

Charter School Leadership and the Law: 10 Strategic Practices©

David R. Hostetler, J.D., M.A., M.A.T.S

Abstract

Charter school law is relatively new and involves a hybrid of traditional rules. Unbeknownst to some, the law offers important opportunities to foster academic success, as well safe, orderly, and legally compliant operations. The author, a long-time charter school attorney and school leadership professor, offers ten “strategic legal compliance” practices. These include the following: (1) embrace the law as an important tool for quality education, (2) understand charter law’s unique legal framework, (3) move beyond mere compliance and risk-aversion, (4) implement key legal compliance processes, (5) maximize the benefits of charter law flexibility, (6) scrutinize vendor contracts, (7) preserve employer discretion in hiring and termination decisions, (8) afford due process and federal protections, (9) define and practice proper oversight responsibilities, and (10) engage effective legal counsel.

Introduction

Successfully starting, building and maintaining something new, like a charter school, is difficult work. Charter school leaders face many unique challenges: fewer resources than traditional schools, reliance on busy volunteers, and possible resistance from charter school opponents, to name a few. One oft-overlooked challenge is the legal maze charter leaders face. While charter schools are less regulated than traditional public schools by nature, in some respects, legal compliance is more confusing or uncertain.

I have practiced and taught education law since 1994, having spent much of that time training public school administrators and prospective administrators, first in a statewide educational leadership development

program, and more recently in a graduate program in school administration. Since our state's charter statute was first enacted in 1996, I have provided legal counsel and training to at least one-half of our state's charter schools and leaders. This paper's underlying training objective is to enable school leaders to embrace the concept of "Strategic Legal Compliance." This involves learning, keeping abreast of, and applying the law to advance a school's educational mission and goals—not just to stay out of trouble with the law. To accomplish this goal, the article offers ten legal practices for effective charter school strategic legal compliance.

1. Keep it "About Children:" Viewing the Law as a Means to the End

Google co-founder Sergey Brin once stated that "[a]ny conversation I have about innovation starts with the ultimate goal"¹ A core value of charter schools is to use innovation as a means to facilitate unique and effective educational opportunities. The law *normally* does not stand in the way of this. With any important school decision, the charter school leader must determine what the legal boundaries are, and then decide within those boundaries what decision or action makes the most sense educationally and/or operationally.

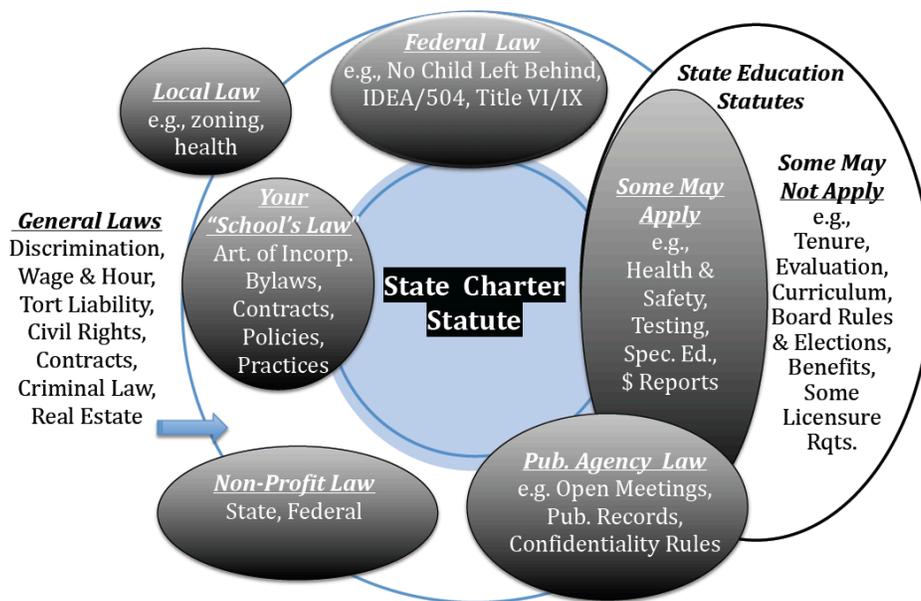
It has become cliché in public education to say that school decisions should always be "about the children." Regrettably, there is oftentimes a dissonance between rhetoric and reality. It is important when addressing legal compliance issues to ensure that legal strategies ultimately be tethered to the school's mission to provide safe and quality education. This challenge is poignantly illustrated in the context of teacher renewal and nonrenewal decisions. The law typically allows practitioners to exercise great latitude, especially in charter schools where at-will employment is permissible. In working with administrators over the years, I've found that schools often renew mediocre teachers who continually fail to live up to high performance standards. Rather than such decision being "about the children," it is clouded by other non-educational reasons (e.g., status quo practice, teacher popularity, local politics). The effective school leader is willing to make the hard and sometimes unpopular decision. Rarely is the law an obstacle to this.

