sort of modifications to the oaths of office and ethical supervision that school board members may be subjected to could materially change what they do? Several immediate points are worth making.

First, if public policy were to impose new obligations and liabilities on school board members, it is important to accompany these new responsibilities with an incentive structure that is self-reinforcing. As noted earlier, in most states, school board members are essentially volunteers who devote far more time than their corporate counterparts on a monthly basis. Eisenberg estimates that directors of large, publicly traded corporations devote no more than 150 hours per year to their typically well-compensated jobs, while Hess<sup>48</sup> reports that, overall, public school board directors devote between 130 and 600 hours per year of their typically volunteer time. Additionally, school districts should indemnify the costs of successful litigation defenses and in limited circumstances may even cover losses, but not for any breaches of loyalty, fraud, or cases of gross negligence.

Second, while corporate directors and managers are obligated under the *Ford* decision to maximize shareholder wealth, the primary objective of school directors is vague. The terms "education" or "public education" are typically not defined in state school codes. Obligations of school directors are more often defined in terms of prohibitions to avoid accusations of negligence than in positive assertions of what they are supposed to be paying attention to. In economic terminology, school boards should be clearly obligated to maximize one outcome, just as their private-sector counterparts are. In our view, the primary focus of local education should be improving the learning of each child in relation to their capacity. "Learning" is more concrete than "educating" and carries with it the common sense notion of acquiring knowledge and skills that entail

- Study of English through spelling and the rules of grammatical construction, writing, and the appreciation of literature
- Study of American and world history, social studies, and civics
- Study of mathematics
- Study of science (botany, biology, chemistry, and physics)
- Study of music and the arts.

Third, our review of states' related statutes and practices with respect to the counterpart *duties* indicates that they are scattered among various statutory provisions—sometimes in state ethics codes, sometimes in provisions affecting all government officials, and sometimes in school codes per se. We see merit in developing not only a prototype oath of office that would parallel the above-described duties of care, but also incorporate a duty of loyalty and the corresponding business judgment rules that would provide a safe haven for school directors from frivolous petitions and litigation.

Fourth, we take it as a given that any oath of office obligates school directors to positively affirm their support for the federal and state constitutions. Finally, we also take as a given that school board directors should be amply compensated for their time and affirmation not to engage in self-dealing, and that there is merit in their salaries being paid out of state monies in recognition of their agency relationship with their parent legislature. Our suggested language in these areas follows.

### A Suggested Board Director Oath of Office

The following oath emphasizes the idea that *learning* is the primary objective of public education, and that both board members and senior education leaders<sup>49</sup> would affirm it:

“I [name], a duly elected or appointed school board director or senior education leader, do solemnly swear:

To support the constitution of the United States and to support the constitution and laws of this state,

To allocate school resources and effect educational policy solely for the purpose of ensuring that each student learns to his or her intellectual capacity, and

To discharge these duties loyally, honestly, impartially, and with diligence and care, so help me God.”

This suggested oath of office achieves *focus* by requiring that learning to capacity be the standard against which board decisions should be evaluated. Note, too, that the affirmation is for each student, and is not a promise to be evaluated against a standard of *average* or representative student learning vis á vis *average* or representative capacity. The suggested standard also has an implied egalitarian premise to it that might indirectly impact current limitations on student participation in various after school activities. Further, since board members, superintendents, assistant superintendents, principals, and assistant principals would affirm the objective of student learning as their purpose and point of focus, any shirking that might have existed before would be eliminated by the implied liability in taking this oath of office.

This affirmation would significantly clarify many educational issues that now get muddled in discussions about what constitutes a properly educated person. For example, it is likely that participation in music of various types (choral, instrumental) is not universal in most school districts. Were a board to conclude that participating in learning about music is valuable, it would have to at least offer, if not require, that such experiences be available or required for each child. Otherwise, the oath would not be fulfilled since it references *each child* as the subject of the oath.

Consider how this oath might impact a budget decision on, say, the choice between updating history books in the middle schools in a district, compared to putting Astroturf on the football field. Both would involve the allocation of considerable resources, and under the suggested oath of office the board would have to evaluate the purchase of new textbooks and updating a football field against the standard of improving student learning. It would seem likely that the textbooks might be more favored under this oath of office as contrasted with the sort of guidance that boards currently face from their state board of education. It seems far less likely that boards could conclude that updating the football field would ensure students would learn to their intellectual capacity, and would find the argument for investing in modern textbooks to be quite compelling vis á vis learning.

Note, too, that the proposed oath contemplates not only the expenditure of resources, but the broader regulatory activities of *education policy*. Again, the oath focuses the decisions to favor those policies that will more likely ensure student learning. Thus, when choosing a new textbook, both those recommending texts (the educators) and those deciding which to adopt (the board) will have to consider which texts will improve student learning the most. In doing so they will have access to the safe haven of the proposed school judgment rule (see below), but only if they make the decision in a specific manner.

Finally, the proposed oath links substantive board member obligations with both a duty of loyalty and a duty of diligence and care. This *objective* duty of care replaces the similar in intent, but practically ineffectual, *subjective* “best of my ability” standard found in most state oaths. One state, Maryland, already supplements its subjective test with an objective one, and more will hopefully follow.<sup>50</sup> Likewise, a duty-of-loyalty standard in oaths of office is not novel. Delaware’s constitution mandates that all public officers swear to “always to place the public interest above any special or personal interests” in discharging their duties. It appears that this constitutional amendment of 1987 is a direct importation of Delaware’s well-developed corporate governance standards. Our suggested amendments would merely apply Delaware’s loyalty standard for public officers to school boards in other states.<sup>51</sup>

### **A Suggested School Board Director Affirmation of Duty of Loyalty**

As noted in the review of state ethics laws, state limitations on conflicts of interest are an amalgam of direct limitations, open procedures, and disclosure. The amendments to the oaths of office outlined above must be supplemented by clear statutory elaboration (and if need be, court interpretation). Newly elected school board members should, as much as possible know, what they are binding themselves to. In 18 U.S.C. Sec. 201, a high federal standard defines what constitutes bribery, graft, and conflict of interest for various federal officials, and would appear to deter most, if not all, of the objectionable or questionable school director conflicts.

Consider the following reworking of 18 U.S.C. 201 as a predicate statutory requirement for receiving state education monies:

Any school board director or person selected to be a public school board director who, directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity, in return for:

- (a) being influenced in the performance of any official act;
- (b) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud on the state; or
- (c) being induced to do or omit to do any act in violation of the official duty of such official or person;

Or whose deliberate actions place personal interests in conflict with the director's duty to the school district and fails to fully and fairly disclose such conflict before a public school board meeting;

Shall be fined under state law not more than three times the monetary equivalent of the thing of value, or imprisoned for not more than fifteen years, or both, depending on the severity of the violation and may be disqualified from holding any office of honor, trust, or profit in the state.

The proposed duty of loyalty for school directors, based on federal law and corporate governance principles, is far more inclusive than the state statutes we have

reviewed and includes both substantial monetary penalties for its violation and holds forth the additional possibility of substantial incarceration. Note that both direct and indirect corruption of any sort is covered, and the personal receipt of anything of value constitutes a violation of this duty of loyalty and is not limited, as we saw earlier, to contracts or the hiring of school personnel.

Liability insurance, if available, constitutes a buffer solution (though imperfect) for corrupt board members because the insurance companies have a significant incentive to monitor and correct any situations that pose undue financial risk to them. As stated earlier, indemnification would not be available for knowing breaches of the duty of loyalty.

### **A Business Judgment Rule for School Board Directors**

We next rework the American Law Institute business judgment rule for our prototype governance environment for school directors. Recall that the intention of fulfilling these conditions is to provide a *safe haven* for school directors from frivolous actions or litigation by aggrieved parents and taxpayers in the district. We suggest:

A school director or senior education official who makes a school judgment in good faith fulfills the duty of care if the school director or senior education official:

- (i) is *not interested* in the subject of the school judgment;
- (ii) is independently *informed* with respect to the subject of the school judgment to the extent the school director or senior education official reasonably believes to be appropriate under the circumstances; and
- (iii) rationally believes that the school judgment is in the best interests of the school district in ensuring that each student learns to his or her intellectual capacity.

