

THE SMITHSONIAN GOVERNANCE DEBACLE: TEN LESSONS CHARTER SCHOOL BOARDS CAN LEARN AT SOMEONE ELSE'S EXPENSE

Brian L. Carpenter, Ph.D.
CEO
National Charter Schools Institute

Introduction

James Smithson, the British donor whose estate initially funded the creation of the Congressionally *chartered* Smithsonian Institution, might well regret his bequest if he knew what's been going on at his namesake.

Due to the actions of the Smithsonian's immediate past secretary—its senior executive—the organization is in trouble. Among other issues, the secretary finagled a stratospheric salary, submitted lavish expenses for reimbursement, engaged in conflicts of interest, and spent a substantial amount of time fulfilling obligations serving other corporate boards. Though his actions were all egregious, responsibility for them ultimately rests where it always does in a non-profit organization: *with the governing board*.

As a result the board's failure to provide proper oversight, the sprawling conglomeration of museums, galleries and a zoo, which currently receives about 70 percent of its annual *billion dollar* budget from US taxpayers, may lose more than face. A House appropriations subcommittee cut the Smithsonian's proposed 2008 funds by four percent, an amount equal to \$26 million (Trescott, 2007). Although the Senate will have to concur for this cut to take effect, the action has the Smithsonian's attention. The governing board—the Board of Regents—recognizes that it must *quickly* remedy its colossal failures.

Enveloped in a hailstorm of adverse media, Congressional ire and public disgust, the Smithsonian Board of Regents formed two investigative committees in March, 2007, each independent of the other. Both were given the charge of assessing what went wrong, and more importantly, with recommending solutions to the Smithsonian's problems. The committees reported their findings in two reports, both of which contain valuable lessons for astute charter school boards and authorizers.

Value Proposition

If you have time to do the reading, the committee reports are fascinating. They are candid and detailed. You can learn an immense amount from these reports about how seriously things can go wrong when sloppy board governance is the organizational norm.

Most charter school board members, while desirous of good governance, however, do not have the time to study hundreds of pages of board committee reports, regardless of the quality of those reports. Instead, by synthesizing the committee reports into a few thousand words, this monograph holds forth a simple value proposition: In exchange for a brief investment of board meeting time to read and discuss this monograph, your board can consider whether it is making similar governance mistakes and correct them. There are also lessons for authorizers to consider in their oversight of boards.

Overview*

When board members default on their oversight responsibilities, bad things happen to good organizations. Consider the Smithsonian Institution, whose board neglect has recently been highlighted in the news—neglect that has tarnished that organization's name and may result in a partial loss of funding.

In a series of articles beginning in January, 2007, *The Washington Post* reported a variety of issues that revealed poor governance. The Smithsonian board, for example, either blithely consented to, or was ignorant of, outrageous executive salaries. While the distinction is hard to discern, the results are not: at the top of this select class, Lawrence M. Small, Secretary of the Smithsonian, then his seventh year in that position, was receiving current year *cash* compensation totaling \$915,698—more than twice that of a US President (whose annual salary is \$400,000).

In addition to this tidy sum, Small was reimbursed for a bewildering assortment of expenses. Many of these were so unreasonable that Senator Charles R. Grassley (R-Iowa) characterized Small as living a “champagne lifestyle [that] turns out to be Dom Perignon” (Grimaldi, 2007). Taxpayers may find this particularly repugnant because the Smithsonian, as the *Post* notes, is a public institution.

However, the board’s failure to exercise its fundamental duty of organizational oversight didn’t end there. Additionally, the *Post* reported that Small also served as a paid director of an insurance company that collected more than \$500,000 a year in insurance premiums from the Smithsonian. One seems hard pressed to characterize such a relationship as anything other than a conflict of interest. Consider a few other unethical actions such as management directing bookkeeping to reclassify an expense to cover Small’s tracks, and it smells like there was a skunk at the picnic.

Failing to see these as problems, the chair of the board’s executive committee initially defended its executive (Grimaldi, 2007). Thus, as *The Washington Post* editorial board opined on March 1, 2007, “As distressing as Mr.

Small’s actions were, the real problem lies with a board that opted to be more lap dog than watchdog.”

Very well, you say, but what does any of this have to do with charter school governance? Plenty.

Some charter school boards act like lap dogs. They approve murky transactions improperly benefiting management, their family members, or individual board members. Some boards fail to exercise due diligence with respect to school finances; they recklessly approve, for example, whopping increases in capital indebtedness, thereby saddling the school with a strangling debt load, the responsibilities for which will exist long after management has changed hands. Many boards “delegate” auditor selection to management, forgetting that the word “independent,” as in the term “independent auditor,” means that the auditor should be *independent* of the management.