¹ Jemima Kiss, *Secrets of a Nimble Giant: Technology Companies usually Get Slower as They Get Bigger – So Why is Google as Fast as Ever? Co-Founder Sergey Brin Tells Jemima Kiss How Size Can Make for Innovation*, THE GUARDIAN, June 17, 2009, <http://www.guardian.co.uk/technology/2009/jun/17/google-sergey-brin>.

2. Understand the Legal Framework: Reducing Confusion and Misunderstanding

Strategic legal compliance requires a basic conceptual understanding of governing laws. I estimate that approximately half of most school’s legal problems arise from a faulty understanding of applicable legal requirements. The charter leader faces a unique problem compared to her private and traditional public school counterparts. Charter law is like charter schools: they are hybrids, legally and educationally. They are part traditional public school, part private school, and part non-profit organization. This blend of identities causes some legal confusion. Understanding basic legal sources, obligations, and relationships gives charter leaders the framework they need for strategically navigating the law. The following diagram provides a visual representation of how these various legal areas relate and apply to charter schools.²

Sample Charter Law Framework



Shared Federal Regulation

Charter schools are typically bound, like traditional public schools, by federal constitutional requirements under the First Amendment (freedom of speech and religion; establishment clause restrictions), Fourth

² This diagram reflects charter school law in North Carolina. While there may be similarities in other states, the applicability, extent, and relationship of the various bodies will vary by state.

Amendment (privacy rights and protection against unreasonable searches), and Fourteenth Amendment (due process and equal protection guarantees).³ Similarly, charter schools are also subject to federal statutory and regulatory requirements; e.g., anti-discrimination statutes, No Child Left Behind Act, the Individuals with Disabilities in Education Act.

Shared State and Local Regulation

Like traditional schools, charter schools are subject to general state and local laws that apply to public and private entities generally. Regarding state educational regulations, charter schools may be subject to portions of the state's regular education code and regulations. In North Carolina, for example, charter schools are bound by all or many of the same financial and student reporting, special education, student discipline, and health and safety rules that apply to traditional schools. In addition, general state statutory and regulatory rules apply universally. These include items such as general health and safety, employee wage and hour, and anti-discrimination laws. Common law requirements such as contract and tort law also apply.

Unique Charter Laws and Exemptions

By nature, charter schools are typically exempt from most or many of the state's public education statutes and regulations. The state's charter statute will typically set forth the general purposes of the charter school law (e.g., to increase educational choice and opportunity, to provide unique educational settings for special student populations, to foster educational competition and innovation). Some state charter acts, like North Carolina's, specifically assign all other power and authority to a charter school's governing board. In other words, the board has the discretion to operate as it sees fit unless otherwise restricted by any other law.⁴ Furthermore, because

³ Because many charter schools are operated by private non-profit organizations, the extent to which constitutional requirements apply to them as "public schools" remains somewhat in question and, consequently, worthy of separate consideration. Charter schools should retain legal counsel to advise them on such matters.

⁴ For example, North Carolina's Charter Act states,

- (c) A charter school shall operate under the written charter.... No other terms may be imposed on the charter school as a condition for receipt of local funds.
- (d) The board of directors of the charter school shall decide matters related to the operation of the school, including budgeting, curriculum, and operating procedures. N.C. GEN. STAT. §§ 115C-238.29E (c),(d) (2011).

charter schools are typically governed by private non-profit entities, they are typically subject to state and federal non-profit and tax law.