These conditions, as in the case of the director of a publicly traded corporation, then, imply (or could be explicitly stated in an ordinance or state law):

- a. a duty to monitor
- b. a duty of inquiry

- c. a duty to make prudent or reasonable decisions on matters that the school board or senior education official is obliged or chooses to act upon
- d. a duty to employ a reasonable process to make such decisions.

Because both school board directors and senior school managers are covered by this obligation, it follows that the superintendent quoted at the outset of this paper, who defended himself in the face of very large racial achievement gaps by arguing that his school board had not made closing the racial achievement a priority, would no longer have a place to hide. Similarly, any school principal who, as a consequence of falling within the definition of a senior education official, failed to be informed of student learning shortfalls in her building, would not be able to defend herself by being within the school judgment rule, and thereby would face liability. Further, as a consequence of the determination of such large racial achievement gaps, there would be a breach of the underlying oath of office that affirms that school decisions are to be solely taken to ensure that each student learns to his or her intellectual capacity, and the prospect of liability for that breach would become quite real and meaningful.

Good management entails constant monitoring and the use of information to make decisions. The combined effect of the proposed oath of office and the proposed school judgment rule would be to obligate school level managers to pay close attention to student progress, and the activities of their teachers and related staff that impact on such progress. The construction of this type of governance mechanism implicitly places responsibility on the chain of management command between the superintendent down to the school teacher for assuring student progress on what happens with each student in the classroom and the student's teacher.

The qualification that the school director or senior school official be *independently* informed deserves comment and explanation. When a teacher engages in grade inflation, that is, assigning high grades to all students without regard to performance at a high standard of demonstrated learning, the teacher's supervisors (principal, superintendent) will be unaware that actual learning is not taking place. Similarly, remarks are in order for social promotion. The notion of independent monitoring means that whether or not learning is taking

place is the result of a disinterested party doing the evaluation of that learning. The teacher, because she is presumed to be initially responsible for the learning of students, cannot be viewed as independent in informing her supervisor that the learning in fact took place. Just as quality control in the production of a wide range of services entails a third-party examination of customer satisfaction and comparison against a standard, independent monitoring in schools would require a third-party examination of whether learning to capacity was actually taking place. This might be accomplished by the school board creating their own independent learning-audit capability, the development of external learning-evaluation services, and/or the use of various kinds of standardized learning-evaluation procedures. Having teachers anonymously grade each other's students' work might be a simple way for school managers to begin to obtain independent information about the extent of learning; however, the standard of evaluation, and ultimately the underlying curricula to be covered, would become matters of discussion and policy.

#### **Parental and Taxpayer Standing and Derivative Lawsuits Against School Board Directors**

When a student fails to learn to his or her capacity, the question arises as to who is the aggrieved party, and who has standing to argue that responsibility for this shortfall lies with school board and senior education officials. When there are positive acts that lead to such learning shortfalls, for instance, the reliance on "whole English" as a method of teaching spelling and writing that many believe demonstrably leads to poor spelling and writing skills, then the liability can become real when monitoring demonstrates that the choice of using "whole English" curricula is responsible for these poor skills. However, there remain two thorny problems: First, who in this new governance framework should have standing to bring pressure on school board to correct its errant decision in a court of law? Second, what recourse should there be for learning shortfalls that reflect the failure to act?

In the corporate arena, when a board of directors acts contrary to shareholder interests and in violation of their duties, the stakeholders are allowed to sue the board derivatively in the name of the corporation (and be reimbursed by the corporation for a winning effort). Since the model oath of office ties school board duties to the mandate of ensuring students learn to their intellectual capacities, the stakeholders, that is, the persons most likely to gain or lose from board actions, are the

individual students. Thus, when school board members act contrary to student learning interests and in violation of their duties, the students should be allowed to sue the board derivatively in the name of the school district, and likewise be reimbursed for prevailing efforts. Of course, as minors, the students' interests would be best protected and represented by their parents. In urban districts, however, children are statistically more at risk of not having natural parents but may have a guardian or foster parent who is in charge of their well-being. This suggests at a minimum that standing to bring action against a school board be granted to not only natural parents but to foster parents and guardians of each child.

There are other parties highly interested in the efficacy of public education that merit consideration: taxpayers and residents. Surely those who contribute to defraying the costs of local public education have an interest in the outcomes of such spending. Similarly, those who reside in a district and are of voting age can participate in the election of school board directors, thereby creating a correlative interest in the decisions and actions of school board members. However, there is still a risk of waste and deadweight loss if school derivative lawsuits are abused. This risk exists despite the fact that judges would summarily dismiss frivolous lawsuits, the school judgment rule would protect diligent and good faith school board decisions, and school districts would be expected to indemnify board members that prevail in court. Reasonably prudent school board members should not be expected to constantly deal with lawsuits, otherwise there will be few qualified candidates left applying for the job. This risk can be mitigated by granting standing only to a limited set of stakeholders. However, the risk of waste and annoyance must be balanced against the salutary effects of widening the universe of standing, that is, against the benefits of having more eyes holding school boards accountable in this new system of governance.

### **Some Implications of an Important School Board Decision: Hiring Teachers**

Several years ago, in conjunction with the reform of teacher certification requirements in Pennsylvania, the second author of this paper undertook a major empirical study of school board hiring practices for the Pennsylvania State Board of Education<sup>52</sup> and found that half of Pennsylvania's school districts did *not* have written hiring policies, and that in an average district 40 percent of the district's teachers had attended that district's high school. Moreover, various measures of

student achievement were inversely related to this measure of hiring insularity or possible nepotism.

Could a school board operating in this new governance environment openly or covertly engage in nepotism vis á vis the hiring of a new teacher? We think not.

The proposed duty of loyalty strictly prohibits deliberate actions that place personal interests in conflict with the director's duty to the school district. Setting aside a teaching job for a family member would obviously violate the duty of loyalty as outlined above, as it would place personal interests above student learning. Moreover, this duty will be buttressed by oaths taken by individual board members.

Would the new governance environment obligate the school board to hire the most academically qualified teacher candidates? Were the oath of office to require merely that students be educated to their intellectual capacity, there might be some room for interpretation on this issue, as education focuses on inputs. However, moving from education to "learning" outcomes would seem to more strongly imply that the teacher herself must be learned in order to impart learning to her students. Again, we suggest that the new governance environment would move the school board to focus on what teachers themselves know, once they become convinced that what teachers know positively impacts student learning outcomes. Certainly, the implied duty to monitor that derives from the suggested school judgment rule would encourage school boards to pay close attention to the linkage between the school inputs they control and student learning outcomes, which they would now be responsible for. Educational researchers likely would find greater interest in these matters than has been the case historically.

### **Implementation Issues and the Matter of Dillon's Law**

While we believe we have provided a coherent argument for moving school governance much closer to the model that applies to widely held, publicly traded corporations, the idea may be so novel for those in public education that objections related to their practicality, feasibility, and undue risk may be expected to arise in defense of the status quo. While the analogy we argue is appealing, we can not demonstrate any firm empirical evidence in support of a new model of governance that conclusively demonstrates that student learning will improve. Of course, our analysis and comparisons do

highlight the ambiguous circumstances under which school board directors currently govern. Several points should be made to bulwark the adoption of such an approach. First, we believe that the new governance structure is far more transparent than the current situation in most states, and as transparency becomes appreciated by school board members, it should actually *reduce* risk and liability, and thereby insurance costs. Second, even though our model is more severe in prohibiting and sanctioning corrupt conduct, it is not that much more demanding than current school law in providing school boards a safe haven. What is different, however, is that under our model of school governance, the safe haven occurs in diligently monitoring student learning and requiring that decisions be informed and reasonable. Further, the oath of office in effect states that no child will be left behind as a matter of school board policy. Moreover, the standard to be measured against is what each student is capable of.

We thus find state enactment of this new model of school governance to be meritorious and within the purview of state authority in the area of public education. It is possible, perhaps even likely, however, that existing interest groups such as associations of superintendents and principals and teachers unions will find offense in the enactment statewide of these new obligations on school board directors. They would correctly perceive that more focused and vigilant school boards would more closely monitor their activities and insist on changes in process and conduct that would ensure that they could honor their oaths of office. Further, senior education officials might balk at having to swear, along with school board members, that they would act solely to ensure that each student learns to his or her intellectual capacity. Public discussion of such a perspective would, in our view, be healthy, for it would identify current impediments to improving student learning.

