

# CASE STUDY: SALE OF A NONPROFIT— *The Sale of Daniel Webster College to ITT Educational Services, Inc.*<sup>1</sup>

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By Attorneys Ovide M. Lamontagne  
and Ryan M. Williams

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## INTRODUCTION

After nearly five years of substantial economic growth, the engine of American prosperity started to sputter in 2006. During that fateful year, as housing values leveled<sup>2</sup> and interest rates rose from their historic lows,<sup>3</sup> defaults on adjustable-rate mortgages by subprime borrowers began to escalate at a feverish pace. By 2008, the disastrous marriage of these subprime loans to mortgage-backed securities was threatening even the most established financial firms. As the year progressed, with the collapse of such institutional giants as Lehman Brothers and the failure of Fannie Mae and Freddie Mac, the seemingly unceasing string of bad news only appeared to be escalating. Indeed, the speed and severity with which things appeared to be falling apart led legendary investor Warren Buffet to describe the turmoil as “an economic Pearl Harbor.”<sup>4</sup>

For countless small, non-profit educational institutions, however, troubled times began well before the subprime mortgage crisis took its grip. Confronted with an increasingly competitive market, these unfortunate trendsetters have been toiling under distressed fiscal circumstances for more than a decade. As a result, for many of these organizations, the credit crunch that has attended the current market turmoil has been not the first, but rather the final, fatal blow in a long, hard-fought battle for solvency. With little hope of survival, these institutions are left with little choice but to dissolve, merge with another non-profit entity, or be acquired by a for-profit company.

To an increasing extent, the latter of these three alternatives has proven to be the only feasible option. To be sure, from the acquisition of Franciscan University in Iowa by the for-profit company Bridgepoint Education in 2005,<sup>5</sup> to the more recent purchase of Myers University in Ohio by the for-profit investment firm Significant Partners in 2008,<sup>6</sup> these for-profit acquisitions are gradually becoming a staple of modern business in the education realm. But despite their increased prevalence, these transactions continue to raise interesting, and often unsettled legal questions as they result in an uncommon interaction between the non-profit and for-profit worlds.

In an effort to illuminate some of these considerations, this article explores the recently completed sale of substantially all of the assets of Daniel Webster College (“DWC”) to the for-profit corporation DWC Acquisition Corp., a wholly-owned subsidiary of ITT Educational Services, Inc. (collectively, “ITT”).<sup>7</sup> Although not exhaustive in its discussion, the article will highlight for practitioners some of the larger issues that can arise when representing a non-profit seeking rescue from financial distress through a transaction of this nature.

## DANIEL WEBSTER COLLEGE'S DEEPENING WOES

With a full-time enrollment of less than one thousand students,<sup>8</sup> DWC is a small college located on a fifty-acre campus to the south of Boire Field municipal airport in Nashua, New Hampshire.<sup>9</sup> Founded in 1965 as the “New England Aeronautical Institute,” DWC was initially established as a non-profit technical school devoted to workforce training in the fields “of aeronautics and aerospace.”<sup>10</sup> However, by an act of the Legislature in 1973, DWC was granted the authority to offer programs outside the field of aeronautics in the areas of arts and sciences.<sup>11</sup> Since adopting the name “Daniel Webster College” in 1978,<sup>12</sup> DWC has further expanded its curriculum to include degree programs at the bachelors’ and masters’ level, and offering courses in business, social science, computer science, and engineering.

Like many of its contemporaries, DWC had been struggling financially well before the global economic collapse in 2008. Indeed, with crushing debt and unstable enrollment, DWC had been suffering from operating losses since at least the turn of this century.<sup>13</sup> In the 2004 fiscal year, for example, it received \$12,864,442 in net tuition and fees, but had operating expenses totaling \$18,634,484. Even taking into account other sources of revenue, including contributions and gains on long-term investments, DWC incurred a year-over-year decrease in net assets of over \$150,000. This budgetary shortfall was not only jeopardizing DWC’s viability, but was also stymieing the Board’s ability to engage in the type of innovation and enrichment of programs and amenities that might bring in additional revenue through increased enrollment.

This was the financial predicament that Robert E. Myers inherited on July 1, 2005, when he was hired by the Board of Directors (the “Board”) to serve as DWC’s new president. Despite these fiscal obstacles, President Myers assumed his position determined to return the institution to solvency. To that end, within months of starting

his tenure, President Myers set forth a proposed course of action for revitalizing DWC in a letter to the Board entitled "A Vision for 2015 and Beyond" ("Vision 2015"). While conceding in that letter that DWC was "financially fragile" and suffered from a "culture of poverty," President Myers expressed his belief that DWC could become one of "the top ten small colleges in the nation that have mastered the balance of developing today's workforce and preparing tomorrow's workforce for careers in aviation, business, engineering, and information technology."<sup>14</sup> To achieve this transformational change, he noted DWC would need, among other things, to add new programs to its academic inventory, review and retool existing programs, and bolster DWC's modest endowment.<sup>15</sup> On October 22, 2005, the Board adopted President Myers' Vision 2015 plan.

## FUNDAMENTAL CHANGE IS NEEDED

DWC's management struggled mightily to achieve the goals set forth in Vision 2015, but progress was hobbled by the lack of financial resources. To be sure, following the Board's adoption of Vision 2015, DWC incurred operating losses in both 2005 and 2006.

This ongoing fiscal predicament became a cause for concern for the United States Department of Education (the "USDOE"). On April 10, 2006, DWC received written notice from the USDOE that it was at risk of losing its ability to participate in the federal student financial assistance programs (the "Federal Aid Programs")<sup>16</sup> offered under Title IV of the Higher Education Act of 1965 (the "HEA").<sup>17</sup> Under the HEA, an educational institution must demonstrate that it can "meet all of its financial obligations" in order to participate in any Federal Aid Program.<sup>18</sup> In its letter, the USDOE explained that DWC failed to meet this criteria and, as a result, would only be permitted to continue to participate in the Federal Aid Programs on a provisional basis if, among other things, it maintained a letter of credit in excess of \$700,000.<sup>19</sup> However, apart from the fact that this provisional form of participation could be revoked at any time if the USDOE determined that DWC could not "meet its responsibilities under its program participation agreement,"<sup>20</sup> it would also automatically lapse on June 30, 2009,<sup>21</sup> with no guarantees that DWC would be re-approved. Given that DWC received approximately 35 percent of its gross annual revenue (or approximately 51 percent of net annual revenue) through federal aid, loss of this funding would be fatal.

