

1007. Accountability

1. Purpose

Section VII.8 of the Bylaws requires the Theler Board [1] establish Standards of Accountability for the Theler Board, approved by the School Board [2], including “conflict of interest; personal and professional integrity of Directors (Code of Ethics); legal compliance; responsible stewardship; openness and disclosure; independent audit; certification of financial statements; whistle-blowing protection and document destruction.”

Supplemental Policies

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|---|--------------------------|
| 1013 Bidding and Contracting Policy | 1009 Governance Policy |
| 1002 Risk Management Policy | 1005 Transparency Policy |
| 1008 Audit Policy | 1006 Internal Controls |
| 3003 Record Retention and Destruction Policy | |
| 1012 Reporting Suspected Misconduct or Malfeasance Policy | |

One-time Requirements

Each Board director assent to “Code of Ethics,” Appendix 1007A § 3.2.1

Annual Requirements

Each Board director provide Disclosure, Appendix 1007C § 3.1.2.2
 Operations Director provide Disclosure, Appendix 1007C § 3.1.2.4
 Board approve Form 990 § 3.7
 Board approve “Nonprofit Checklist,” Appendix 1007B § 3.3.2
 Board complete “Reliability/Autonomy Matrix Worksheet,” Appendix 1007D § 3.4.2.

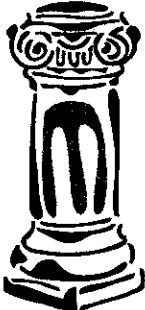
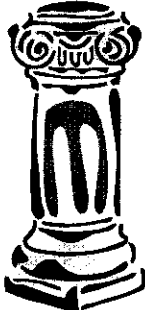



2. Scope

Nonprofit organizations must be accountable to their stakeholders. Nonprofit accountability can be visualized as five “pillars of accountability” [3] as summarized in Table 1007-2. This policy covers the “pillars” of legal and ethical accountability (risk management, financial integrity and ethical fundraising). The “pillars” of business accountability (dynamic programming and organizational stability) are covered in other policies.

¹ Board of Directors of the Mary E. Theler Community Center
² Board of Directors of North Mason School District #403
³ Nonprofit Risk Management Center, www.nonprofitrisk.org

“where community and nature walk hand-in-hand”

**Table 1007-2
Pillars of Accountability**

Legal/ethical accountability			Business accountability	
Risk Management	Financial Integrity	Ethical Fundraising	Dynamic Programming	Organizational Stability
				
<ul style="list-style-type: none"> • Conflict of interest • Code of ethics • Legal compliance • Transparency • Responsible stewardship • Whistle-blowing protection • Document destruction 	<ul style="list-style-type: none"> • Independent audit • Certification of financials 	<ul style="list-style-type: none"> • Financial sustainability 	<ul style="list-style-type: none"> • Strategic planning • Program/project planning 	<ul style="list-style-type: none"> • Board succession • Leadership/staff sustainability • Mission stability

3. Policy

All Board directors, staff and volunteers of Theler Center shall act with honesty, integrity and openness in all their dealings as representatives of the organization. Theler Center promotes a working environment that values respect, fairness, transparency and integrity.

3.1. Conflict of Interest

A conflict of interest is a situation in which someone in a position of trust, such as a Board director, has competing professional or personal interests. [4] Such competing interests can make it difficult to fulfill his or her duties impartially. Even if there is no evidence of improper actions, a conflict of interest can create an appearance of impropriety that can undermine confidence in the ability of that person to act properly in his/her position.

Conflict of interest issues can arise when a director of multiple nonprofit organizations learns of a potential business opportunity that may be relevant to one or more of the nonprofits. This policy provides guidance regarding disclosure of business opportunities.

More generally, conflict of interest can be defined as any situation in which an individual or corporation (either private or governmental) is in a position to exploit a professional or official capacity in some way for their personal or corporate benefit.

Conflict of interest means a conflict, or the appearance of a conflict, between the private interests and the official responsibilities of a person in a position of trust.

⁴ A conflict can be actual, potential or perceived. The conflict can be either between private interests and those of a nonprofit or between the interests of two nonprofits.

Someone accused of a conflict of interest may deny that a conflict exists because he/she did not act improperly. In fact, a conflict of interest does exist even if there are no improper acts as a result of it. Individuals must also guard against the appearance of impropriety that can undermine public confidence in the ability of a person to act properly in his/her position. [BD, OD]

A more subtle conflict of interest arises from competing professional or personal interests that can make it difficult for an individual to fulfill his/her duties impartially. One way to understand this is to use the term "conflict of roles" or "conflict of agendas."

The "nuances" of conflict of interest are summarized in Table 1007-2.

