HIGHER ED AS A BUSINESS

Donors and Covenants: Universities as the Guardians of Assets

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Universities, whether public or private, operate with a publicly granted charter. The university governing board holds the charter in trust, hence the term "trustee." In governing, the board is obligated by the duties of care, loyalty and obedience:

Duty of Care

The duty of care relates to the level of competence expected of the board in carrying out governance responsibilities by using the degree of diligence and skill one would expect of a prudent person. It is the duty to participate actively in governance, to protect the institution through appropriate oversight and to identify and manage risks, including risks to academic integrity, assets and institutional reputation.

Duty of Loyalty

The duty of loyalty requires that board members act in good faith and in the best interests of the institution as a whole, not a particular subset of it. This duty specifies that a trustee should not have mixed loyalties; it is the basis for avoiding conflicts of interest.

Duty of Obedience

The duty of obedience requires that board member actions must be true to the campus charter and act to fulfill it in a manner that complies with the law and furthers the stated mission of the institution. This duty is based on the premise that constituents and the public at large can trust that what they are told by the board is true.

Universities hold a public trust and obligation because they are publicly chartered, exempt from taxation, have the authority to issue tax-exempt bonds and can receive gifts that grant tax benefits to donors. By public charter, they can receive donations for scholarships, professorships, buildings and other spaces, science and engineering equipment, endowments for general use or specified uses, and art or other objects, among other possibilities.

Donors may specify restrictions on how their gifts may be used. Gifts that are not restricted in this way may be designated by the board of trustees for specific purposes or may be deemed unrestricted and available for general use.

It is not often that boards face the prospect of appealing to a court to change a restricted-use gift into an unrestricted category. But it happens. Given financial difficulties such as those faced by many institutions during the 2008 Great Recession, institutions of higher education explored many options to maintain financial stability. Some engaged in consolidations;

some entered partnerships to save on operations or increase revenue; most increased fundraising activity; a few closed; and some decided to sell assets.

Brandeis University sought to sell its art collection and close its museum. After several years of legal challenges, the University reversed course, but much damage had been done in terms of relations with donors and the art world. La Salle University was sanctioned after it decided to auction off nearly 50 works of art from its collection in order to raise money for operations. While it is deemed acceptable to sell art works in order to buy art, unless the gift of art was restricted in use, it is unacceptable to sell art for general operating purposes.

Other institutions have generated controversy in art and philanthropic circles by selling assets. These include Fisk University, Randolph College and the Berkshire Art Museum, among others.

Decisions to sell gifts of art raise ethical and legal concerns. The ethical issues relate to relations with donors. A future donation may be denied because the donor decides that he or she cannot trust the university to use a gift as intended, even if not legally restricted. The sale of restricted asset raises legal concerns and can result in legal action by the state as well as by interested parties. This was the experience at Brandeis and many other institutions.

A current controversy regarding a board's role in the sale of a restricted asset is being played out at Rider University. The university wants to sell the Westminster Choir College in Princeton, N.J., that it acquired some 20 years ago when it was struggling and Rider wanted to strengthen its programming in the arts. Now claiming extreme financial pressures following the 2008 recession, and a significant drop in enrollment, Rider solicited several hundred potential buyers of the Choir College. They found only a few prospective buyers, all outside the U. S. The winning bidder is a for-profit Chinese company with little experience in education.

The reaction to the pending sale of the non-profit college to a for-profit company was swift and loud. Alumni, faculty, staff and students of both Westminster and Rider denounced the proposal. They cited the lack of experience of the purchasing company and the conditions of the sale that would honor employment protections and student financial aid support for only a limited period of time. They also objected because, under the proposed agreement, the college would effectively be under the control of the Chinese government.

Others objected to the provision that the sale of assets would include the endowment that was created in part by donations to help Westminster fulfill its mission. Princeton Seminary has brought suit in state court arguing that the sale would violate the promise made by the original donor of the land.

To be consummated, the sale must overcome the legal challenges posed to date and be approved before July 1, 2019 by the National Association of Schools of Music, the New Jersey Department of Education, the Attorney General of New Jersey, the Middle States accrediting commission, the Chinese Ministry of Commerce and the Chinese State Administration of Foreign Exchange.

In the late David Riesman's memorable phrase, the role of a board of trustees is to save the university of the future from the actions of the present. That is, it must fulfill its duties of care, loyalty and obedience in ways that fulfill its public trust and do not endanger risks to integrity, finances and reputation. In this light, one must ask what risks these boards considered when they decided to sell assets.

Did they consider the legal and ethical intentions of donors and the covenant they entered with them? Did they consider the potential complications that might result from contracts made years earlier? Did they study examples of other attempted and actual sales of tax-exempt assets to non-profit and for-profit organizations? Did they arrive at these decisions as part of strategic planning involving shared governance with the faculty and broader input from campus constituents? Did they discuss the idea of sale with the donors connected with the assets? Did they consider the possible unintended consequences of a proposed sale, no matter what legal advice they received? Did they analyze and discuss the risks to integrity and reputation?

These are the kinds of considerations required if a board is to fulfill its duties of care, loyalty and obedience. These considerations require discussions with stakeholders, which can take time. But time taken at the front end of a decision can save more time, money and reputation after it is announced.

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