The question remains, however, whether or not any school board, without state enabling legislation, could obligate itself to follow this new form of governance. There is already precedent in five states<sup>53</sup> for making local school board oaths of office stricter than those applying to other public officers<sup>54</sup> These states do not seem, however, to require duties of loyalty and care as precise as those suggested above. Thus, local districts in states that wish to pursue our proposed governance model would need to fully incorporate our suggested standards in their oaths of office and ethics ordinances. Given the latitude accorded to states to tighten their

oaths of office, there seems to be no impediment for districts to implement the proposed amendments.<sup>55</sup>

It is our view that any politically independent local school district could do likewise, since school districts, as contrasted with a municipal corporation, are instrumentalities of state government, and far more like home-rule communities than the form of government that Judge John Dillon sought to regulate in *Clark v. City of Des Moines* (1865).<sup>56</sup> Recall that under Dillon's rule, municipal corporations may not exercise *any* power unless expressly granted in words by the legislature. However, as Richardson points out, only five states still rigidly follow Dillon's rule even for *municipal* corporations (Richardson 2000, 20).

## SECTION 6: SUMMARY AND CONCLUSIONS

The purpose of this paper was to compare and contrast governance procedures in widely held, publicly traded corporations and public school districts. Based on a close reading of public oaths of office and ethics statutes in 43 states and the typical provisions of corporation law, we observe wide differences in the nature and detail of governance structures. While both organizations entail elected directors, the duties and standards of evaluation for directors of widely held, publicly traded corporations are more extensive and transparent than those facing elected or appointed school directors.

To recap a few findings from our extensive review of state oaths governing school board directors' conduct, only 4.9 percent of the states positively obligate directors to perform honestly; about half require that board directors perform to the best of their ability; only a quarter require that school directors perform impartially; and, remarkably, only 7.3 percent (three of 41 states) require that school directors avoid conflicts of interest.

We think that obligating school officers to positively affirm that they will allocate resources and effect policy *solely* for the purpose of ensuring that each student learns to his or her intellectual capacity directs attention to what students, parents, and taxpayers expect from public education in the twenty-first century.

While some may find this new set of responsibilities possibly far too risky to undertake, we couple these suggested obligations with an explicit safe haven from frivolous litigation that flows from a positively stated school director business judgment rule. This safe haven shields

all school directors that monitor and remain informed and that exercise reasonable judgment. Additionally, school districts would indemnify all school board members that prevail in court.

It is reasonable to expect that school boards that adopt such governance procedures will not only pay more attention to what their students accomplish by way of learning, it will require superintendents and their managers to pay more attention to what is going on in the classroom. It will obligate them to be far more certain that any direction or redirection of resources and school policy actually improves student learning. For example, this standard could readily lead to explicit discussions about whether the prudent course of action is to raise all teacher salaries or only those whose students are learning—particularly when collective bargaining agreements are under negotiation. Moreover, the governance procedures would likely encourage school principals to monitor and intervene when some teachers' students are systematically doing better or systematically doing worse in terms of learning to their intellectual capacities.

While our first preference would be for states to enact new oaths of office that reflect meaningful obligations supplemented by a much more stringent duty of care and loyalty ordinances than can be found in current state law, we recognize that there may be substantial

political resistance to such innovations. Yet, such legislation seems well within the discretion that local school boards currently have available to them, and we hope that some will venture forth with this new governance model and its higher standards.

As these proposed amendments are adopted, changes in student learning and school organization should appreciably reflect the greater interest and focus on learning outcomes that such rules will likely generate. Where in the five states mentioned above that have adopted more stringent oaths of office, there may already be measurable results of such natural experimentation to compile and compare. Certainly, the impact of school governance on student learning is worthy of further research.

#### **ACKNOWLEDGMENTS**

The authors wish to thank Mrs. Carrie Severino for her assistance in reviewing state statutes governing the appointment, oaths of office, and ethics and budgeting statutes that pertain to school board directors. The findings and views of this paper are the sole responsibility of the authors and do not reflect those of the Federal Reserve Bank of Cleveland, the Becket Fund, Carnegie Mellon University or its board of trustees.

## ENDNOTES

<sup>1</sup>The Governments Division of the U.S. Bureau of the Census (2002) identifies 13,726 school districts that are created to provide public elementary, secondary, and/or higher education and have sufficient administrative and fiscal autonomy to qualify as independent governments, and 1,508 municipal entities that provide these public education services. Thirty-one states organize public education through entirely independent school districts, 15 states contain both dependent and independent school districts, and four other states and the District of Columbia organize public education entirely on the basis of political dependent systems.

<sup>2</sup>This is settled nineteenth-century law (Russo 2004, 139).

<sup>3</sup>The usual constitutional requirement is for the legislature to provide for a “thorough and efficient” education for the children of the state.

<sup>4</sup>Periodically, Congress has sought to expand the federal role in local public education. However, as Kirst (2004) points out, between 1862 and 1963 Congress considered and rejected 36 times unrestricted federal aid to school districts.

<sup>5</sup>This was done first because of concerns over equality of access to public education for students of color, and subsequently for special needs students.

<sup>6</sup>See Section 1116()(1)(E)(i) of the No Child Left Behind Act of 2001, Public Law 107-110 of the 102nd Congress, signed by President Bush on January 8, 2002.

<sup>7</sup>The ideas presented below are a synthesis and amplification of those found in Kolb and Strauss (1999) and Strauss (1999).

<sup>8</sup>There is, of course, a wide variety of corporate forms. However, for the purposes of drawing a comparison to a public school district, the publicly traded corporation, with a separate board of directors and separate management, is the most reasonable point of comparison.

<sup>9</sup>Eisenberg (2000) estimates that an external director devotes 140 to 175 hours per year to his corporation.

<sup>10</sup>That is, one share of stock entitles the owner to one vote in the choice of directors and in the voting on major

matters (mergers, acquisitions, divestitures, etc.) brought to the attention of shareholders for determination.

<sup>11</sup>The American Law Institute and that American Bar Association each has developed good practices recommendations in the area of corporate governance.

<sup>12</sup>170 N.W. 668 (Mich. 1919).

<sup>13</sup>Ala. Code 1975 § 16-11-2(c). Qualifications for county school board are even stricter on their face; “[Board members] shall be persons of good moral character, with at least a fair elementary education, of good standing in their respective communities and known for their honesty, business ability, public spirit and interest in the good of public.” Ala. Code 1975 § 16-8-1(b). Again, responsibility for enforcement of these provisions is unclear.

<sup>14</sup>Okl. Stat. 70 § 5-110(a).

<sup>15</sup>See appendix for the state-by-state oaths of office.

<sup>16</sup>See e.g., Ga. Code Ann. § 21-4-3 (defining ground for recall to include violating oaths of office); *Fitzgerald v. City of Maryland Heights*, 796 S.W. 2d 52, 62 (Mo. App. E.D. 1990). “Count 5 of the Bill of Impeachment charged the Mayor with violating his oath of office.... The Mayor’s oath of office required him to support ‘the provisions of all laws of [Missouri] affecting Cities of the Third Class...’ We construe this oath as obligating the Mayor to enforce state statutes in a reasonable manner.”

<sup>17</sup>See *Baggett v. Bullitt*, 84 S.Ct. 1316 (1964) (where an oath requiring officeholders to swear they were not “subversives” seeking to overthrow or alter America’s constitutional form of government was found unconstitutional).

<sup>18</sup>See § 3.4 *infra*.

<sup>19</sup>Oddly enough, this “first and greatest concern” is listed eleventh on the list of duties.

<sup>20</sup>The other instance of the word “recognize” under § 16-2-9.1 is followed immediately by very specific “responsibilit[ies].” Thus, § (a)(11)’s weakness stands alone.

<sup>21</sup>This immunity may explain why school boards have, until recently, been indifferent to their success or failure in improving student achievement. See Hess (2002) and Wirt and Kirst (2001) on the recent emphasis that school boards place on student achievement.