To make matters worse, DWC's financial frailty also caused the college's accrediting body, the New England Association of Schools and Colleges ("NEASC"), to issue a formal "Notice of Concern" in the spring of 2006. NEASC issues such notices when it "determines that an institution is in danger of being found not to meet one or more Standards of Accreditation if current circumstances or trends continue."<sup>22</sup> In DWC's case, NEASC explained that the college was in danger of failing to meet the NEASC "standards on Financial Resources" because of DWC's: (1) heavy dependence on tuition; (2) mixed financial results, especially with regard to unrestricted assets; (3) thin or weak operating margin; (4) high level of debt; and (5) low cash reserves. Accordingly, NEASC required DWC to undergo a "focused evaluation" - which is a form of assessment involving

a team of academics visiting a college's campus and assessing its progress towards addressing the issues raised in a Notice of Concern<sup>23</sup> - by the end of 2008. When that focused evaluation was completed in 2008, the visiting team of academics reported that DWC had experienced "no significant improvement in financial stability" and was now operating "on a year-to-year or perhaps semester-to-semester basis."<sup>24</sup> As a result, they concluded that "a dark cloud of uncertain financial viability continues to hover over the [c]ollege: a challenge which must be resolved."<sup>25</sup> In light of the fact that accreditation is necessary for an institution to grant degrees,<sup>26</sup> if DWC had failed to resolve this challenge and its accreditation was lost, it would have been forced to close.

Though hobbled by the potential loss of its accreditation and its ability to participate in federal aid programs, DWC managed to struggle through 2008. However, it suffered a year-over-year decrease in its net assets of \$316,235, and was projecting an operating loss in excess of \$700,000 for the upcoming fiscal year. Faced with the stark reality that DWC was teetering on the brink of insolvency, the Board came to the unanimous conclusion that a fundamental change would be necessary in order to insure the survival of the institution.

## SELECTION OF ITT

Unlike the directors of a for-profit corporation, the Board could not focus merely on economic factors when exploring the alternatives available for resolving the College's precarious financial situation. Since its inception, DWC had operated as a voluntary, non-profit corporation<sup>27</sup> that was exempt from federal taxation under Section 501(c)(3) of the Federal Tax Code (the "Code").<sup>28</sup> As such, pursuant to both common and statutory law, the College was deemed a "charitable trust"<sup>29</sup> and its assets were held for the public benefit.<sup>30</sup> To the maximum extent possible, therefore, all of the Board's decisions needed to be guided by an awareness of, and fidelity to both DWC's charitable mission and the interests of its beneficiaries (i.e., the college's students and the local community).<sup>31</sup>

With these principles in mind, President Myers and several members of the Board began exploring external alternatives for preserving DWC's charitable assets, including merger discussions with two other non-profit colleges and negotiations with a venture capital firm about potential investment. However, none of these options could meet DWC's needs in a manner that would allow it to remain sufficiently aligned with its charitable mission. It was not until the end of 2008, when President Myers and the Board members began a conversation with representatives from ITT that their search for a financially viable solution bore fruit.

Unlike DWC, ITT is a for-profit, publicly-traded corporation. Despite this difference, ITT was an attractive potential partner because it possesses nearly 40 years of experience in higher education and operates 29 nationally-accredited institutions across the United States. Moreover, in contrast to the other scenarios explored, the discussions with ITT produced a template for a transaction that would allow the institution "Daniel Webster College"<sup>32</sup> to continue to provide educational opportunities to the community in accord

with the general charitable intent of DWC's founders, permit DWC to extinguish in excess of \$22,300,000 in debt, and enable the corporate entity that held title to the DWC's assets to create an independent source of charitable giving for New Hampshire residents.

Ultimately, DWC and ITT concluded that several unique factors common to both organizations would enable a synergy between the two institutions with minimal disruption to the student body, including the fact that both organizations share: (i) a close symmetry of mission; (ii) a congruence of program offerings that emphasize practical education and professional advancement; (iii) a common history as technical schools that train students for entry directly into the workforce; and (iv) a similar vision for the future. After carefully considering all available options, the Board determined that partnering with ITT presented the best option for resolving DWC's long-standing financial problems. and provide "Daniel Webster College" with the resources to continue. The Board and ITT also determined that structuring the deal in the form of an asset sale would provide both parties with the flexibility needed to achieve this dual objective.

## EXECUTION OF THE LETTER OF INTENT

On January 14, 2009, DWC and ITT signed a Letter of Intent ("LOI"), in which they agreed to begin the arduous process of preparing the final asset purchase agreement (the "Purchase Agreement") that would govern the sale of substantially all of the assets of DWC to ITT's subsidiary, DWC Acquisition Corp. (the "Transaction"). As is customary in acquisition transactions, the LOI set forth the parties' general understanding as to the assets to be acquired, the purchase price, the structure of the deal, the scope and extent of the parties' due diligence, the seller's obligations to preserve the business during such due diligence, and each parties' obligations as to confidentiality. It was not until after this LOI had been executed that the Board sought assistance from outside legal counsel.

Ideally, in transactions of this nature, legal counsel would be involved in the negotiations well before the LOI is executed. While an LOI has obvious utility in guiding the relationship between the parties when a deal will involve lengthy and costly preliminary negotiations, "in the hands of many entrepreneurs and corporate officers, . . . [LOI's] have led to much misunderstanding, litigation and commercial chaos."<sup>33</sup> The confusion and problems tend to arise from the fact that, unbeknownst to many in the business world, an LOI can become binding even though the document expressly contemplates the execution of a subsequent writing.<sup>34</sup> As more fully explained by Judge Leval in his oft-cited opinion, *Teachers Ins. and Annuity Assoc. of America v. Tribune Co.*,<sup>35</sup> there are at least two distinct types of preliminary agreements with such binding force: The first binds the parties "to their ultimate contractual objective" and "occurs when the parties have reached complete agreement (including the agreement to be bound) on all the issues perceived to require negotiation," but express an intention to adopt a more formal writing.<sup>36</sup> The second occurs when the agreement, on its face, "expresses mutual commitment to a contract on agreed major terms, while recognizing the existence of open terms that remain

to be negotiated."<sup>37</sup> Unlike the first, this latter form of binding preliminary agreement imposes upon each party a duty to negotiate in good faith and bars each from "renouncing the deal, abandoning the negotiations, or insisting on conditions that do not conform to the preliminary agreement."<sup>38</sup>

Given that many LOI's are prepared by persons who are unaware of their potential ramifications, to the extent possible, practitioners should advise their clients against executing such documents without first obtaining the advice of legal counsel, even if counsel is not retained to negotiate the terms of the document. This need for counsel becomes arguably more pronounced when the transaction is between a charitable organization, which will likely have little experience with such matters, and a sophisticated for-profit entity. Fortunately, in this case, DWC's Board consisted of a group of sophisticated business persons cognizant of both charitable trust principles and the implications of executing an LOI. Not surprisingly, therefore, the LOI expressly disavowed the enforceability of the majority of its provisions.