Table 1007-2 "Nuances" of Conflict of Interest		
Direct Conflict of Interest	Appearance of Conflict of Interest	"Conflict of Agendas" aka "Competing Agendas" aka "Conflict of Loyalties" aka "Conflict of Roles"
Any situation in which an individual is in a position to exploit a professional or official capacity in some way for their personal or corporate benefit monetarily or otherwise.	Appearance of impropriety that can undermine public confidence in the ability of a person to act properly in his/her position.	Competing professional or personal interests that can make it difficult for an individual to fulfill his/her duties impartially.
Example: <ul style="list-style-type: none"> • Hiring family members • Sole-source outsourcing to Board directors or their families 	Example: <ul style="list-style-type: none"> • "...board members had ownership/management relationships with [name deleted] and [name deleted]..." (Theler 2005-2006 audit comments) 	Example: [emphasis added] <ul style="list-style-type: none"> • "...trust proceeds are commingled with other funds used by METO and that there is no accounting or tracking of funds as to purposes." (Theler trustee e-mail 4/13/05) • "...overlapping board structure with 'sister' organizations... negatively impact the trust purposes by making flow of funds and expenditures unclear as to their purpose." (Theler trustee letter to NMSD 4/8/05) • Close friendships among board directors or between board directors and staff
Solution: <ul style="list-style-type: none"> • Conflict of Interest Policy • Disclosure • Competitive outsourcing • Board director recusal 	Solution: <ul style="list-style-type: none"> • Code of Conduct • Disclosure • Culture of Transparency 	Solution: <ul style="list-style-type: none"> • Conflict of Interest Policy • Code of Conduct • Disclosure

3.1.1. Identifying Conflicts

The following are the most common forms of conflicts of interest:

- **Self-dealing**, in which public and private interests collide, for example issues involving privately held business interests;
- **Outside employment**, in which the interests of one job contradict another;
- **Family interests**, in which a spouse, child, or other close relative is employed (or applies for employment) or where goods or services are purchased from such a relative or a firm controlled by a relative;
- **Gifts from friends** who also do business with the person receiving the gifts. (Such gifts may include non-tangible things of value such as transportation and lodging.)

Board Directors may hold positions as officers and directors of other corporations in related businesses. A director's efforts to advance another corporation's purpose will not constitute a conflict of interest or a breach of fiduciary duty to Theler Center absent a showing of bad faith.

A potential conflict of agendas (loyalties) may arise when an individual who serves on multiple nonprofit boards learns of a business opportunity that is relevant to one or more of the nonprofits. The director is obligated to disclose the opportunity to both nonprofits.

3.1.2. Avoiding Conflicts

3.1.2.1. **Restrictions.** The following are **precluded** from serving on the Theler Center Board:

- "Employees of Theler Center and North Mason and Grapeview School District[s]..." [5] [6];
- more than one member of the Board of the Directors of any other nonprofit corporation or government board or commission;
- more than one member of a household [7];
- officers or members of the Board of businesses or nonprofits with missions either competing with or conflicting with Theler Center's mission.

3.1.3.2. **Multiple directorships.** When a director serves on more than one board, he/she must determine to which nonprofit, if any, he/she owes a fiduciary duty to disclose a potential business opportunity, and from which board, if any, must he or she seek approval to pursue a transaction on behalf of another nonprofit.

Board members are considered to be in a conflict of interest under the following circumstances:

- when they—or when members of their family, business partners, or close personal associates—could personally or professionally benefit, directly or indirectly, financially or otherwise, from their position on the board;
- when they use their position on a board to the disadvantage or detriment of a third party;
- when they solicit or obtain preferential treatment related to services received from or rendered to the corporation, including contracted work, employment, or honoraria;
- when circumstances arise that compromise, or appear to compromise, the ability of board members or staff to make unbiased decisions;
- when they appropriate financial or other resources for personal use (e.g., information, property, equipment, supplies, transportation, training);
- when they seek, accept, or receive material personal benefit from a supplier, vendor, individual, or organization doing or seeking business with the corporation;
- when they are involved in the contracting, employment, supervision, grievance, evaluation, promotion, remuneration, or firing of a family member, business associate, or friend of the director;
- non-pecuniary interests may present a moral conflict of interest, if not a legal conflict.

<http://www.nonprofitquarterly.org/section/864.html>

⁵ Bylaws § IV.2

⁶ Employees of Theler Center are proscribed because of the obvious conflict of interest created by employees determining the conditions of their own employment. Employees of the school districts utilizing NM High School are proscribed because the Theler Board interacts directly with the NMSD Board of Directors—the employer of NMSD employees—which is a similar conflict of interest.