School-Created Law

Finally, school leaders must remember that *they* create and are governed by their own set of unique school-based laws and rules. These derive from the school's charter, and its organizing documents—such as bylaws, articles of incorporation and school policies—and its contracts with employees and vendors. Being aware of the legal ramifications of this should guide school leaders in carefully drafting and adopting such documents.

3. Consider the Law as Friend, Not Foe: Moving Beyond Mere Risk Avoidance

My experience with school leaders is that many typically feel intimidated by the law. Like a layman doing his own taxes who worries about an IRS audit, school leaders worry about getting “bitten” by the law. Reading and understanding law is not easy; less experienced administrators are often not used to or comfortable with legal terms, principles, and practices. School leaders also sometimes fail to appreciate the fact-dependent and circumstantial nature of legal decision-making, and may be put off by the lawyer's typical “it depends” response.

In my experience, charter leaders oftentimes have less administrative, leadership, and legal training compared to their traditional school counterparts, which compounds their difficulties with law. Learning the law and planning for compliance are important first steps. Just as one must keep abreast of the latest curricular and pedagogical developments, she must also stay informed about the law. The advanced leader understands this and deliberately goes beyond basic compliance and uses the law to fulfill the school's educational mission.

4. Implement Legal Systems: Establishing a Culture of Safety, Order, and Compliance

In the usual frenzy of starting a charter school and operating in its early stages, the squeaky wheel usually gets the grease. The legal planning for operating a school often gets short shrift in the absence of some pressure or sense of legal urgency. This is not to say that new schools act illegally, but they are often not as well prepared for legal challenges or questions when they arise. When schools call me for advice about a contractual issue or a school dispute, probably half of those instances can be associated with a poorly drafted contract or policy provision. Spending the time and resources to get the school's legal “ducks in a row” at the beginning is a “pay

now, or pay later” choice. School leaders do not think they have the time or money to pay a lawyer to draft policies, to develop and review school contracts, and advise on risk management issues. Often, school leaders do not understand the significance and value of laying a solid legal foundation. Below are some things that ought to be in place from the beginning or as soon as possible for *all* charter schools, new and old.

Establish a Policy and Compliance Committee

Each school should have a person or group responsible to develop and review the school’s legal and policy practices and obligations. This reduces the risk that important documents and tasks will fall through the cracks, ensures systematic and timely actions, and promotes strategic legal compliance. Ideally, the committee should be chaired by a qualified attorney from the school board, and will ensure that practices are in place and implemented effectively.

Avoid “Copy & Paste” Lay Lawyering

Leaders must avoid the temptation to save money (in the short run) by having a lay volunteer prepare legal documents and policies by searching the Internet or contacting other schools and copying and pasting their materials into school documents. Although there is a proper place for “boilerplate” legal language, its use still requires legal review to determine in what instances it is appropriate and when special adaptation is required. Ordinarily, the untrained layperson is unable to make such determinations.

Adopt Concise and Consistent Organizing Documents

The school’s lawyer should draft, or at least review, the school’s organizing documents. These typically include its articles of incorporation, bylaws, and, in most cases, federal tax exemption materials such as a 501(c)(3) application. These documents must be carefully drafted and consistent with the school’s approved charter and with one another. They also provide the foundation for subsequent school policies and practices.

Adopt Well-drafted, Well-tailored, and Well-organized School Policies

To some, the notion of adopting comprehensive policies seems contradictory to operating a charter school. Charter schools are supposed to benefit from a *minimum* of regulations, so why add regulations in the form of policies? There are debatable points and relevant factors to consider in determining how much and what kind of

policies to adopt. Nevertheless, my estimate is that roughly 80-90 percent of charter schools that I have advised or observed need substantially more or substantially revised policies from a legal standpoint. I typically recommend to clients a policy series comprised of five key sections, to be adapted to their unique needs. The sections address: (1) the school board; (2) personnel; (3) students and community; (4) general operations; and (5) technology use. Certainly, there are other ways to organize a school's policies. The main point is to have something in place that is reasonably organized and complete, which requires thoughtful consideration for addressing the school's main areas of operation.