Of those few provisions that were purportedly enforceable, only one warrants further discussion. In particular, the LOI prohibited DWC and its representatives from directly or indirectly engaging in, essentially, any activity that could have resulted in DWC's receipt of a competing offer.<sup>39</sup> While such exclusivity (or "no-shop") provisions are not uncommon, and indeed are often necessary to protect a contracting party's investment in a potential deal, they should not be accepted without due consideration. This is so because, beginning with the seminal case *Revlon, Inc. v. MacAndrews & Forces Holdings, Inc.*, courts have increasingly held that a for-profit corporate board that has determined to partake in a transaction to sell the company must focus on "the maximization of the company's value at a sale for the stockholders' benefit."<sup>40</sup> As a direct corollary to this rule, *Revlon* and its progeny have concluded that such for-profit boards must obtain "a body of reliable evidence with which to evaluate the fairness of the transaction."<sup>41</sup> In application, this means that, when a "board is considering a single offer and has no reliable grounds upon which to judge its adequacy, [it must engage in] a canvas of the market to determine if higher bids may be elicited."<sup>42</sup> Thus, in certain cases, acceptance of a "no-shop" provision can be problematic because it blocks a board's ability to engage in such a canvas of the market and hinders its ability to obtain a "reliable grounds upon which to judge [the deal's] adequacy."<sup>43</sup>

To be sure, it does not appear that any court has yet had the opportunity to consider whether the so-called *Revlon* duties would apply to the sale of a non-profit corporation. Nevertheless, it should be noted that the *Revlon* duties are not the product of some abstract judicial artifice, but rather derive from a board's general duty of "care and loyalty to the corporation and its shareholders."<sup>44</sup> While they do not possess shareholders, charitable corporations owe a similar, if not more stringent duty of care and loyalty to their beneficial community as fiduciaries. In recognition of these owed loyalties, the majority of states now employ general corporate law principles in defining a non-profit corporate board's fiduciary duties.<sup>45</sup> Indeed, the Director of Charitable Trusts of the New Hampshire General's Office

(the “Director”) has gone even further and stated that the managers of a charitable trust must “be judged by a stricter standard of duty and care than the managers of ordinary for-profit corporations.”<sup>46</sup> Accordingly, given the legal landscape in New Hampshire, if the issue were to come before a New Hampshire court, the authors believe that there would be a compelling argument for the application of Revlon standards in the non-profit realm.

Nevertheless, even if *Revlon* were deemed applicable, it was apparent that its standards would have been met in this case. Somewhat auspiciously, the Board had done precisely what *Revlon* commands by entering the market and considering the reasonably available options prior to entering into any form of definitive agreement. Moreover, as stated in the LOI, the purchase price in the deal the Board ultimately chose was based upon an independent appraisal of the fair market value of the assets to be sold. With this information on hand, it was clear that the Board had reliable grounds upon which to judge the deal’s adequacy.<sup>47</sup>

After deciding that the transaction with ITT was in the best interests of DWC and the community at large, the Board still faced several hurdles in order to accomplish the sale. As discussed below, both the Charitable Trusts Unit of the New Hampshire Attorney General’s Office and the Hillsborough County Probate Court, as well as certain college accrediting bodies, would play significant roles in achieving DWC’s objectives.

## REVIEW BY THE NEW HAMPSHIRE CHARITABLE TRUSTS UNIT

On January 29, 2009, representatives of DWC and ITT met informally with the Director of the Charitable Trusts Unit to discuss the proposed transaction. By statute and common law, the Director represents the public interest in matters involving charitable trusts.<sup>48</sup> Pursuant to RSA 7:20, he is empowered to exercise “all the common law and statutory rights, duties and powers of the attorney general in connection with the supervision, administration and enforcement of charitable trusts” operating within the State of New Hampshire.<sup>49</sup>

For over a decade, the Director has interpreted this statutory and common law power as granting to his office oversight authority in transactions involving the merger or acquisition of charitable trusts, under the theory that such transactions invariably result in some alteration to the trust’s charitable purpose. Perhaps the most famous exercise of this oversight authority occurred in 1998 when the Director investigated the merger of Elliot Hospital and Catholic Medical Center into Optima Health. In that matter, the Director concluded that the affiliation had violated charitable trust law because it had resulted in a change to the charitable purpose of both entities and neither party had provided notice to the New Hampshire Charitable Trusts Unit or sought approval from the Probate Court.<sup>50</sup> Accordingly, even though the union of these two organizations had been consummated over four years prior, Optima Health was ultimately dissolved and its constituent parts (the two independent hospitals) reconstituted.<sup>51</sup>

The Optima Health matter reaffirmed for DWC’s counsel, as it should for all practitioners, the critical importance of involving the

New Hampshire Charitable Trusts Unit in merger and acquisition transactions of this nature from the outset.<sup>52</sup> To this end, the parties deemed it prudent to open a dialogue with the Director on a confidential basis as soon as practicable after the LOI had been executed and, thus, submitted several important documents (including the LOI and certain financial statements) for the Director’s confidential review prior to their January meeting. The parties also kept the Director apprised of any major developments that arose during negotiations, provided the Director with a copy of the draft Purchase Agreement once completed, and, on March 26, 2009, made a presentation to the Director and his forensic accountant<sup>53</sup> regarding the financial aspects of the Transaction. All of these disclosures were made prior to the execution of the Purchase Agreement.

For his part, because the statutes were of little help, the Director indicated that he would look to the standards articulated in RSA 7:19-b for guidance in conducting his review of the merits of the proposed sale. Enacted in 1997 to address a rising trend of hospital mergers and healthcare acquisitions, RSA 7:19-b provides a regulatory framework governing “acquisition transactions”<sup>54</sup> involving “health care charitable trusts” (a “HCCT”).<sup>55</sup> In pertinent part, the statute requires the Director to review such acquisitions to determine if certain “minimum standards” are met,<sup>56</sup> including whether: (1) the proposed transaction is permitted by applicable law; (2) due diligence has been exercised in selecting the acquirer, negotiating the terms of the proposed transaction, and in determining that the transaction is in the best interest of the HCCT and the community which it serves; (3) all conflicts of interest and pecuniary benefits have been disclosed; (4) the proceeds to be received pursuant to the transaction constitute fair value; (5) any proceeds from the transaction will continue to be devoted to purposes consistent with both the HCCT’s charitable purpose and the needs of the community; and (6) if the acquirer is other than another New Hampshire-based HCCT, control of the proceeds will be independent from the acquirer.

Though recognizing that RSA 7:19-b was inapplicable to the transaction, counsel had no quarrels with the utilization of these criteria as a theoretical framework in which to structure the review of the proposed transaction. However, in addition to the aforementioned factors, RSA 7:19-b also requires an HCCT to provide reasonable “public notice” of the proposed transaction to the community, “along with reasonable and timely opportunity for such community, through public hearing or other similar methods, to inform the deliberations of the governing body of the [HCCT] regarding the proposed transaction.”<sup>57</sup>

Typically, this element is fulfilled through a series of public forums, conducted in advance of the execution of a binding contractual agreement.<sup>58</sup> The application of this particular process to an educational institution proved problematic - unlike a hospital (whose patrons tend to focus on immediate needs), a college must have an appearance of stability and permanency in order to attract prospective students. If disclosure prior to the execution of a definitive Purchase Agreement had been required, DWC’s precarious financial condition would have become a matter of public knowledge. As a result, if the deal ultimately fell through it would have more

than likely resulted in a precipitous decline in enrollment, which would have exacerbated the problems faced by DWC and further jeopardized its charitable assets. Perhaps in recognition of these facts, the Director determined that it was in the public's interest to postpone receiving public comment until after the Purchase Agreement had been executed and DWC had submitted its application to the Probate Court for *cy pres* relief. As it turned out, the Probate Court proved to be an ideal forum for eliciting public comment.