⁷ A household is "one person or a group of people who have the accommodation as their only or main residence and for a group, either share at least one meal a day or share the living accommodation, that is, a living room or sitting room"
www.statistics.gov.uk/downloads/theme_social/FRS_Tech01-02.pdf

- A director is required to disclose an opportunity if it is a corporate opportunity for any of the nonprofits that the director serves.
- Where an opportunity is a corporate opportunity for one, but not all, of the nonprofits that a director serves, he/she must disclose the opportunity to the appropriate nonprofit, and withhold disclosure from all of the other nonprofits.
- If a business opportunity does not constitute a corporate opportunity for any nonprofit that the director serves, the director is free to exercise his or her judgment as to which nonprofit, if any, the director will disclose the opportunity.
- Although the corporate opportunity doctrine does not require directors to disclose every business opportunity they learn about, disclosure generally acts as a shield to protect a director from potential liability.

3.1.3.3. Ethical standards. Board Directors and the Operations Director must apply common ethical standards to all decisions. [8]

- **Peer Standards Test [9]:** “Would the community accept and approve of this action?” [10]
- **Public Disclosure Test [11]:** “How might key stakeholders, the public, or the media react if this action were publicly disclosed? What impact would this action have on the credibility of Theler Center and its leadership?”
- **Reasonable Person Test:** “What would a reasonably prudent person do under the circumstances?”
- **The Best Interests Test [12]:** “How would a person act honestly and in good faith in the best interests of Theler Center?”

3.1.2.4. General disclosure. Each Board Director and the Operations Director shall annually submit to the Board a written disclosure of all nonprofit or government boards or commissions to which s/he is a member, including any directorships, trusteeships, officers or other positions of authority held in those nonprofits and government agencies. See Appendix 1007C.

3.1.2.5. Emergent disclosure. In general, when a Board Director or the Operations Director encounters a potential business opportunity, he/she must disclose it to the Theler Board if the opportunity is deemed a “corporate opportunity” for Theler Center, provided that:

- Theler Center is financially able to take advantage of the opportunity;
- the opportunity is within Theler Center’s mission and goals;
- Theler Center has an interest or expectancy in that opportunity; and

Board members may create an ethical conflict under these circumstances:

- when their personal interests conflict with the interests of members or clients or are otherwise adverse to the interests of the corporation;
- when their membership on the board or staff of another organization could create interests that conflict with the interests of the corporation or its clients and where their activities on one board might materially affect their capacity on another board.

<http://www.nonprofitquarterly.org/section/864.html>

Don't over restrict

Social, business, religious, and service club networks are often the glue that hold smaller communities together and that sustain the nonprofit agencies in their midst. In small communities there is typically a small group of community leaders who serve many functions. Therefore it is not practical or desirable to prohibit Board members, their families and close associates from also being vendors to Theler Center. Procuring goods and services must be conducted based on principles of fairness and transparency.

⁸ <http://www.nonprofitquarterly.org/section/864.html>

⁹ Or the Community and Industry Standards Test

¹⁰ This test is not a rationale for accepting a practice just because “everybody is doing it.” Directors must be cautious not to engage in unethical activity (for example contracting with board members to supply services in small communities, or hiring family members as staff) simply because it’s accepted by the community.

¹¹ Or the “Smell Test”

¹² Or “Duty of Loyalty”

- if the opportunity is taken by the director for personal benefit or benefit of another, places the director in a position adverse to his or her duties to Theler Center.

Disclosure is not required if a business opportunity is not a corporate opportunity for Theler Center. [13] Board directors and the Operations Director are free to pursue individual business opportunities [14] or those corporate business opportunities he/she discloses but the Theler Board declines to pursue.

- 3.1.2.6. **Voluntary disclosure.** Even where disclosure is not required, a director may decide to even the playing field by disclosing the opportunity to all of the nonprofits the director serves. [15]
- 3.1.2.7. **Competitive procurement.** The Board will establish a “Bidding and Contracting Policy” ensuring all goods and services are procured competitively.

3.1.3. Resolving Conflicts

- 3.1.3.1. **Recusal.** Board Directors with a conflict of interest are expected to recuse themselves from (i.e., abstain from) decisions where such a conflict exists.

The Board of Directors may evaluate whether a conflict of interest exists and may, by majority vote, require the conflicted Board director to recuse himself/herself from discussions and/or decisions.

Example:

If the Board is considering hiring a consulting firm for some task, and one firm being considered has, as a partner, a close relative of one of the Board's directors, he/she should not vote on which firm is to be selected. In fact, to minimize any conflict, the Board director should not participate in any way in the decision, including discussions.

- 3.1.3.2. **Third-party Evaluations.** Evaluations of business decisions by a non-conflicted third party may be used to assure “arms-length” transactions.