Even worse, in some cases, charter school boards are largely composed of longtime personal friends of management—and even relatives in some states where the law allows. Instead of engaging in governance as a solemn responsibility on behalf of taxpayers, these board

members arrive at meetings with their rubber stamps in tow, conducting school affairs like they’re running a family-held business. They are incognizant that their *laissez-faire* decision making is harmful to their school and to the broader charter movement.

Like the Smithsonian board, such boards forget (or ignore) the fact that *charter schools are public institutions*; and that *each* board member has a duty to the taxpayers who fund the school.

It hasn’t been that long since the charter world played its own rendition of the Smithsonian tragicomedy. Remember the California Charter Academy scandal of 2004? Failure by the boards and the authorizer resulted in the overnight displacement of 10,000 students as 60 schools under CCA collapsed (Rotherham, 2005). The movement ended up with a shiner visible to the country when the story was carried above the fold on the front page of *The New York Times* (Dillon, 2004).

It’s true, in these two examples, the organizations suffered due to poor executive leadership. Rather than excuse sloppy governance, however, these examples should serve to strengthen every charter school board member’s resolve to govern well.

There is much at stake.

Primary Source Documents for this Monograph

Two committees, a Governance Committee (GC) and an Independent Review Committee (IRC), conducted investigations and produced reports independent of the other. The reports, number 54 pages and 112 pages (plus 280 pages of supporting documentation), respectively. Both reports, along with numerous articles from *The Washington Post*, constituted the sources of information about the Smithsonian in this monograph. Links to the committee’s reports appear below, while *The Washington Post* articles can be accessed through its archives (for a fee) at www.washingtonpost.com. You can download copies of both committee reports by entering the following links into your Web browser:

The Board of Regents Governance Committee. (2007). Report of the governance committee to the board of regents, June 14, 2007. Retrieved July 28, 2007, from http://newsdesk.si.edu/releases/Governance_Committee_Report.pdf (In-text citations in this monograph refer to this report as “GC”)

Bowsher, C. A., Potts, S. D., & A.W. Pete Smith, Jr. (2007). A report to the board of regents of the Smithsonian Institution [Electronic Version]. Retrieved July 31, 2007 from http://www.si.edu/about/regents/documents/IRC_report.pdf. (In-text citations in this monograph refer to this report as “IRC”)

Talent Isn't Enough

One of the interesting things that the current Smithsonian “governance crisis” (IRC, p. 1) illustrates is that a group of talented, high-achieving individuals does not necessarily make a competent board. The Smithsonian Board of Regents includes the Chief Justice of the Supreme Court, the Vice President of the US, and six Congressional Regents. Clearly as individuals, these people have ascended to the heights of their chosen careers. *However, as a group, they failed to fulfill the board’s very purpose for existing: to ensure that the organization, on behalf of its owners, accomplishes what it should, while avoiding the things that should be avoided* (Carver, 2006).

Herein lies an important lesson for charter schools and authorizers: even the most talented individuals need to develop their capacity for board governance. It’s also critical to understand that this development process has to involve a lot more than learning compliance with open meetings laws and the Freedom of Information Act (FOIA). Learning how to govern means learning how to do *the work of the board*. It does not, mean, however, learning how to do the work of the organization’s executive; an error that the Smithsonian appears poised to make as the pendulum now swings in the other direction.

In the discussion that follows, I briefly discuss ten aspects of governance using examples of board failures from the Smithsonian case. These ten aspects do not constitute the entire work of the board, but when taken together, they help form a more complete picture how boards should operate.

Ten Governance Failures and How to Remedy Them

1. Failure to enact, revise, and monitor compliance with policies.

In a number of instances, the GC and IRC reports (see p. 2) indicate that the Smithsonian board either failed to enact or revise policies necessary for proper management, or in some instances, failed to monitor compliance by the executive with its existing policies. For example, the Smithsonian board established a conflict of interest policy, but the board failed to monitor organizational compliance with it.

Many charter schools have inadequate policies or none at all. In schools where policies do exist, board members often aren’t even conversant in them. A critical role of the board is to establish major policies *and then monitor compliance with them*. After all, what’s the point of enacting policies if compliance is never monitored?

2. Failure to actually provide oversight.

The IRC report makes a statement from which every charter school board should learn: “Historically, the Smithsonian Board of Regents appears to not have taken a strong oversight role. Mr. Small’s predecessor tried to increase the involvement of the Regents in the affairs of the Smithsonian, but found a limited interest on the part of the Regents in taking a more active role” (IRC, p. 3).