## THE PROBATE COURT AND *CY PRES* RELIEF

Apart from clarifying the scope of the Director's authority in non-profit mergers and acquisitions, the Optima Health matter also underscored the critical importance of obtaining Probate Court approval for such transactions through the doctrine of *cy pres*. Derived from the olden French phrase "*cy pres comme possible*," meaning "as near as possible," the common law doctrine of *cy pres* permits a charitable trust to alter its purpose when such purpose has become "obsolete, impossible, or impractical to enforce due to changes in social, economic, or other conditions."<sup>59</sup> As the New Hampshire Supreme Court further explained in 1889, the doctrine is a rule of construction "by which a charity may be enforced in favor of the general intent, even where the particular mode or means provided by the donor fails by reason of its inadequacy."<sup>60</sup> Now codified in the revised statutes, the doctrine now dictates that:

[i]f property is or has been given in trust to be applied to a charitable purpose, and said purpose or its application is or becomes impossible or impracticable or illegal or obsolete or ineffective or prejudicial to the public interest to carry out, the trust shall not fail. Upon petition by the trustee or trustees or the attorney general, the [P]robate [C]ourt may direct the application of the property to some charitable purpose which is useful to the community, and which charitable purpose fulfills as nearly as possible the general charitable intent of the settlor or testator. In applying the doctrine of *cy pres*, the court may order the distribution of the trust assets to another charitable trust or to a charitable corporation to be held and administered by it in accordance with the terms of the governing instrument as said terms may be modified by the application of *cy pres* under this section and RSA 547:3-e.<sup>61</sup>

For this transaction, there were multiple charitable trusts for which *cy pres* relief would be required. As noted previously, DWC was itself a charitable trust, the purpose of which was to operate the non-profit educational institution "Daniel Webster College."<sup>62</sup> In effect, the corpus of this "trust" consisted of all of the operational assets of DWC, including its real property, personal property, accounts receivable and intellectual property. ITT would acquire substantially all of these operational "charitable assets" and continue to operate "Daniel Webster College," but as a for-profit entity. As a result, the legal entity that held title to the college's assets would no longer be capable of pursuing its stated charitable purpose and, thus, *cy pres* relief would be required in order to permit it to adopt a new charitable purpose. At the same time, as part of its endowment, DWC also had custody and control over approximately 25 academic scholarships.

Each of these scholarships qualified as separate charitable trusts because each had been established by a donor with the express intent that the funds would be utilized to provide financial assistance to students attending the college.<sup>63</sup> However, ITT would not acquire the scholarship funds. Instead, those funds and any remaining proceeds from the transaction would be retained by the legal entity that previously held title to DWC's assets, with the intent that they would be utilized in furtherance of that entity's new charitable purpose.

This layering of multiple charitable trusts presented certain logistical hurdles.<sup>64</sup> For one thing, the arguments for *cy pres* relief to change the charitable purpose of the legal entity that held title to the college's assets and the scholarship funds were distinct, with the former premised upon the financial impracticability of continuing to operate the DWC on a non-profit basis and the latter contingent upon the fundamental change that would occur at "Daniel Webster College" as a result of the acquisition. Moreover, because of the potential revocation of its accreditation and its participation in federal aid Programs, DWC needed to complete the sale as soon as practicable. With such an expedited schedule, DWC's counsel questioned whether it was feasible to both track down the various donors to the scholarship funds and provide the same with adequate notice of the Probate Court proceedings.<sup>65</sup> Even more to the point, because the purchase price for the sale was dependent in part upon DWC's net working capital at the time of closing, it would not be clear until after the closing had occurred whether the legal entity that would retain custody of the scholarship funds would have the financial wherewithal to continue to operate as an independent charitable foundation.

In light of these considerations, DWC's counsel determined that the Probate Court approval process should be bifurcated into two discrete stages: In the first stage, the Board filed an initial Petition for *cy pres* relief with the Probate Court, requesting approval for the transaction and permission for the legal entity that previously held title to the college's assets to continue to retain in trust both the scholarship funds and any remaining assets until completion of the second stage. Moreover, as that legal entity would no longer be able to pursue its charitable purpose of operating a college by the name "Daniel Webster College" following the transaction, the Board also requested the authority to adopt amended Articles of Agreement and By-Laws contemporaneously with the consummation of the transaction.<sup>66</sup> As amended, those documents dictated that the legal entity that held title to the college's assets would adopt the name "STEAM Fund," and would continue to operate for the following charitable purpose:

to . . . foster the accessibility of higher education in New Hampshire by providing scholarships and other financial assistance to New Hampshire residents who desire to attend a secondary or post-secondary school, preferably located in Southern New Hampshire, that focuses on degree programs in a technical field, said schools including, but not being limited to Daniel Webster College, and which individuals have demonstrated sufficient merit and/or financial need based upon criteria adopted by the Trustees of the Corporation, in their sole and absolute discretion, and to do

any and all things in furtherance of these objects and purposes.

The second stage is still ongoing at the time of this writing and was initiated following the completion of the transaction. In this stage, the focus is on the proper disposition of the scholarship funds and other residual operational assets which were not acquired by ITT and which STEAM Fund holds in trust for the public benefit. Segregating these particular issues allowed the Board and its counsel to focus their energy at the outset on consummating the transaction and preserving the charitable assets of DWC. Moreover, the Board could both provide proper notice to the various donors of the scholarship funds and more adequately marshal the assets of STEAM Fund in order to assess the practical reality of its continued existence as a separate charitable entity after the closing. Ultimately, adoption of this bifurcated approach provided a workable solution to what could have been a much more complicated Probate Court process.

### **ADDITIONAL APPROVALS FROM VARIOUS EDUCATIONAL BODIES**

In addition to the approvals and challenges discussed above, consummation of the proposed Transaction also required sanction from NEASC, the USDOE and the New Hampshire Postsecondary Education Commission (“NHPEC”). To alleviate the risk that tardy receipt of any of these consents would jeopardize the transaction, the parties agreed to begin the process for obtaining these approvals before the formal Purchase Agreement had been executed. Accordingly, on February 5, 2009, DWC submitted a “Substantive Change Report” with NEASC’s Commission on Institutions of Higher Education, in which it set forth the facts and circumstances that justified the proposed change in ownership of “Daniel Webster College.”<sup>67</sup> At around the same time, DWC also filed a change of ownership application with the NHPEC<sup>68</sup> and requested that the USDOE conduct a pre-acquisition review of the Transaction.<sup>69</sup> In the end, each of these agencies granted DWC the authority to proceed with the Transaction.<sup>70</sup>

### **THE PURCHASE AGREEMENT**

Unlike its counterpart in the for-profit realm, a non-profit board of directors cannot rely on mere business judgment in determining that the sale of a non-profit corporation is necessary to protect that entity’s charitable assets. Instead, as a direct consequence of the cypres doctrine’s application in this arena, the non-profit board must wait until the non-profit corporation’s charitable mission has become “impracticable”<sup>71</sup> or “ineffective”<sup>72</sup> before it will be permitted to sell. By the time that the facts support such a claim, however, it is often the case that the non-profit corporation is in dire financial straits.<sup>73</sup> As a result, it is also often the case that non-profit corporations will have to suffer under a gross disparity in bargaining power once a prospective acquirer comes along.