Managing Conflict of Interest

- Board members should disclose conflicts of interests early and often.
- Conflict of interest should be a regular item on every board agenda and periodically discussed by the whole board.
- In cases where a board member may not perceive that a conflict of interest exists, it is the responsibility of other board members who are aware of a real, potential, or perceived conflict of interest on the part of a fellow board member to raise the issue.
- If the board is contemplating a financial transaction with a board member, the process should be conducted through a fair and open process in which board members who have no personal or business interests in the matter make the final decision about awarding contracts.
- The organization should report annually (for example, on its Web site or in its annual report) any conflict of interest disclosures and their disposition in relation to any financial transactions.

<http://www.nonprofitquarterly.org/section/B64.html>

¹³ However, a conflict can arise if an opportunity is presented to a director in his or her corporate capacity for one nonprofit, but the opportunity represents a corporate opportunity for more than one of the nonprofits that the director serves. If a nonprofit requires a director to disclose a corporate opportunity of another nonprofit, the director may be forced to breach his or her fiduciary duty of loyalty to the initial nonprofit, and this may create a conflict of interest.

¹⁴ A potential business opportunity generally is not a corporate opportunity if it is an opportunity: that the director learns of in his or her individual capacity and not in his or her corporate capacity; that is not essential to the corporation; in which the corporation holds no interest or expectancy; and in which the director has not wrongfully employed the resources of the corporation in developing or acquiring the opportunity.

¹⁵ However, directors should carefully consider the possible consequences of such disclosure. In the context of grants or donations, such equal disclosure might be the best approach, because each nonprofit will have an equal opportunity to compete for funding. However, in the context of real property, personal property, or other tangible interests, competition may drive up the cost of an opportunity, and thus disclosure may hinder each nonprofit's ability to take advantage of the opportunity, or may make an opportunity less attractive. Another potential adverse effect of disclosure is that a director who serves multiple nonprofits that decide to compete for the same business opportunity might be precluded from participating in the acquisition of that opportunity on behalf of any of the nonprofits, because such competition creates a conflict of loyalties, and thus a conflict of interest. If the opportunity is contingent upon the director's involvement, then prohibiting the director from participating may cause all of the nonprofits to lose the opportunity.

Example:

If the Board must purchase goods or services from a firm in which one of the Board directors owns an interest, it is improper (and, typically, illegal) for the Board director to simply state a price and then have the (majority-controlled) board of directors approve that price. The Board should task an independent person (a third party), well-qualified to evaluate such matters, to calculate a "fair price", which is then voted on by the minority shareholders.

Example:

If the Board is considering renting office space to a nonprofit for which one of the Theler Center Board directors also serves on the Board, the Board should get an independent evaluation showing what the market rate is for such leases in the locale, to address the conflict of interest that exists between the fiduciary duty of the Board director to Theler Center and the interest of that Board director has in the other nonprofit.

- 3.1.3.3. **Restrictions and exclusions.** Board directors and staff should be restricted or excluded from benefits where there may be a question of fairness.

Example:

Board directors, staff and their family members should be excluded from contests and prize drawings.

3.2. Code of Ethics

A code of ethics helps minimize problems with conflicts of interest because it can spell out the extent to which such conflicts should be avoided, and what the parties should do where such conflicts are permitted by a code of ethics (disclosure, recusal, etc.). Thus, directors cannot claim that they were unaware that their improper behavior was unethical.

- 3.2.1. **Duties.** A Board Director must strive, to the best of his/her ability, to fulfill the "Four Duties:"

- **Duty of Care:** The duty of care describes the level of competence that is expected of a Board director, and is commonly expressed as the duty of "care than an ordinarily prudent person would exercise in a like position and under similar circumstances." This means that a Board director's duty is to exercise reasonable care when he or she makes a decision as a steward of the organization. [16]
- **Duty of Loyalty:** The duty of loyalty is a standard of faithfulness; a Board director must give undivided allegiance when making decisions affecting the organization. This means that a Board director can never use information obtained as a director for personal gain, but must act in the best interests of the organization. [17]
- **Duty of Obedience:** The duty of obedience requires Board directors to be faithful to the organization's mission. They are not permitted to act in a way that is inconsistent with the central goals of the organization. A basis for this rule lies in the public's trust that the officer will manage donated funds to fulfill the organization's mission. [18]
- **Duty of Due Diligence:** The care to be expected from a reasonable and prudent person exercised under the circumstances before making a decision on a matter. [19]

- 3.2.2. **Gifts and gratuities.** Board Directors, the Operations Director and their immediate families will not use their position with Theler Center to solicit any cash, gifts, gift

¹⁶ http://www.greatboards.org/resources/pdf/legal_obligations.PDF and <http://www.nonprofits.org/faq/legalresp.pdf>

¹⁷ *ibid*

¹⁸ *ibid*

¹⁹ <http://www.nonprofitquarterly.org/section/864.html>