<sup>22</sup>However, no state to our knowledge has eliminated governmental immunity in the area of student competency or student achievement.

<sup>23</sup>It is common for state law to require that school authorities have a “duty to supervise at all times the conduct of children on school grounds to enforce those rules and regulations necessary to their protection” (California). State laws typically also regulate the conditions of school premises, and thereby establish liability for those responsible for maintaining safe premises.

<sup>24</sup>These antimajoritarian tendencies have lessened since the founding but still exist in republican structures like the Electoral College and the lifetime appointment of Supreme Court justices, for example.

<sup>25</sup>See, for example, Maryland Constitution Article I § 9.

<sup>26</sup>Art. XIV §1.

<sup>27</sup>Interestingly, the oath of office conflict clause is less restrictive for Delaware school board members than for other public offices; it merely requires incoming members to affirm that they did not buy their way into office (Del. Code 14. I.10. III § 1053).

<sup>28</sup>One can scarcely imagine a more striking conflict of interest than a board member voting to monetarily (or otherwise) settle a legal dispute with himself or herself.

<sup>29</sup>To begin the effort, a brief examination of New Jersey case law on the issue of personal interests yields the following precedents: *Rodecker v. Gonzalez*, 93 N.J.A.R.2d (EDU) 367 (1993), precluding a municipal counsel from seeking election to school board of education due to inherent conflict of interest; *Board of Educ. of Tp. of Howell v. Suchcicki*, 93 N.J.A.R.2d (EDU) 157 (1992), holding that union officials representing board of education employees could not run for elected school board positions due to conflict of interest; *Board of Educ. of Tp. of Jackson, Ocean County v. Acevedo*, 92 N.J.A.R.2d (EDU) 163 (1992), where conflict of interest forced a board of education member to resign his seat after suing the board for harming his son.

<sup>30</sup>“For the love of money is the root of all evils,” 1 Tim 6:10, *New American Bible*.

<sup>31</sup>That is, purely private schools are largely limited in their ability to raise prices to cover losses from corruption (general cost cutting notwithstanding), while public schools have recourse to the incomparable power of taxation.

<sup>32</sup>Webster’s *Revised Unabridged Dictionary*, 1998 MICRA, Inc.

<sup>33</sup>West Virginia Code, §6-10-1.

<sup>34</sup>Tennessee Code, 8-31-102, “Relative means a parent, foster parent, parent-in-law, child, spouse, brother, foster brother, sister, foster sister, grandparent, grandchild, son-in-law, brother-in-law, daughter-in-law, sister-in-law, or other family member who resides in the same household.” But note how the “same household” requirement, which is fairly common, substantially weakens the prohibition.

<sup>35</sup>Montana Statute 2-2-302.

<sup>36</sup>For example, Kentucky requires that “every person elected to a board of education” shall swear “that he will not, while serving as a member of such board, become interested, directly or indirectly, in any contract with or claim against the board” (Kentucky Code, § 160.170). Incidentally, “claim” in this context refers to lawsuits as mentioned earlier.

<sup>37</sup>Kentucky Code, § 160.170, excepting the hiring of the superintendent of schools or school board attorney.

<sup>38</sup>New Jersey Code, 18A:12-2.

<sup>39</sup>In fact, even the strict states are not nearly so rigid as it may appear, as they often include a plethora of situational exceptions.

<sup>40</sup>Those enabled to vote in a school district are those who are of age and residents of the school district. They may or may not be taxpayers. Renters do not directly pay school property taxes, but likely bear some of the incidence of the school property tax through their rental payments.

<sup>41</sup>Even families with school-age children may not send their children to public schools. Overall, nonpublic school enrollment was 11.1 percent of K–12 enrollment, and it is not uncommon for more than 20 percent of school-age children in central cities to attend parochial rather than public schools.

<sup>42</sup>See [www.census.gov/govs/www/school02.html](http://www.census.gov/govs/www/school02.html).

<sup>43</sup>For example, Mississippi prohibits board members from being interested in contracts for the “construction, repair, or improvement of any school facility, the furnishing of any supplies, materials, or other articles, [and] the doing of any public work or the transportation of children.” The statute is silent about contracts for real estate, consulting, outsourced services, etc.

<sup>44</sup>Connecticut allows conflicted contracts to stand if they are not challenged within 90 days of execution. (Connecticut Code, Sec. 1-84[i]).

<sup>45</sup>Mississippi Code, § 25-4-105(6).

<sup>46</sup>However, dissenting shareholders must first inform the board of directors of the complaint and give them an opportunity to cure it before initiating a suit.

<sup>47</sup>In the federal context, private citizens have a right of *qui tam*, which allows privately initiated lawsuits on behalf of the United States for fraud by government contractors. Most importantly, prevailing plaintiffs are entitled to a share of any money recovered. See Federal Civil False Claims, Act 31 U.S.C., §§ 3729-33.

<sup>48</sup>See Hess (2002), table 11. Fully one-quarter of school board directors in large districts devoted more than 70 hours per month or better than 840 hours per year, or about 42 percent of a full-time job to school board activities.

<sup>49</sup>By “education leaders,” we mean superintendents through principals and their assistant principals, that is, all nonunionized personnel.

<sup>50</sup>In fact, Maryland’s constitution requires that its public officers swear they will discharge their duties “diligently,” the same term proposed in this paper.

<sup>51</sup>Ironically, Delaware school boards members take a separate oath that omits the duty of loyalty language required of other public officers (See Delaware Code, Title 14, § 1053 and Delaware Constitution, Article XIV).

<sup>52</sup>For evidence that school districts do not hire the most highly qualified teachers, see Ballou (1996), Ballou and Podgursky (1995), and Ballou and Podgursky (1997). For evidence that teacher quality impacts favorably on student performance, see Boardman, Davis, and Sanday (1977), Ehrenberg and Brewer (1994), Hanushek (1970), Ferguson (1991), Monk and King (1995), and Strauss and Sawyer (1986). For evidence that specific teachers impact student achievement, see Rivkin, Hanushek and Kain (2001). See Strauss et al. (1998) for the study for the Pennsylvania State Board of Education and Strauss et al. (2000).

<sup>53</sup>See table 1 and the appendix.

<sup>54</sup>Interestingly, two states impose a *less* stringent oath for school board members than for other public officers generally (see table 1 and the appendix).

<sup>55</sup>Indeed, one state has oaths of office that already vary across every single school district (see Oregon Statute 332.005 and the Oregon School Board Association model oath office found in the appendix).

<sup>56</sup>See Reynolds (2000) for a discussion of Dillon’s rule in relation to issues of sprawl in Virginia.

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## APPENDIX 1 STATE AND FEDERAL OATHS OF OFFICE

### ALABAMA

#### **Article XVI of Alabama constitution provides:**

"I, . . . , solemnly swear (or affirm, as the case may be) that I will support the Constitution of the United States, and the Constitution of the State of Alabama, so long as I continue a citizen thereof; and that I will faithfully and honestly discharge the duties of the office upon which I am about to enter, to the best of my ability. So help me God."

### ALASKA

#### **Constitution Article 12 § 5. Oath of Office**

All public officers, before entering upon the duties of their offices, shall take and subscribe to the following oath or affirmation: "I do solemnly swear (or affirm) that I will support and defend the Constitution of the United States and the Constitution of the State of Alaska, and that I will faithfully discharge my duties as . . . to the best of my ability." The legislature may prescribe further oaths or affirmations.

### **Sec. 14.12.090. Oath**

School board members, before taking office, shall take and sign the following oath or affirmation: "I do solemnly swear (or affirm) that I will support and defend the Constitution of the United States and the Constitution of the State of Alaska and that I will honestly, faithfully, and impartially discharge my duties as a school board member to the best of my ability."

### ARIZONA

State of Arizona, County of \_\_\_\_\_  
I, \_\_\_\_\_ (type or print name) do solemnly swear (or affirm) that I will support the Constitution of the United States and the Constitution and laws of the State of Arizona, that I will bear true faith and allegiance to the same and defend them against all enemies, foreign and domestic, and that I will faithfully and impartially discharge the duties of the office of \_\_\_\_\_ (name of office) \_\_\_\_\_ according to the best of my ability, so help me God (or so I do affirm).