The present matter was no exception to this general observation. As discussed at length above, by the time the parties had reached the point of executing the LOI, DWC was operating on the edge of a

financial precipice. Its accreditation and eligibility for federal aid in jeopardy, DWC was suffering yearly operating losses and had no ability to borrow the funds necessary to change its blighted course. If the transaction failed to go through, both parties were well aware that DWC would soon close. The other party to transaction was on a firm footing: ITT had a net cash position in excess of \$225 million as of December 31, 2008. Clearly, DWC and ITT were not on equal footing.

Despite this disparity in bargaining power, DWC managed to maintain a modicum of leverage by continually advertizing to the impending review of the acquisition by regulatory and administrative bodies. The parties had no choice but to work towards an agreement that was fair and consistent with charitable trust principles. In this sense, the very thing that could have prevented the DWC board from achieving its objective of protecting the college’s remaining charitable assets through the transaction ultimately gave it the bargaining strength to adhere to its fiduciary duties to the public in structuring the deal. In the end, due in no small part to the possibility that the Director would not approve the transaction and the energy and resources the parties had invested would have been for naught, the negotiations resulted in a Purchase Agreement that contained terms that protected the value of DWC’s charitable assets to the maximum extent possible.

More particularly, as suggested above, in the Purchase Agreement the parties agreed that ITT would acquire essentially all of the assets necessary to operate “Daniel Webster College” (e.g., DWC’s real estate, tangible and personal property, and the trade name “Daniel Webster College”). In return for these assets, ITT agreed to pay in full all of DWC’s outstanding indebtedness, including three issues of tax-exempt bonds,<sup>74</sup> and assume all of the contracts that DWC had with its faculty. In addition, ITT agreed to pay DWC an amount equal to the fair market value of the assets acquired (as determined by two independent appraisal reports), plus \$2,500,000, minus certain other adjustments to be determined at the closing, including the final amounts expended by ITT in paying off all of DWC’s outstanding debt. Finally, ITT agreed to assume, pay, perform and/or discharge: (i) DWC’s accrued current liabilities and accounts payable; (ii) all liabilities and obligations arising under the contracts assigned to ITT under the Purchaser Agreement; and (iii) all of the New Hampshire transfer tax owed in connection with the sale of DWC’s real property.

Beyond the financial provisions, the Purchase Agreement contained numerous other terms that are standard for an acquisition transaction of this nature. Just by way of example, DWC was required to carry on its business in substantially the same manner throughout the pendency of the Purchase Agreement and to provide reasonable access to all of its contracts and other documentation for ITT’s review. As the critical asset being acquired by ITT was the right to operate “Daniel Webster College,” the Purchase Agreement also made consummation of the sale conditional upon the approval of the Director, the Probate Court, the Federal Aviation Authority and the educational agencies discussed above (e.g., NEASC, the USDOE and NHPEC). Finally, because asset purchase agreements can be

interpreted as only governing the parties' rights and obligations during the pendency of the underlying transaction, the Purchase Agreement contained a term extending the representations and warranties of DWC for two years post-closing.

On or about March 28, 2009, the Board held a special meeting in order to consider the terms of the Purchase Agreement and the general propriety of the transaction. Recognizing that the financial outlook for DWC was bleak, the Board determined that the proposed sale was the best option for ensuring that "Daniel Webster College" continued to provide educational opportunities to the community in a manner that is the functional equivalent of DWC's original charitable purpose. At the same time, the Board was pleased with the fact that the transaction would free DWC to continue to serve the public interest by applying its remaining assets to a modified charitable purpose of providing financial assistance to individuals who desire to attend a secondary or post-secondary technical education institution in New Hampshire. Accordingly, the Board voted unanimously to allow DWC to engage in the Transaction. Accordingly, on April 1, 2009, DWC and ITT executed the Purchase Agreement.

### **OBTAINING CY PRES APPROVAL AND CLOSING THE DEAL**

On April 23, 2009, representatives for DWC and the Director had an informal meeting with the Administrative Judge of the Probate Court in order to explain the transaction and file DWC's initial Petition for cy pres relief. The Petition described in detail: (i) the history of DWC; (ii) the persistent and ongoing financial troubles of the college; (iii) the circumstances causing DWC to select ITT as an acquirer; (iv) the pertinent terms of the Transaction; and (v) the prima facie justification under the doctrine of cy pres for both DWC's adoption of a modified charitable purpose and its participation in the Transaction. As an attachment to its Petition, DWC also submitted over 800 pages of exhibits.

The intent of providing such an exhaustive submission was to permit the Probate Court to review the matter without the necessity of a time-consuming request for additional documentation. In order to further expedite the process, DWC also submitted a proposed Procedural Order at the initial conference, in which it recommended that the Probate Court adopt the bifurcated approach to the proceedings and schedule a hearing for May 26, 2009, in order to consider and rule upon the merits of the Petition. In addition, DWC attached to the Order a proposed Notice by Publication which it intended to publish in the Union Leader twice before the final hearing.<sup>75</sup> That notice informed the public of the nature of the transaction and required all persons having a direct, legal relationship with DWC to submit a written statement to the Probate Court by May 12th or else be foreclosed from asserting any future interests or rights in the outcome of the matter.

Although the Director is the duly authorized representative of the public in matters such as those presented in the petition,<sup>76</sup> and thus the legal necessity for the notice was not entirely clear, DWC determined that there were numerous benefits to providing such public notice. For one thing, it provided an avenue through which

unknown parties with a potential legal interest in the matter could come forward and, thereby, significantly decreased the likelihood of a challenge being raised to the validity of the Probate Court approval. But even more importantly, because transparency is an underlying tenet of charitable trust principles,<sup>77</sup> DWC desired to inform the public of the transaction and afford the community an opportunity to voice any potential concerns to the Director and/or the Probate Court. For this reason, DWC also published the Petition and all of its exhibits on DWC's website for the public's review. Perhaps recognizing the benefits of such disclosures, the Probate Court adopted the proposed Procedural Order and ordered DWC to publish the Notice by Publication in the manner described.

On or about May 18, 2009, the Director submitted his answer approving the transaction.

With the Director approving the transaction and no members of the public coming forward to voice an objection to the sale, the May 26th hearing proved to be straightforward. In order to grant the relief requested in the Petition, the Probate Court needed to determine that: (i) it had become impossible, impracticable, illegal, obsolete, ineffective or prejudicial to the public interest for DWC to continue to fulfill its charitable mission as a non-profit educational institution; and (ii) the proposed charitable purpose for the entity that previously held title to the college's assets fulfilled as nearly as possible the general charitable intent of the college's original creators.<sup>78</sup> Based on the evidence, counsel for the Board argued that it had become, at minimum, financially impractical for DWC to continue to operate as a non-profit. On the second required finding, counsel asserted that providing scholarship funds to individuals who desire to attend a secondary or post-secondary educational institution in New Hampshire that focuses on technical programs fulfilled as nearly as possible the general charitable intent of DWC's settlors and donors. Moreover, counsel explained that the proposed transaction furthered both DWC's current purpose, in that it ensured that "Daniel Webster College" would continue to exist for the foreseeable future, and that the proceeds from the sale would advance the proposed charitable purpose for STEAM Fund. The Probate Court agreed and, on that same day, issued an Order granting DWC's Petition for cy pres relief in its entirety.