I recommend policy manuals with multi-purpose uses and benefits: (1) to provide a framework to strategically implement the school's mission and charter through the details of school operations; (2) to provide for direction, consistency, and legal compliance; and (3) to establish policy sections that can be easily used or adapted for information and training materials (e.g., student and employee handbooks); this reduces the number of documents, related costs, and inconsistencies between policies and separate handbooks.

Establish a Legal Audit Process

Each school should also adopt the practice of regular legal audits, based on a five-year rotational schedule and carried out by the Policy and Compliance Committee. The purpose is to carefully assess and review school legal practices and obligations. Some things need to be done annually, some only periodically. A 5-year auditing plan might look something like the following:

Annual Reviews and Actions:

1. Board and staff orientation & training on legal duties
2. Review annual contract obligations
3. Update necessary policies per new laws and school needs
4. Review of facilities and grounds for safety concerns

5-year Rotational Legal Audits (listed by yearly order):

1. Student safety, athletics & emergency plans
2. Contracts (employees, insurance, vendors)
3. Board policy manual
4. Handbooks and procedures
5. Charter renewal, mission, strategic plans, corporate organizing documents

5. Maximize Legal Flexibility: Innovating within the Law

Charter schools were intended to be free of “red tape” and regulation to foster educational innovation and variety. School leaders should make the most of this. As a general legal principle, I advise clients to minimize their obligations and maintain as much legal flexibility as they can to be successful. Some schools mimic their traditional school counterparts in areas of law where they are not required to do so. There is no need to add to the school’s burdens, unless it makes educational or operational sense. This provides another reason to retain an attorney early in the process. Simply copying regulations from a traditional public school may add unnecessary obligations and hinder the charter school’s effectiveness.

6. Scrutinize Contracts: Vetting Vendor Arrangements

Schools often enter into contracts for various support services such as technology infrastructure, facility and equipment leases, and transportation. The quality and integrity of service providers varies greatly. My experience in dealing with contractual conflicts is that they often arise from one or more common problems associated with poor contracting practices—by schools and by vendors. These include the failure to put an agreement into writing or doing so without all necessary terms; creating confusing, inconsistent and one-sided agreements (typically forced upon the school by the vendor); drafting “cobbled contracts” by a lay person who copied the contract from some other source without proper adaptation; and heavy-handed contract enforcement by vendors. In short, these problems usually arise because the school did not want to pay an attorney to draft or review the contract.

For example, one client initially contracted, without legal assistance, to purchase mobile units from an out-of-state provider. There were many e-mails and phone calls leading up to and following the signed agreement. When the school discovered that the site preparation costs would far exceed what the vendor’s representative “estimated,” the school determined it could not afford the project. The vendor sent the school a bill for just under \$150,000 in withdrawal and penalty fees. School officials didn’t know what to do. The contract had one-sided and draconian penalty provisions as well as other vendor-favored provisions. Fortunately, the contract had also had a very brief clause buried in the contract language stating that the contract terms would be “accepted” upon the

school's direction to deliver the mobile units. Because of that small but legally significant provision, the vendor eventually backed away from its claims when we were able to assert that clause as an "out."

7. Preserve Employer Discretion: Maximizing the School's Supervisory Options

Personnel management provides some of the greatest opportunities for strategic legal compliance that fosters educational excellence. One of the most important contributors to academic success is the quality of teachers and staff at a school. Therefore, a school's employee recruiting, hiring, and supervision should serve this critical objective. The law is typically an aid, not obstacle, to this process.

For example, most charter schools are permitted to hire employees at-will, or at least under less restrictive requirements than traditional public schools, where collective bargaining and state tenure rules usually prevail. In states that allow employment-at-will, staff should be employed using that mechanism and schools should not confer tenure or long-term contracts, unless there's a compelling managerial or educational reason to do so (e.g., a one-year or multi-year contract may attract quality teachers or foster strong faculty morale).