## ARKANSAS

Each director elected or appointed shall, within ten (10) days after receiving notice of his election or appointment, subscribe to the following oath:

I, \_\_\_\_\_, do hereby solemnly swear or affirm, that I will support the Constitution of the United States and the Constitution of the State of Arkansas, and that I will not be interested, directly or indirectly, in any contract made by the district of which I am a director, except as permitted by state law and that I will faithfully discharge the duties as school director in \_\_\_\_\_ School District, No. \_\_\_\_\_ of \_\_\_\_\_ County, Arkansas, upon which I am about to enter.

## CALIFORNIA

### Constitution Article, XX Section 3

I, \_\_\_\_\_, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States and the Constitution of the State of California against all enemies, foreign and domestic; that I will bear true faith and allegiance to the Constitution of the United States and the Constitution of the State of California; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties upon which I am about to enter.

And I do further swear (or affirm) that I do not advocate, nor am I a member of any party or organization, political or otherwise, that now advocates the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means; that within the five years immediately preceding the taking of this oath (or affirmation) I have not been a member of any party or organization, political or otherwise, that advocated the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means except as follows:

\_\_\_\_\_  
(If no affiliations, write in the words "No Exceptions") and that during such time as I hold the office of \_\_\_\_\_ I will not advocate nor become a member of any party or organization, political or otherwise, that advocates the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means.

## COLORADO

### 22-31-125. Oath of School District Directors

Each director shall, no later than fifteen days following the survey of votes, appear before some officer authorized to administer oaths or before the president of the board of education and take an oath that the director will faithfully perform the duties of the office as required by law and will support the constitution of the United States, the constitution of the state of Colorado, and the laws made pursuant thereto.

### Constitution Article XII, Section 8

Oath of civil officers. Every civil officer, except members of the general assembly and such inferior officers as may be by law exempted, shall, before he enters upon the duties of his office, take and subscribe an oath or affirmation to support the constitution of the United States and of the state of Colorado, and to faithfully perform the duties of the office upon which he shall be about to enter.

## CONNECTICUT

### § 1-25 for all other persons of whom an oath is required

You solemnly swear or solemnly and sincerely affirm, as the case may be, that you will faithfully discharge, according to law, your duties as...to the best of your abilities; so help you God or upon penalty of perjury.

## DISTRICT OF COLUMBIA

### § 1-501. Oath to be taken by officers

All civil officers in the District shall, before they act as such, respectively take and subscribe an oath or affirmation to support the Constitution of the United States, and faithfully to discharge the duties of their respective offices; and the oath or affirmation provided for by this section shall be taken and subscribed, certified, and recorded, in such manner and form as may be prescribed by law.

## DELAWARE

### Delaware Code Annotated, Title 14. Education, § 1053 Oath of office of the school board member

Each school board member shall, before entering upon the duties of the office, take and subscribe to the following oath or affirmation:

I do solemnly swear (or affirm) that I will support the Constitution of the United States of America and the Constitution of the State of Delaware, and that I will faithfully discharge the duties of the office of school board member according to the best of my ability; and I do further solemnly swear (or affirm) that I have not directly or indirectly paid, offered or promised to pay, contributed, or offered to or promised to contribute, any money or other valuable thing as consideration or reward for the giving or withholding a vote at the election at which I was elected to said office, so help me God (or I so affirm).

**Constitution ARTICLE XIV, Oath of Office, § 1.  
Form of oath for members of General Assembly  
and public officers**

Members of the General Assembly and all public officers executive and judicial, except such inferior officers as shall be by law exempted, shall, before they enter upon the duties of their respected offices, take and subscribe the following oath or affirmation:

I, \_\_\_\_\_ (name), \_\_\_\_\_ do proudly swear (or affirm) to carry out the responsibilities of the office of \_\_\_\_\_ (name of office) to the best of my ability, freely acknowledging that the powers of this office flow from the people I am privileged to represent. I further swear (or affirm) always to place the public interest above any special or personal interests, and to respect the right of future generations to share the rich historic and natural heritage of Delaware. In doing so I will always uphold and defend the Constitutions of my Country and my State, so help me God.

No other oath, declaration or test shall be required as a qualification for any office of public trust.

**FLORIDA**

**Florida Statutes § 876.05 Public employees;  
oath**

(1) All persons who now or hereafter are employed by or who now or hereafter are on the payroll of the state, or any of its departments and agencies, subdivisions, counties, cities, school boards and districts of the free public school system of the state or counties, or institutions of higher learning, and all candidates for public office, are required to take an oath before any person duly authorized to take acknowledgments of instruments for public record in the state in the following form:

I, \_\_\_\_\_, a citizen of the State of Florida and of the United States of America, and being employed by or an officer of \_\_\_\_\_ and a recipient of public funds as such employee or officer, do hereby solemnly swear or affirm that I will support the Constitution of the United States and of the State of Florida.

(2) Said oath shall be filed with the records of the governing official or employing governmental agency prior to the approval of any voucher for the payment of salary, expenses, or other compensation.

**GEORGIA**

**Ga. Code Ann. § 45-3-1. Additional oath of public officers**

Every public officer shall:

- (1) Take the oath of office;
- (2) Take any oath prescribed by the Constitution of Georgia;
- (3) Swear that he or she is not the holder of any unaccounted for public money due this state or any political subdivision or authority thereof;
- (4) Swear that he or she is not the holder of any office of trust under the government of the United States, any other state, or any foreign state which he or she is by the laws of the State of Georgia prohibited from holding;
- (5) Swear that he or she is otherwise qualified to hold said office according to the Constitution and laws of Georgia;
- (6) Swear that he or she will support the Constitution of the United States and of this state; and
- (7) If elected by any circuit or district, swear that he or she has been a resident thereof for the time required by the Constitution and laws of this state.

**HAWAII**

**Hawaii Revised Statutes § 12-7 Filing of oath**

The name of no candidate for any office shall be printed upon any official ballot, in any election, unless the candidate shall have taken and subscribed to the following written oath or affirmation, and filed the oath with the candidate's nomination papers.

The written oath or affirmation shall be in the following form:

I, \_\_\_\_\_, do solemnly swear and declare, on oath that if elected to office I will support and defend the Constitution and laws of the United States of America, and the Constitution and laws of the State of Hawaii, and will bear true faith and allegiance to the same; that if elected I will faithfully discharge my duties as \_\_\_\_\_ (name of office) to the best of my ability; that I take this obligation freely, without any mental reservation or purpose of evasion; So help me God.

## IDAHO

### 59-401. LOYALTY OATH—FORM

Before any officer elected or appointed to fill any office created by the laws of the state of Idaho enters upon the duties of his office, he must take and subscribe an oath, to be known as the official oath, which is as follows:

I do solemnly swear (or affirm, as the case may be) that I will support the Constitution of the United States, and the Constitution of the State of Idaho, and that I will faithfully discharge the duties of (insert office) according to the best of my ability.

## ILLINOIS

### Constitution Article XIII, Section 3, Oath or Affirmation of Office

Each prospective holder of a State office or other State position created by this Constitution, before taking office, shall take and subscribe to the following oath or affirmation:

I do solemnly swear (affirm) that I will support the Constitution of the United States, and the Constitution of the State of Illinois, and that I will faithfully discharge the duties of the office of... to the best of my ability.

## INDIANA

### Const. Art. 15, § 4 Oath or affirmation of office

Section 4. Every person elected or appointed to any office under this Constitution, shall, before entering on the duties thereof, take an oath or affirmation, to support the Constitution of this State, and of the United States, and also an oath of office.

### Indiana Code 20-5-3-1.5 Oath of members

Sec. 1.5. Governing Body; Oath of Office. Each person elected or selected to be a member of a school corporation governing body shall take the following oath before taking office:

I solemnly swear (or affirm) that I will support the constitution of the United States of America, the constitution of the state of Indiana, and the laws of the United States and the state of Indiana. I will faithfully execute the duties of my office as a member of this governing body, so help me God.

Provided, that the school corporation governing body may provide for such additional provisions to said oath as the governing body may deem appropriate for said office.

## IOWA

### Constitution Article XI § 5: Oath of office

Every person elected or appointed to any office, shall, before entering upon the duties thereof, take an oath or affirmation to support the constitution of the United States, and of this state, and also an oath of office.