Having obtained all requisite approvals and completed all necessary due diligence, the parties closed the sale on June 10, 2009. As of the time of this writing in early September 2009, the Probate Court, the Director and representatives of STEAM Fund have embarked upon the second stage of the probate court process discussed above.

### **CONCLUSION**

From execution of the LOI to consummation of the deal at closing, it took a little more than six months for DWC to obtain all approvals required to finalize the transaction. Although it may appear unnecessarily cumbersome to those accustomed to practicing in the for-profit realm, this elaborate review process serves a critically important function - to protect the charitable assets that the non-profits operating throughout this state hold for our collective benefit. While certainly not perfect, when respected and followed, the process

can actually benefit the charitable entity seeking to engage in an acquisition transaction, as it provides both a means for assessing the propriety of an offer and a workable framework in which to structure a deal. In the end, if both parties make a conscientious effort to conduct their negotiations with absolute transparency and fidelity to the process, the involvement of the reviewing bodies is more of an asset than a hurdle.

*The authors would also like to acknowledge attorneys Jon B. Sparkman, Karen S. McGinley, Daniel E. Will, Sandra K. Mann, James F. Merrill and Harper R. Marshall.*

## ENDNOTES

- 1 Although the legal entity that acquired DWC's assets was DWC Acquisition Corp., for ease of reference both DWC Acquisition Corp. and ITT Educational Services, Inc. will be referred to collectively as "ITT."
- 2 The decrease in home equity was a vital contributing factor to the current economic crisis as extraction of home equity more than doubled from \$626.9 billion in 2001 to \$1.428 trillion in 2005. A. Greenspan and J. Kennedy, *Sources and Uses of Equity Extracted from Homes*, Table 2 (2007), available at <http://www.federalreserve.gov/pubs/feds/2007/200720/200720pap.pdf> (last accessed July 13, 2009).
- 3 Beginning in 2000, the Federal Reserve engaged in a prolonged series of cuts to the federal funds rate which resulted in the rate being reduced from 6.5% at its peak on May 16, 2000 to 1.00% on June 25, 2003. Thereafter, the Federal Reserve began increasing the rate until it hit 5.25% on June 29, 2006. See Federal Reserve Board, *Chart: Intended Federal Funds Rate: Change and Level, 1990 to Present*, available at <http://www.federalreserve.gov/fomc/fundsrate.htm> (last accessed July 14, 2009).
- 4 L. Shen and A. Frye, *Buffet Calls Crisis an 'Economic Pearl Harbor,' Backs Paulson*, dated September 24, 2009, available at <http://www.bloomberg.com/apps/news?sid=a8B.QQmw5A8M&pid=20601087> (last accessed July 9, 2009).
- 5 D. Lederman, *Inside Higher Ed: Rescuing a College in Cleveland*, dated June 12, 2008, available at [http://www.insidehighered.com/news/2005/03/02/forprofit3\\_2](http://www.insidehighered.com/news/2005/03/02/forprofit3_2) (last accessed July 16, 2009).
- 6 S. Jaschik, *Inside Higher Ed: A For-Profit Buys a Catholic College*, dated March 2, 2005, available at <http://www.insidehighered.com/news/2008/06/12/myers> (last accessed July 16, 2009).
- 7 It is the authors understanding that all of the facts presented in this article can be found in the documents submitted to the Hillsborough County Probate Court in connection with DWC's Petition for *Cy Pres* Relief and, thus, are matters of public record. To the extent that the reader has an interest, the petition and all of its exhibits are available for review at the Hillsborough County Probate Court, located at 30 Spring Street, Nashua, New Hampshire, under the case caption *In re: Daniel Webster College*, probate court docket number 316-2009-EQ-866 (Hillsborough 2009).
- 8 As of the 2007-2008 academic year, the College had a full-time enrollment of approximately 940 students. See Daniel Webster College, *Factbook 2008-2009* 8, <http://www.dwc.edu/about/factbook/> (last accessed July 9, 2009).
- 9 Daniel Webster College, *Factbook 2008-2009* 8, <http://www.dwc.edu/about/factbook/> (last accessed July 9, 2009).
- 10 See New England Aeronautical Institute, *Articles of Agreement*, Article 2. A copy of the New England Aeronautical Institute Articles of Agreement can be obtained by searching for the legal entity on the New Hampshire Secretary of State's corporate database, which is located at the following web address: <https://www.sos.nh.gov/corporate/soskb/csearch.asp>.
- 11 See N.H. Laws 1973, c. 73; see also RSA 292:22 (providing, among other things, that the legislature may "alter, amend or repeal the charter of any voluntary corporation"); RSA 292:8-h (forbidding educational institutions from granting degrees unless permitted to do so by legislative act).
- 12 See N.H. Laws 1970, c. 68; N.H. Laws 1978, c. 18.
- 13 When required because of a direct quote, citations will be provided to documents that were submitted to the Hillsborough County Probate Court in connection with the DWC's Petition for *Cy Pres* Relief. Citation to these documents will list the exhibit number and be formatted in the following manner: [Description of Document], Exhibit [#] at [pinpoint cite]. Subsequent citations will be shortcited as merely the Exhibit number and page.
- 14 Robert E. Myers, *A Vision for 2015 and Beyond*, Exhibit 13 at p. 1, 2-6.
- 15 *Id.* at pp. 1, 2-6.
- 16 These federal student assistance programs include the federal: (1) Pell Grant Program, 20 U.S.C. § 1070a, *et seq.*; (2) Family Education Loan Program, 20 U.S.C. § 1071, *et seq.*; (3) Direct Student Loan Program, 20 U.S.C. § 1087a, *et seq.*; (4) Perkins Loan Program, 20 U.S.C. § 1087aa, *et seq.*; (5) Supplemental Educational Opportunity Grant Program, 20 U.S.C. § 1070b, *et seq.*; and (6) Work-Study Program, 20 U.S.C. § 2751, *et seq.*
- 17 USDOE, *Letter Concerning Title IV of the Higher Education Act - dated April 10, 2006*, Exhibit 45 at p. 1.
- 18 See 34 C.F.R. § 668.171(a).
- 19 The amount of the letter of credit is determined by the Secretary of Education, with the caveat that it must be for an amount "not less than one-half of the title IV, HEA program funds received by the institution during its recently completed fiscal year." 34 C.F.R. § 668.175(c).
- 20 See 34 C.F.R. § 668.13 (explaining that "[i]f, before the expiration of a provisionally certified institution's period of participation in a Title IV, HEA program, the Secretary determines that the institution is unable to meet its responsibilities under its program participation agreement, the Secretary may revoke the institution's provisional certification for participation in that program.>").
- 21 See U.S. Department of Education, *Program Participation Agreement*, dated September 12, 2006, Exhibit 15 at p. 1.
- 22 NEASC, *Letter Re: Notice of Concern*, dated March 17, 2006, Exhibit 12 at p.1. It should be noted that DWC received a similar Notice of Concern in 2003. See New England Association of Schools and Colleges, *Focused Evaluation Team Report*, Exhibit 18 at p. 17.
- 23 As more fully described in NEASC materials, a "focused evaluation":  
provides a means of monitoring specific developments or concerns within an institution between comprehensive evaluations. When [NEASC] requires a focused evaluation, the institution submits a report on specified areas, and a small team visits the institution to validate the information provided in the report, evaluate the areas of focus, and report its findings and its recommendation and the chief executive officer's response and takes action, if appropriate, on the institution's accreditation status.  
NEASC, *Procedures for the Focused Evaluation Visit*, February 2009, copy available online at [http://cibe.neasc.org/downloads/POLICIES/Pp52\\_Procedures\\_for\\_Focused\\_Evaluation\\_Visit.pdf](http://cibe.neasc.org/downloads/POLICIES/Pp52_Procedures_for_Focused_Evaluation_Visit.pdf) (last accessed July 15, 2009), Exhibit 30 at p. 1.
- 24 Exhibit 18 at p. 20.
- 25 Exhibit 18 at p. 22.
- 26 See RSA 292:8-h, II, III (forbidding an educational institution from granting degrees unless authorized to do so by an act of legislature and, through its specification of permitted degrees, the Postsecondary Education Commission); see, e.g., N.H. Admin. R. Pos 1005.02 (h), (i) (requiring an institution under the jurisdiction of the Postsecondary Education Commission to "be in good standing with a U.S. Department of Education institution accrediting agency," such as NEASC).
- 27 RSA 292:1, II (permitting the creation of voluntary corporations for the "promotion of education and the arts and sciences").
- 28 26 U.S.C. § 501(c)(3) (excluding from federal business income taxes corporations which, among other things, are "organized and operated exclusively for . . . educational purposes . . .").
- 29 "Charitable trust" is statutorily defined as:  
any fiduciary relationship with respect to property arising under the law of this state or of another jurisdiction as a result of a manifestation of intention to create it, and subjecting the person by whom the property is held to fiduciary duties to deal with the property within this state for any charitable, nonprofit, educational, or community purpose.  
RSA 7:21, II(a).
- 30 RSA 7:21, II (defining "charitable trust" as including entities, such as DWC, that are determined by the IRS to be tax-exempt under section 501(c)(3) of the Code); see, e.g., *Society of Cincinnati v. Exeter*, 92 N.H. 348, 349 (1943) ("It is of the essence of a privately organized public charity, termed in the law as a charitable trust, that it hold property in trust for the public benefit . . . in the case of a charitable trust property is devoted to purposes beneficial to the community." (internal citations omitted)).
- 31 See H. Oleck and M. Stewart, *Nonprofit Corporations, Organizations, & Associations*, § 455 (Prentice Hall, Supp. 1999).