The duty of oversight is a legal concept under which governance

The concept of the board acting as the representative of the organization’s owners is one that has been clearly articulated by Dr. John Carver, the world’s foremost expert on board governance. In his book, *Boards That Make a Difference*, he explains this idea more completely, along with Policy Governance™ fundamentals. For more information on this model of governance, go to carvergovernance.com or contact the National Charter Schools Institute.

“Nevertheless, board members must understand that they cannot delegate the duty of oversight to others, including other board members. Ultimately, every individual board member can be held liable for the acts and omissions of the entire board.”

laws take shape. In essence, the duty of oversight means that *every* board member has a responsibility to be informed about the organization’s operations for the purpose of making reasonable decisions (Charney & Hyatt, 2003).

This does not mean, as some busybody charter school board members will think, that the duty of oversight is an open-ended invitation to walk the school’s hallways and sit uninvited in classrooms, or direct the administration to reproduce volumes of records for the board member’s individual inspection. Such actions are not part of board oversight. In fact, they constitute a misuse of authority that the board should prohibit.

In contrast, the duty of oversight is properly fulfilled when *the board as a whole* monitors the ongoing condition of the organization, especially the organization’s financial condition.

Nevertheless, board members must understand that they cannot delegate the duty of oversight to others, including other board members. Ultimately, *every* individual board member can be held liable for the acts and omissions of the entire board.

3. Failure to establish and control its own agenda.

The Smithsonian Board erred when it did what many charter school boards do: It delegated the establishment of its meeting agenda to the senior executive. As a result, Small tightly controlled the flow of information to the board thereby preventing the board from focusing on various issues it should have considered (GC, p. 4; IRC p. 70).

A governing board should establish its own agenda. The board should always consult its executive in the process, but the final decision as to what the board should discuss should be determined by the board.

4. Failure to ask probing questions of management or engage in robust board deliberation.

In order to effectively perform its duty of oversight, the board should ask probing questions about the condition of the organization, the assumptions which its executive uses to manage and lead it, and the ethical propriety by which decisions and actions are executed. Critical appraisal of such factors is part of the board’s work. Skillful, honest executives value such deliberations because they appreciate that transparent accountability is in the best interest of the organization.

Instead, the Smithsonian Board “failed to ask very basic questions about the Smithsonian’s operations” (IRC, p. 80). No surprise then, that it learned too late that its second-in-command earned \$10.3 million in cash, stocks, and options on other boards during her six years of employment at the Smithsonian. The IRC report also stated that “she spent 400 work days away from her office performing non-Smithsonian activities” (p. 78). That such abuses existed within clear potential scrutiny of the board for six years proves it wasn’t asking many questions.

Does your board ask probing questions and engage in robust deliberation? Does your management react defensively when you probe for information not presented in reports? Be wary. Questioning is part of the governance process.

5. Failure to preserve the role and authority of the board by flawed usage of committees.

A central tenet of governance is that a board should never permit anyone—individual board members, including the board chair or groups such as committees—to come between it and its CEO (Carver, 2006). The board must preserve the integrity of this relationship in order to ensure that proper delegation takes place.

In practice, this means, among other things, that committees should not make decisions that are properly the purview of the whole board. This includes limiting the power of the “Executive Committee,” which is commonly misused as a mini-board to make decisions in between board meetings.

The Smithsonian Board botched this responsibility as well. It allowed individuals and committees to make decisions—such as Small’s compensation—for the whole board. In fact, the IRC report noted, that not only did this occur, “some Regents did not learn all the details of Mr. Small’s compensation until they read about it in press accounts” (IRC, p. 5).

Decisions that belong to the whole board should never be delegated or relegated to committees. Governance also includes the process of holding committees accountable to the board.

6. Failure to perform its duty of obedience by ignoring its own articles of incorporation and bylaws.

There is an important governance concept embedded in corporate law known as “seniority of documents” (Charney & Hyatt, 2003). Essentially, the concept means that

the law recognizes that certain documents supersede other documents. For example, an organization’s bylaws are senior to an organization’s policies, meaning that if the policies contradict the bylaws, the policies are invalid unless the bylaws are appropriately amended. If a charter school has a management agreement, the board’s policies are senior to that agreement.