In addition to preserving employer flexibility, schools must also make sure that they have systematic and effective processes in place for teacher evaluation, contract review, renewal and termination. These processes should include documentation that supports the school's employment practices and decisions.

8. "Do Process:" Affording Procedural Due Process and Other Constitutional Rights

Like traditional public schools, charter schools (at least those receiving federal funds and considered public schools) must comply with federal education and constitutional law. When students and employees are deprived of a "property" or "liberty" interest (as defined by the courts), they are entitled to procedural due process, involving fair notice of what is happening and why, and the right to be heard before an impartial decision maker. For students, due process is required when a student is threatened with suspension or expulsion, since the courts tell us that education is, constitutionally, a protected property interest. For employees, due process is required when they are threatened with dismissal before their contract term expires (a "property interest" deprivation), or for exercising their free speech rights or suffering reputational injury by damaging communications by the school ("liberty

interest” deprivations). It is common for schools without legal counsel to be unaware of when due process requirements apply and how to carry them out. It is also common for grievance practices and procedures to be overlooked or, alternatively, overly complicated, time-consuming, and indistinguishable from formal due process procedures. These policies and procedures should be developed and carried out with the aid of legal counsel.

9. Clarify Responsibilities: Everyone “Staying in Their Lanes”

A common mistake made by charter schools is the failure to establish or enforce clear lines of responsibility among school leaders, particularly between the board and the school’s administrative staff. This is particularly true in schools where board members helped found the school, have been otherwise deeply involved in the school’s operations, or have close relationships with school families who raise complaints.

For example, parents will sometimes approach a board member with a school complaint. Instead of referring the parent to school administrators to address the concern, or sharing the school’s grievance policy with the parent, the board member will interject herself in the problem to find a solution. School boards should normally limit themselves to policy-making and school oversight—not administration for which they hire professionals. Understandably, the modes of operation for charter schools vary widely, and sometimes board member need to get involved. However, while extraordinary circumstances may require a board member’s involvement, the general practice should be to leave conflicts and all other administrative matters to the professional administrators. Not only does this promote clearer boundaries and expectations, but legally it helps avoid a due process problem of biased board members who become involved in a problem prematurely.

10. Engage Legal Counsel: Retaining a Qualified Education Attorney

By now, it should be apparent that retaining legal counsel is crucial. Every school needs at least one qualified school attorney involved from the beginning. Many schools attempt to enlist an attorney on their board or as a volunteer consultant. This is a good start. Remember, however, that attorneys are typically specialists in a particular area of law. For example, a tax attorney may be able to advise on tax matters, but may know very little about corporate, personnel, or constitutional law.

It is best to enlist or retain an attorney that specializes in education law, particularly charter school law if possible. The primary legal areas for which expertise is required include constitutional law (primarily First, Fourth, and Fourteenth Amendment Law), corporate and non-profit law, employment law and, of course, education law (e.g., student discipline and due process, special education). Things that an attorney should do (not a staff person or lay volunteer) include preparing or reviewing all organizing legal documents (e.g., bylaws), reviewing all contracts (employee and vendor), and helping to draft school policies, at least those that have legal implications. The school should also enlist an education attorney who can be readily available to promptly advise on issues that suddenly arise, as well as those that require longer-term consideration and planning. It is also wise to have an attorney provide periodic trainings for board members and staff regarding basic legal duties and requirements.

Schools not only need qualified teachers and administrators, they need qualified consultants to ensure sound and legal operations and practices. Furthermore, board members have a legal fiduciary duty to serve the best interests of the school. This includes making decisions based on good faith efforts to discern what is proper and beneficial. Involving an attorney in decisions with legal ramifications is one important way to satisfy this fiduciary duty and also to provide legal cover for board members who rely on the advice of counsel.

Conclusion

There are many things that must be in place to establish and build a successful charter school. Through strategic legal compliance, a school is much better positioned to minimize legal mistakes, conflicts and costs, to facilitate increased school safety, order, and efficiency, to establish a culture of excellence, and most importantly, to achieve academic success for students. Like most important things, there are costs involved – time, money, and effort – but the effort put forth at the beginning, and along the way, will pay long-term dividends.