32 Because the educational institution “Daniel Webster College” is still in existence and is operating separate from the corporate entity that previously held title to all of DWC’s assets, in an effort to avoid confusion the DWC will be referred to as “Daniel Webster College” whenever reference is being made to its existence post-transaction.

33 1 J. Perrillo, *Corbin on Contracts* § 1.16, at 46 (Rev. ed. 1993).

34 See, e.g., *Burbach Broad. Co. of Del. v. Elkins Radio*, 278 F. 3d 401, 405, (4th Cir. 2002) (remanding to the district court to consider evidence on the intention of the parties where the LOI expressly stated that it would “expire by its own terms if an asset purchase agreement was not executed” by a certain date). Although it has not explored the matter in as much detail as other courts, the New Hampshire Supreme Court has likewise acknowledged that a preliminary agreement can become a binding contract, despite the absence of certain terms, “if it demonstrates that the parties have manifested their intent to be bound to the essential terms of a more detailed forthcoming agreement.” *Lower Village Hydroelectric Assoc., L.P. v. City of Claremont*, 147 N.H. 73, 75 (2001) (citing *Estate of Younge v. Huysmans*, 127 N.H. 461, 466 (1985)).

35 *Teachers Ins. and Annuity Assoc. of Am. v. Tribune Co.*, 670 F. Supp. 491 (S.D.N.Y. 1987).

36 *Id.* at 498.

37 *Id.*

38 *Burbach Broad. Co.*, 278 F. 3d at 407.

39 Once executed, the Purchase Agreement contained a similar provision granting to ITT certain exclusivity rights while the parties conducted their due diligence. See *Asset Purchase Agreement*, § 5.7, at 46, Exhibit 8 at pp. 46-47.

40 *Revlon, Inc. v. MacAndrews & Forces Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1986).

41 *Barkan v. Amsted Indus., Inc.*, 567 A.2d 1279, 1287 (Del. 1989); see also *In re Netsmart Techs., Inc. S’holders Litig.*, 924 A.2d 171, 195 n. 76 (Del. Ch. 2007) (“The corollary to this is clear: when [a board does] not possess reliable evidence of the market value of the entity as a whole, the lack of an active sales effort is strongly suggestive of a Revlon breach.”).

42 *Barkan*, 567 A.2d at 1286.

43 *Id.*

44 *Revlon, Inc.*, 506 A.2d at 179.

45 *Stern v. Lucy Webb Hayes Nat’l Training Sch.*, 381 F. Supp. 1003, 1013 (D.D.C. 1974) (holding that the directors of a nonprofit board breached their duty to supervise management of hospital’s funds); see also *Mile-O-Mo Fishing Club, Inc.*, 210 N.E.2d 12, 15 (Ill. 1965) (“The officers and directors of a not for profit corporation should . . . be charged with the same degree of fidelity to the interests of the corporation as are the officers and directors of a business corporation.”); Memorandum of the Attorney General at 26-2, *Burson v. Nashville Mem’l Hosp., Inc.* (Tenn. Ch. Ct. filed Mar. 17, 1994) (No. 94-744-1) (stating that, under Tennessee law, the “current accepted standard for nonprofit corporate directors is the same as that of their for profit counterparts”); *Developments in the Law - Nonprofit Corporations*, 105 Harv. L. Rev. 1579, 1593 (1992) (noting that most courts now define nonprofit duties of care by reference to corporate law); Colin T. Moran, *Why Revlon Applies to Nonprofit Corporations*, 53 Bus. Law. 373 (1998) (collecting cases).

46 Director of Charitable Trusts, *New Hampshire Attorney General’s Report on Optima Health*, dated March 10, 1998, available at <http://doj.nh.gov/publications/optima1.html> (last accessed July 17, 2009) (“Optima Report”).

47 See, e.g., *Barkan*, 567 A.2d at 1286 (stating that “there is no single blueprint a board must follow to fulfill its duties.”).