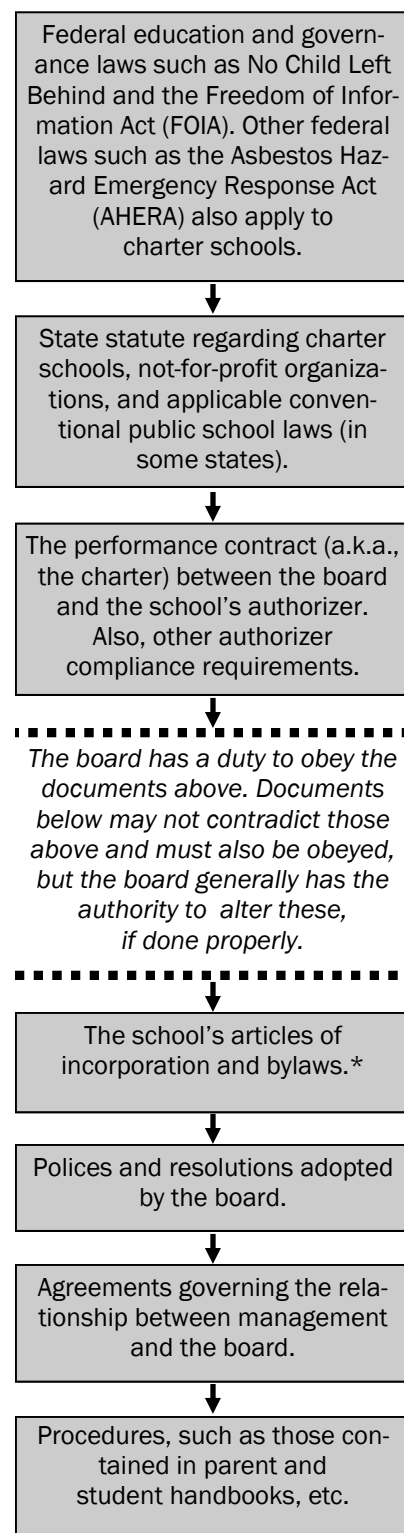
Arising from this concept is the duty of obedience which requires *a board to obey documents, including its own, based on the authority of those documents*. In effect, the authority of the board is constrained by various documents. In the decision making process, the board must, therefore, actively consult those documents in order to make informed decisions.

Here too, the Smithsonian Board failed a basic responsibility of governance. By permitting the executive committee to approve Small’s compensation, not only did the board violate the integrity of the governance process, it also disobeyed its own charter and bylaws (IRC, p. 67).

A charter school board needs to regularly review key documents which it has a duty to obey (like its charter). It should also ensure that documents such as policies and management agreements conform to senior documents (such as state laws and its charter). A generalized sequence of the seniority of those documents to which the board has a duty to obey appears in Figure 1.

Be forewarned that this is more than an academic concept. Charter school board members can be sued for failing to fulfill their duty of obedience. A board action that violates your bylaws, for example may land you in court. Avoid this by reviewing senior documents with your attorney.

Figure 1. Generalized Seniority of Documents for Charter Schools



* Generally, the corporation comes into existence *before* the charter is issued, but the point here is that the school may not receive a charter unless the authorizer is satisfied with the bylaws.

7. Failure to promote board independence from management.

The GC report states that “Press reports and Congressional inquiries have questioned the relationship between the Regent nominations and the prior Secretary” (GC, p. A-14). Such inquiries are rightly premised on an underlying governance concept: the decisions of a board should embody the highest degree of objectivity. This is hard to achieve when the board is composed of management’s personal friends since they are unlikely to exert rigorous oversight necessary to governance. This doesn’t mean that an executive shouldn’t cultivate friendly relationships with his board. It means that friends don’t make objective boards.

Unfortunately, maintaining board independence is a commonly overlooked aspect of governance in the charter sector. Yet, charter school boards need independence in order to make certain key decisions objectively—such as whether the school’s current management is getting the job done right.

There’s a lesson for authorizers here. Since board members aren’t likely to withdraw themselves from the board based on a prior relationship with management, *it is incumbent on authorizers to examine those relationships before appointing or reappointing board members.* Full disclosure of prior relationships should not only be required on board member applications; the extent of those relationships should also be judiciously evaluated by authorizers. If longtime friends and colleagues of the executive are permitted to serve on a charter school board, such members should *never* constitute a majority.

“Full disclosure of prior relationships should not only be required on board member applications; the extent of those relationships should also be judiciously evaluated by authorizers.”

Lastly, I want to add a strong word of warning about family members (spouses of teachers, administrators, etc.) serving on a board at the school where their family member is employed. Although this is permissible under some existing state laws, I urge the movement to clean house before we have a crisis precipitated by such improper governance, and thereby end up as the subject of a media investigation like the Smithsonian. Charter schools are public institutions and should be governed with the highest degree of fidelity—not nepotism. Authorizers should lead the way.