### Iowa Code § 63.10 elections

All other civil officers, elected by the people or appointed to any civil office, unless otherwise provided, shall take and subscribe an oath substantially as follows:

I, \_\_\_\_\_ do solemnly swear that I will support the Constitution of the United States and the Constitution of the State of Iowa, and that I will faithfully and impartially, to the best of my ability, discharge all the duties of the office of \_\_\_\_\_ (naming it) in (naming the township, city, county, district, or state, as the case may be), as now or hereafter required by law.

### Iowa Code § 277.28 Oath required

Each director elected at a regular district or director district election shall qualify by taking the oath of office on or before the time set for the organization meeting of the board and the election and qualification entered of record by the secretary. The oath may be administered by any qualified member of the board or the secretary of the board and may be taken in substantially the following form:

Do you solemnly swear that you will support the Constitution of the United States and the Constitution of the state of Iowa and that you will faithfully and impartially to the best of your ability discharge the duties of the office of \_\_\_\_\_ (naming the office) in \_\_\_\_\_ (naming the district) as now or hereafter required by law?

If the oath of office is taken elsewhere than in the presence of the board in session it may be administered by any officer listed in sections 63A.1 and 63A.2 and shall be subscribed to by the person taking it in substantially the following form:

I, \_\_\_\_\_, do solemnly swear that I will support the Constitution of the United States and the Constitution of the state of Iowa and that I will faithfully and impartially to the best of my ability discharge the duties of the office of \_\_\_\_\_ (naming the office) in \_\_\_\_\_ (naming the district) as now or hereafter required by law.

## KANSAS

### **Constitution of the State of Kansas ARTICLE 15 § 14. Oaths of state officers**

All state officers before entering upon their respective duties shall take and subscribe an oath or affirmation to support the constitution of the United States and the constitution of this state, and faithfully to discharge the duties of their respective offices.

## KENTUCKY

### **Constitution Section 228, Oath of officers and attorneys**

Members of the General Assembly and all officers, before they enter upon the execution of the duties of their respective offices, and all members of the bar, before they enter upon the practice of their profession, shall take the following oath or affirmation: I do solemnly swear (or affirm, as the case may be) that I will support the Constitution of the United States and the Constitution of this Commonwealth, and be faithful and true to the Commonwealth of Kentucky so long as I continue a citizen thereof, and that I will faithfully execute, to the best of my ability, the office of... according to law; and I do further solemnly swear (or affirm) that since the adoption of the present Constitution, I, being a citizen of this State, have not fought a duel with deadly

weapons within this State nor out of it, nor have I sent or accepted a challenge to fight a duel with deadly weapons, nor have I acted as second in carrying a challenge, nor aided or assisted any person thus offending, so help me God.

### **160.170 Oath of board members**

Every person elected to a board of education shall, before assuming the duties of his office, take the following oath, in addition to the constitutional oath:

State of Kentucky, County of \_\_\_\_\_, \_\_\_\_\_, being duly sworn, says that he is eligible under the law to serve as a member of the board of education, and that he will not, while serving as a member of such board, become interested, directly or indirectly, in any contract with or claim against the board, and that he will not in any way influence the hiring or appointment of district employees, except the hiring of the superintendent of schools or school board attorney.

## LOUISIANA

### **Constitution §30. Oath of Office**

Section 30. Every official shall take the following oath or affirmation:

I, \_\_\_\_\_, do solemnly swear (or affirm) that I will support the constitution and laws of the United States and the constitution and laws of this state and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as \_\_\_\_\_, according to the best of my ability and understanding, so help me God.

## MAINE

### **Maine Revised Statutes Annotated, Subchapter III. School Directors, § 1251. Board of directors**

Provisions for a board of directors shall be as follows:

Oath of office. Before their first meeting, newly elected directors must take the following oath or affirmation before a dedimus justice or notary public.

I \_\_\_\_\_ do swear that I will faithfully discharge to the best of my abilities the duties incumbent on me as a school director of School Administrative District No. \_\_\_\_\_ according to the Constitution and laws of this State. So help me God.

**Maine Revised Statutes Annotated, Article IX.  
General Provisions § 1. Oaths and subscriptions;  
alternative affirmation; administration of oaths  
to Governor, Senators, Representatives, and  
other officers**

Section 1. Every person elected or appointed to either of the places or offices provided in this Constitution, and every person elected, appointed, or commissioned to any judicial, executive, military or other office under this State, shall, before entering on the discharge of the duties of that place or office, take and subscribe the following oath or affirmation:

I, \_\_\_\_\_ do swear, that I will support the Constitution of the United States and of this State, so long as I shall continue a citizen thereof. So help me God.

I \_\_\_\_\_ do swear, that I will faithfully discharge, to the best of my abilities, the duties incumbent on me as \_\_\_\_\_ according to the Constitution and laws of the State. So help me God.

Provided, that an affirmation in the above forms may be substituted, when the person shall be conscientiously scrupulous of taking and subscribing an oath.

**MARYLAND**

**Constitution of Maryland Article I. Elective Franchise, § 9. Oath or affirmation of office**

Every person elected, or appointed, to any office of profit or trust, under this Constitution, or under the Laws, made pursuant thereto, shall, before he enters upon the duties of such office, take and subscribe the following oath, or affirmation: I, \_\_\_\_\_, do swear, (or affirm, as the case may be,) that I will support the Constitution of the United States; and that I will be faithful and bear true allegiance to the State of Maryland, and support the Constitution and Laws thereof; and that I will, to the best of my skill and judgment, diligently and faithfully, without partiality or prejudice, execute the office of \_\_\_\_\_, according to the Constitution and Laws of this State (and, if a Governor, Senator, Member of the House of Delegates, or Judge), that I will not directly or indirectly, receive the profits or any part of the profits of any other office during the term of my acting as \_\_\_\_\_.

**Code of Maryland Title 5. State Treasurer  
§ 5-101.1. Oath**

In addition to the oath specified in Article I, § 9 of the Maryland Constitution, the Treasurer shall take an oath to discharge the duties of the Office of Treasurer faithfully, diligently, and honestly.

**MASSACHUSETTS**

**Constitution Art. VI. Oath and affirmation**

ART. VI. Instead of the oath of allegiance prescribed by the constitution, the following oath shall be taken and subscribed by every person chosen or appointed to any office, civil or military under the government of this commonwealth, before he shall enter on the duties of his office, to wit;

I, A.B., do solemnly swear, that I will bear true faith and allegiance to the Commonwealth of Massachusetts, and will support the constitution thereof. So help me GOD.

Provided, That when any person shall be of the denomination called Quakers, and shall decline taking said oath, he shall make his affirmation in the foregoing form, omitting the word "swear" and inserting instead thereof the word "affirm;" and omitting the words "So help me GOD," and subjoining, instead thereof, the words "This I do under the pains and penalties of perjury."

**MICHIGAN**

All officers, legislative, executive and judicial, before entering upon the duties of their respective offices, shall take and subscribe the following oath or affirmation: I do solemnly swear (or affirm) that I will support the Constitution of the United States and the constitution of this state, and that I will faithfully discharge the duties of the office of \_\_\_\_\_ according to the best of my ability. No other oath, affirmation, or any religious test shall be required as a qualification for any office or public trust.

## MINNESOTA

### **Minnesota Statutes Annotated, Public Services and Privileges, Chapter 358. Seals, Oaths, Acknowledgments, 358.05. Oath of office**

The oath of office to be taken by members and officers of either branch of the legislature shall be that prescribed by the Constitution of the state of Minnesota, article IV, section 8. Every person elected or appointed to any other public office, including every official commissioner, or member of any public board or body, before transacting any of the business or exercising any privilege of such office, shall take and subscribe the oath defined in the Constitution of the state of Minnesota, article V, section 6.

### **Constitution of the State of Minnesota, Article V. Executive Department, § 6. Oath of office of state officers**

Each officer created by this article before entering upon his duties shall take an oath or affirmation to support the constitution of the United States and of this state and to discharge faithfully the duties of his office to the best of his judgment and ability.

### **Constitution of 1857 as amended, Minnesota Statutes Annotated State Employment Chapter 43. State Civil Service [Repealed], 43.16. Repealed by Laws 1975, c. 399, § 2**

The repealed section, which required officers, employees, and applicants for examinations to take an oath to the effect that such person will protect and preserve the property and money of the state, will uphold and defend the state and federal constitutions, and except as provided in these constitutions not take part in movements to alter or change our form of government, was derived from:

## MISSISSIPPI

### **Constitution, Article 14, Section 268.**

All officers elected or appointed to any office in this state, except judges and members of the legislature, shall, before entering upon the discharge of the duties thereof, take and subscribe the following oath:

I, \_\_\_\_\_, do solemnly swear (or affirm) that I will faithfully support the Constitution of the United States and the Constitution of the State of Mississippi, and obey the laws thereof, that I am not disqualified from holding the office of \_\_\_\_\_; that I will faithfully dis-

charge the duties of the office upon which I am about to enter. So help me God.

## MONTANA

### **Section 3. Oath of office**

Members of the legislature and all executive, ministerial and judicial officers, shall take and subscribe the following oath or affirmation, before they enter upon the duties of their offices: "I do solemnly swear (or affirm) that I will support, protect and defend the constitution of the United States, and the constitution of the state of Montana, and that I will discharge the duties of my office with fidelity (so help me God)." No other oath, declaration, or test shall be required as a qualification for any office or public trust.

## NEBRASKA

### **§ 79-552. Class V school district; board of education; members; election by district; procedure; oath; qualifications; student member**

All persons elected as members of the board of education shall take and subscribe to the usual oath of office before the first Monday in January following their election, and the student member shall take and subscribe to the usual oath of office before the first Monday in January following his or her designation.

### **§ 11-101.01. Oath of office; state and political subdivisions; employees; form**

All persons in Nebraska, with the exception of executive and judicial officers and members of the Legislature who are required to take the oath prescribed by Article XV, section 1, of the Constitution of Nebraska, who are paid from public funds for their services, including teachers and all other employees paid from public school funds, shall be required to take and subscribe an oath in writing, before a person authorized to administer oaths in this state, and file same with the Department of Administrative Services, or the county clerk of the county where such services are performed, which oath shall be as follows:

I, \_\_\_\_\_, do solemnly swear that I will support and defend the Constitution of the United States and the Constitution of the State of Nebraska, against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or for purpose of evasion; and that I will faithfully and impartially perform the

duties of the office of \_\_\_\_\_ according to law, and to the best of my ability. And I do further swear that I do not advocate, nor am I a member of any political party or organization that advocates the overthrow of the government of the United States or of this state by force or violence; and that during such time as I am in this position I will not advocate nor become a member of any political party or organization that advocates the overthrow of the government of the United States or of this state by force or violence. So help me God.

## NEVADA

### **Constitution, Article 15, Section 2, Oath of office**

Members of the legislature, and all officers, executive, judicial and ministerial, shall, before they enter upon the duties of their respective offices, take and subscribe to the following oath:

I, \_\_\_\_\_, do solemnly [solemnly] swear (or affirm) that I will support, protect and defend the constitution and government of the United States, and the constitution and government of the State of Nevada, against all enemies, whether domestic or foreign, and that I will bear true faith, allegiance and loyalty to the same, any ordinance, resolution or law of any state notwithstanding, and that I will well and faithfully perform all the duties of the office of \_\_\_\_\_, on which I am about to enter; (if an oath) so help me God; (if an affirmation) under the pains and penalties of perjury.

## NEW HAMPSHIRE

### **Constitution Art. 84. Oath of Civil Officers**

Any person chosen governor, councilor, senator, or representative, military or civil officer, (town officers excepted) accepting the trust, shall, before he proceeds to execute the duties of his office, make and subscribe the following declaration:

I, A.B. do solemnly swear, that I will bear faith and true allegiance to the United States of America and the state of New Hampshire, and will support the constitution thereof. So help me God.

I, A.B. do solemnly and sincerely swear and affirm that I will faithfully and impartially discharge and perform all duties incumbent on me as \_\_\_\_\_, according to the best of my abilities, agreeably to the rules and regulations of this constitution and laws of the state of New Hampshire. So help me God.

## NEW JERSEY

### **New Jersey Statutes Annotated, Title 18A.**

#### **Education, 18A:12-2.1. Qualifying oaths of members**

Each member of a board of education shall, before entering upon the duties of his office, take and subscribe:

(1) An oath that he possesses the qualifications of membership prescribed by law [see below], including a specific declaration that he is not disqualified as a voter [not on parole or a convicted felon] pursuant to R.S. 19:4-1, and that he will faithfully discharge the duties of this office, and also

(2) The oath prescribed by R.S. 41:1-3 of the Revised Statutes.

#### **41:1-3. Oath of allegiance and oath of office; persons required to take; form**

Every person who shall be elected, or appointed to any public office in this State or in any county, municipality or special district other than a municipality therein, or in any department, board, commission, agency or instrumentality of any thereof, and is required to take and subscribe an oath of office shall, before he enters upon the execution of his said office take and subscribe the oath of allegiance set forth in R.S. 41:1-1 and, in addition, (a) any specially prescribed official oath, or (b) if no text is specially prescribed for such oath of office, the following official oath of office:

I, \_\_\_\_\_, do solemnly swear (or affirm) that I will faithfully, impartially and justly perform all the duties of the office of \_\_\_\_\_ according to the best of my ability. So help me God.

#### **41:1-1. Oath of allegiance; form**

Every person who is or shall be required by law to give assurance of fidelity and attachment to the Government of this State shall take the following oath of allegiance:

I, \_\_\_\_\_, do solemnly swear (or affirm) that I will support the Constitution of the United States and the Constitution of the State of New Jersey, and that I will bear true faith and allegiance to the same and to the Governments established in the United States and in this State, under the authority of the people. So help me God.

**Qualifications, Title 18A. Education, 18A:12-2  
Inconsistent interests or office prohibited**

No member of any board of education shall be interested directly or indirectly in any contract with or claim against the board, nor, in the case of local and regional school districts, shall he hold office as mayor or as a member of the governing body of a municipality, nor, in the case of county special services school districts and county vocational school districts, shall he hold office as a member of the governing body of a county.

**NEW MEXICO**

**§ 22-5-9.1. Oath of office**

All elected or appointed members of local school boards shall take the oath of office prescribed by Article 20, Section 1 of the constitution of New Mexico.

**Constitution, Article XX, Section 1.**

**[Oath of officer]**

Every person elected or appointed to any office shall, before entering upon his duties, take and subscribe to an oath or affirmation that he will support the constitution of the United States and the constitution and laws of this state, and that he will faithfully and impartially discharge the duties of his office to the best of his ability.

**NEW YORK**

Section I, Article XIII of the New York State Constitution and provides, "I do solemnly swear (or affirm) that I will support the constitution of the United States, and the constitution of the State of New York, and that I will faithfully discharge the duties of the office of \_\_\_\_\_, according to the best of my ability."

**NORTH CAROLINA**

**West's North Carolina General Statutes  
Annotated, Chapter 115C. Elementary  
and Secondary Education, Subchapter II.  
Administrative Organization of State and  
Local Education Agencies, Article 5. Local  
Boards of Education, § 115C-37. Election of  
board members**

Members to Qualify—Each county board of education shall hold a meeting in December following the election. At that meeting, newly elected members of the board of education shall qualify by taking the oath of office prescribed in Article VI, Sec. 7 of the Constitution.

**West's North Carolina General Statutes  
Annotated, Constitution of North Carolina, Article  
VI. Suffrage and Eligibility to Office, Sec. 7. Oath**

Before entering upon the duties of an office, a person elected or appointed to the office shall take and subscribe the following oath:

I, \_\_\_\_\_, do solemnly swear (or affirm) that I will support and maintain the Constitution and laws of the United States, and the Constitution and laws of North Carolina not inconsistent therewith, and that I will faithfully discharge the duties of my office as \_\_\_\_\_, so help me God.