8. Failure to engage in ongoing board development.

One of the things most evident in reviewing the reports by the committees is that the Smithsonian Board didn’t understand governance. As previously noted, that’s not because the people on the board were incompetent as leaders in their chosen professions. It’s simply because governance is a discipline, mastery of which, like any other, requires study and practice.

The GC report recommends that the Smithsonian develop an orientation program for new Regents. That’s a good start, but it falls short of recognizing that ongoing board development is needed in order to learn and practice the tenets of good governance.

Charter school boards can develop their own governance capacity by *consistently* doing three things:

1. Orienting new board members. At a minimum, each new board member should receive copies of various documents that are foundational to the school’s existence, along with training to understand how the board

uses those documents to do its work. Some of these documents were mentioned on p. 5. For more information, see Chapter 5 of *Charter School Board University* (Carpenter, 2006).

2. Allocating time on its regular agenda for the purpose of discussing governance. Reading books or articles like this one on governance, then coming prepared to discuss those readings is a great way to facilitate board development. Ensuring that this development regularly takes place is a prime responsibility of the board president or chair.

3. Conducting *at least* one board development retreat each year (not to be confused with conducting strategic planning). The board should avoid all regular business during the development retreat so it can focus its attention specifically on improving its governance. Incidentally, I strongly recommend that the CEO or school leader participate in this retreat because the real secret to a successful school is learning how to navigate the intersection of governance (the board's responsibility) and management (the CEO's responsibility).

9. Failure by the board to assess itself.

Congruent with regularly developing the board's governance capacity is regularly assessing the board's performance—something the Smithsonian board didn't do. At a minimum, a board should assess its own performance at least annually. I recommend doing it in conjunction with the board's assessment of its CEO—for which a consultant can be useful because of the knowledge and objectivity they provide.

Even better, a board can assess its performance following *each* meeting. Such assessments can raise red flags which might prevent a full scale debacle like the kind that occurred at the Smithsonian.

10. Failure to promote organizational transparency.

Through its numerous governance failures, the Smithsonian board ultimately failed to promote organizational transparency. By not holding its executive accountable, the board unwittingly created a culture in which wrong things were allowed to happen. In so doing, the board damaged the organization.

Ultimately, it is the board that creates the ethical climate in a charter school. In large part, it does this through selecting the right CEO (see Chapter 16 of *Charter School Board University*). Larger yet, however, is the role played by the board in cultivating an ethical climate by insisting on organizational transparency from that CEO. A board that fails to demand this runs the risk of not only finding themselves unfavorably written about in the morning paper, but also of jeopardizing the very existence of the organization.

The board's actions should also be transparent. As well as setting the standard for the rest of the organization to follow, transparency is a prerequisite for democratic organizations. In fact, one of the purposes of open meetings acts is to ensure accountability of public organizations—like charter schools—by requiring that their business be done in public view. Considering that charters exist at the pleasure of the tax-paying public, should we be expected to do anything less?

References & Resources

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Summary

The Smithsonian's governance errors extend beyond the ten that were briefly discussed in this monograph. Due to space constraints, it simply wasn't possible to describe all of the ways in which the board failed the organization. In fact, by my count, there were at least 17 major governance errors described in the committee reports, which means that there are another seven errors that didn't even get mentioned in passing in this monograph. Fellow researchers and consultants will, no doubt, want to read about these for themselves in the source documents. For charter school board members, however, the ten failures noted in this monograph provide ample illustrations to begin a discussion about the seriousness of providing proper organizational oversight.

The point of the monograph is not a case of governance consultant *schadenfreude*. While the Smithsonian board should have taken its governance responsibilities more seriously, *many* boards in the profit and not-for-profit sector, including some charter school boards I've observed, wait until it's too late. In this respect, the Smithsonian board performed no more poorly than many charter school boards. It's just that some of them haven't made the newspaper—yet.

Board members need to realize they have been granted a weighty privilege to make decisions in behalf of others, but that the privilege is coupled with an equally as great responsibility. An appropriate response is to embrace the privilege *and the responsibility* by committing oneself to reading and studying governance in order to perform the board member role well. When reading about the failures of the Smithsonian board in this monograph, consider that some lessons are cheaper when learned at someone else's expense.

Disclaimer: This monograph is not intended to substitute for legal advice. Charter school boards should retain and consult their own independent attorney. Further, the opinions stated herein are those of the author and do not necessarily reflect those of the National Charter Schools Institute.

From the CEO of the National Charter Schools Institute

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Brian L. Carpenter, Ph.D.

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