**West's North Carolina General Statutes  
Annotated, Chapter 11. Oaths, Article 1. General  
Provisions, § 11-7. Oath or affirmation to sup-  
port Constitutions; all officers to take**

Every member of the General Assembly and every person elected or appointed to hold any office of trust or profit in the State shall, before taking office or entering upon the execution of the office, take and subscribe to the following oath:

I, \_\_\_\_\_, do solemnly and sincerely swear that I will support the Constitution of the United States; that I will be faithful and bear true allegiance to the State of North Carolina, and to the constitutional powers and authorities which are or may be established for the government thereof; and that I will endeavor to support, maintain and defend the Constitution of said State, not inconsistent with the Constitution of the United States, to the best of my knowledge and ability; so help me God. (Amended by Laws 1985, c. 756, § 5.)

**West's North Carolina General Statutes  
Annotated, Chapter 11. Oaths, Article 2. Forms  
of Official and Other Oaths, § 11-11. Oaths of  
sundry persons; forms**

The oaths of office to be taken by the several persons hereafter named [no reference to school boards] shall be in the words following the names of said persons respectively, after taking the separate oath required by Article VI, Section 7 of the Constitution of North Carolina:

**General Oath**

Any officer of the State or of any county or township, the term of whose oath is not given above, shall take an oath in the following form:

I, A.B., do swear (or affirm) that I will well and truly execute the duties of the office of \_\_\_\_\_ according to the best of my skill and ability, according to law; so help me, God.

## NORTH DAKOTA

### Section 4.

Members of the legislative assembly and judicial department, except such inferior officers as may be by law exempted shall, before they enter on the duties of their respective offices, take and subscribe the following oath or affirmation: "I do solemnly swear (or as the case may be) that I will support the Constitution of the United States and the Constitution of the State of North Dakota; and that I will faithfully discharge the duties of the office \_\_\_\_\_ according to the best of my ability, so help me God" (if an oath), (under pains and penalties of perjury) if an affirmation, and no other oath, declaration, or test shall be required as a qualification for any office or public trust.

## OHIO

### § 15.07 Oath of officers

Every person chosen or appointed to any office under this state, before entering upon the discharge of its duties, shall take an oath or affirmation, to support the Constitution of the United States, and of this state, and also an oath of office.

### Ohio Revised Code § 3313.10. Oath of office of member

Before entering upon the duties of his office each person elected or appointed a member of a board of education shall take an oath to support the Constitution of the United States and the constitution of this state and that he will perform faithfully the duties of his office. Such oath may be administered by the treasurer or any member of the board.

## OKLAHOMA

### Section 5-116—Oath of Office

Each member of the board of education and the treasurer and assistant treasurer of a school district shall take and subscribe to the following oath:

I \_\_\_\_\_ (Name of officer), hereby declare under oath that I will faithfully perform the duties of \_\_\_\_\_ (Name of position) of \_\_\_\_\_ (Name of school district) to the best of my ability and that I will faithfully discharge all of the duties pertaining to said office and obey the Constitution and laws of the United States and Oklahoma.

Oklahoma Constitution Art XV, § 1 Officers required to take oath or affirmation

All public officers, before entering upon the duties of their offices, shall take and subscribe to the following oath or affirmation:

I, \_\_\_\_\_, do solemnly swear (or affirm) that I will support, obey, and defend the Constitution of the United States, and the Constitution of the State of Oklahoma, and that I will not, knowingly, receive, directly or indirectly, any money or other valuable thing, for the performance or nonperformance of any act or duty pertaining to my office, other than the compensation allowed by law; I further swear (or affirm) that I will faithfully discharge my duties as \_\_\_\_\_ to the best of my ability.

The Legislature may prescribe further oaths or affirmations.

## OREGON

### Oregon Constitution

Article XV Section 3. Oaths of office. Every person elected or appointed to any office under this Constitution, shall, before entering on the duties thereof, take an oath or affirmation to support the Constitution of the United States, and of this State, and also an oath of office.

### 332.005 Directors as district school board; oath.

(1) The directors of a school district in their official capacity shall be known as the district school board.

(2) Directors must qualify by taking an oath of office before assuming the duties of office.

### **Oregon School Board Association—Model Oath of Office**

I, \_\_\_\_\_, do solemnly swear that I will support the Constitution of the United States, the Constitution of the State of Oregon and the laws thereof, and the policies of the \_\_\_\_\_ School District. During my term, I will faithfully and impartially discharge the responsibilities of the office of School Board Member according to the best of my ability.

### **PENNSYLVANIA**

I do solemnly swear (or affirm) that I will support, obey and defend the Constitution of the United States and the Constitution of this Commonwealth, and that I will discharge the duties of my office with fidelity.

### **RHODE ISLAND**

#### **R.I. Stat. § 36-1-2 Engagement of office**

Every person, except the justices of the supreme and superior courts, elected to office by the general assembly, or by either house thereof, or under the provisions of the law in relation to public schools, or appointed to office, civil or military, by the governor, shall, before he or she shall act therein, take the following engagement before some person authorized to administer oaths, namely: I, [naming the person], do solemnly swear (or affirm) that I will faithfully and impartially discharge the duties of the office of [naming the office] according to the best of my abilities, and that I will support the Constitution and laws of this state, and the Constitution of the United States, so help me God: [Or: This affirmation I make and give upon the peril of the penalty of perjury.]

#### **Constitution Article III, Section 3. Oath of general officers**

All general officers shall take the following engagement before they act in their respective offices, to wit: You being by the free vote of the electors of this state of Rhode Island and Providence Plantations, elected unto the place of do solemnly swear (or, affirm) to be true and faithful unto this state, and to support the Constitution of this state and of the United States; that you will faithfully and impartially discharge all the duties of your aforesaid office to the best of your abilities, according to law: So help you God. Or: This affirmation you make and give upon the peril of the penalty of perjury.

### **SOUTH CAROLINA**

I do solemnly swear (or affirm) that I am duly qualified, according to the Constitution of this State, to exercise the duties of the office to which I have been elected, (or appointed), and that I will, to the best of my ability, discharge the duties thereof, and preserve, protect and defend the Constitution of this State and of the United States. So help me God.

### **SOUTH DAKOTA**

### **TENNESSEE**

#### **8-18-111. Form of oath of office**

The official oath, unless otherwise expressly prescribed by law, shall be in the following form: "I do solemnly swear that I will perform with fidelity the duties of the office to which I have been appointed (or elected, as the case may be), and which I am about to assume."

### **FEDERAL OATHS OF OFFICE**

#### **President of the United States (U.S. Constitutional Oath)**

I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States.

#### **Federal Employees**

#### **Title 5, Part III, Subpart B, Chapter 33, Subchapter II, § 3331. Oath Of Office**

An individual, except the President, elected or appointed to an office of honor or profit in the civil service or uniformed services, shall take the following oath:

I, AB, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.

**Federal Military Oaths of Office**

“I, \_\_\_\_\_, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I will obey the orders of the President of the United States and the orders of the officers appointed over me, according to regulations and the Uniform Code of Military Justice. So help me God.” (Title 10, US Code; Act of 5 May 1960 replacing the wording first adopted in 1789, with amendment effective 5 October 1962).

I, \_\_\_\_\_ (SSAN), having been appointed an officer in the Army of the United States, as indicated above in the grade of \_\_\_\_\_ do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign or domestic, that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservations or purpose of evasion; and that I will well and faithfully discharge the duties of the office upon which I am about to enter; So help me God. (DA Form 71, 1 August 1959, for officers.)

**National Banking Laws: Comptroller of the Currency Requirement****12 USC 73**

Each director, when appointed or elected, shall take an oath that he will, so far as the duty devolves on him, diligently and honestly administer the affairs of such association, and will not knowingly violate or willingly permit to be violated any of the provisions of title 62 of the Revised Statutes, and that he is the owner in good faith, and in his own right, of the number of shares of stock required by title 62 of the Revised Statutes, subscribed by him, or standing in his name on the books of the association, and that the same is not hypothecated, or in any way pledged, as security for any loan or debt. The oath shall be taken before a notary public, properly authorized and commissioned by the State in which he resides, or before any other officer having an official seal and authorized by the State to administer oaths, except that the oath shall not be taken before any such notary public or other officer who is an officer of the director's bank. The oath, subscribed by the director making it, and certified by the notary public or other officer before whom it is taken, shall be immediately transmitted to the Comptroller of the Currency and shall be filed and preserved in his office for a period of ten years.