48 See, e.g., *Attorney General v. Rochester Trust Co.*, 115 N.H. 74, 76 (1975).

49 RSA 7:20.

50 See Optima Report; Cf. 11 C. DeGrandpre and W. Treat, *New Hampshire Practice: Probate Law and Procedure*, § 65-6(c), at 233 (3d ed. 2001).

51 See *In re Optima HealthCare Corp. et al*, probate court docket number 1999-0339 (1999).

52 See generally O. Lamontagne and W. Maroney, *The Charitable Trusts Aspects of a Hospital Merger: The Merger of Franklin Regional Hospital and Lakes Region General Hospital*, N.H.B.J. at pp. 28-29 (March 2003) (“FRH Article”).

53 The Director is imbued with the authority in transactions involving assets in excess of \$5,000,000 to retain “expert assistance” after consultation with the parties. See RSA 7:19-b, IV.

54 Under the statute, an acquisition transaction is defined as:

[the] transfer of control, direct or indirect, of a health care charitable trust, or of 25 percent or more of the assets thereof, including, but not limited to, purchases, mergers, leases, gifts, consolidations, exchanges, joint ventures, or other transactions involving transfer of control or of 25 percent or more of assets.

RSA 7:19-b, I(a).

55 The statute further defines “health care charitable trust” as:

a charitable trust organized to provide health care services including, but not limited to, hospitals, community health care services, and medical-surgical or other diagnostic or therapeutic facilities or services, or a charitable trust operating as a health insurer or health maintenance organization . . . [but] include[ing] any testamentary or inter vivos trust which is not organized to provide health care services.

RSA 7:19-b, I(d).

56 RSA 7:19-b, II.

57 See RSA 7:19-b, II(a)-(g).

58 See generally FRH Article at pp. 31-32 (March 2003).

59 11 C. DeGrandpre and W. Treat, *New Hampshire Practice: Probate Law and Procedure*, § 68-4, at 278 (3d ed. 2001).

60 *Trustees of Adams Female Acad. v. Adams*, 65 N.H. 225, 227 (1889). Note that the *cy pres* doctrine is distinguishable from the doctrine of deviation, as the latter is invoked where compliance with the terms of the trust instrument causes the impediment and the primary charitable objective can be achieved by simply changing “the machinery, management and methods of administering the trust.” *Town of Exeter v. Robinson’s Heirs*, 94 N.H. 463, 466 (1947); see also *Citizens’ Nat. Bank v. Morgan*, 94 N.H. 284, 288 (1947) (applying the doctrine of deviation where “the results of the provisions of a trust are so interfered with and the gifts so diminished by an unanticipated change of circumstances that it is equitable to permit a deviation from the terms.”). The Probate Court is also invested with the power to invoke the charitable doctrine of deviation pursuant to RSA 547:3-c.

61 RSA 547:3-d, I.

62 See New England Aeronautical Institute, *Articles of Agreement*, Article 2.

63 RSA 7:21, II(a).

64 To be sure, this was not the first instance in which the sale of a non-profit entity to a for-profit entity had required consideration of multiple charitable trusts. For example, in *Portsmouth Hospital v. Attorney General of New Hampshire*, Portsmouth Hospital had filed one petition with the Probate Court requesting *cy pres* relief in order to sell its principal assets and transfer its remaining assets, including several trusts and the proceeds from the sale, to a charitable foundation. *Portsmouth Hospital v. Attorney General of New Hampshire*, superior court docket number E-426-84 (Rockingham 1984). However, as discussed, other considerations militated against adopting this approach.

65 In a tentative draft, the American Law Institute has explained that, even without a retained property interest, the settlor of a charitable trust has standing to enforce the trust, subject to three qualifications:

First, if a nonprofit organization receives a restricted gift or devise that is treated as a charitable trust . . . , special-interest standing ordinarily enables the settlor to maintain a suit against the trustee-organization only to enforce the restriction - that is, to restrain the trustee from diverting funds from the specified charitable purpose or to compel restitution for any such breach of trust . . . . Second, when numerous donors contribute to the funding of a trust, only a settlor who is a major contributor relative to the trust’s total funding has the required special interest . . . . Finally, absent contrary provision or agreement, settlor standing is “personal,” although exercisable by an incapacitated settlor’s personal fiduciary . . . or by a deceased settlor’s personal representative during a reasonable period of estate administration.

*Restatement (Third) of Trusts*, § 94, comment (g) (T.D. No. 5, 2009); but see *Restatement (Third) of Trusts*, § 67, comment (d), at 516 (2003) (indicating that, in framing a new purpose for a charitable trust through *cy pres*, “it would be especially appropriate to consult the donor if available”). Therefore, in an abundance of caution, notice should typically be provided to those charitable trust donors that are reasonably available.

66 See RSA 292:7 (granting a voluntary corporation the right to “change its name . . . or amend its articles of agreement”).

67 Additional information concerning the process involved in obtaining NEASC’s approval can be found at: [http://cihe.neasc.org/accreditation\\_processes\\_resources/accreditation\\_processes/proposal\\_for\\_substantive\\_change/](http://cihe.neasc.org/accreditation_processes_resources/accreditation_processes/proposal_for_substantive_change/) (last accessed July 13, 2009).

68 See, e.g., N.H. Admin. R. Pos 100, *et seq.*

69 See 34 C.F.R. § 600, *et seq.* (concerning the process for maintaining participation in the Federal Aid Programs after a change in ownership of a participating institution has occurred).

70 At its May 14, 2009 meeting, NHPEC voted to approve ITT’s acquisition of the

College, with the requirement that a site visit take place in March 2010 to examine the transition, developments in governance, future plans, and a general assessment of progress (successes, issues, etc.). Previously, on March 23, 2009, the College had also received a favorable response from the USDOE to its request for pre-acquisition review. However, after the closing, Daniel Webster College will be required to file various applications with the Federal Aviation Administration and the United States Department of Veterans Affairs.

71 RSA 547:3-d, l; see also *Webster's Third New International Dictionary* 1136 (unabridged ed. 2002) (defining "impracticable" as "incapable of being performed or accomplished by the means employed or at command.").

72 *Id.* at 1136 (defining "ineffective" as "not producing or incapable of producing an intended effect.").

73 For an example, Myers University was hemorrhaging money and, indeed, was in receivership when it finally obtained a purchaser. See D. Russ, *WKYC.com: \$11 Million Takeover Offer for Myers University*, dated April 9, 2008, available at [http://www.wkyc.com/news/news\\_article.aspx?storyid=86867](http://www.wkyc.com/news/news_article.aspx?storyid=86867) (last accessed July 18, 2009).

74 The majority of transactions involving non-profit colleges will require the payment

(or defeasance) of tax-exempt bonds. Although beyond the scope of this article, most bonds have very specific payment provisions and will often permit early payment (referred to as a redemption) only on and after specific dates and only upon payment of a premium (usually a percentage of the amount of principal being paid). Because this area of law is complicated, the authors recommend that experienced bond counsel is obtained when such matters arise. In this transaction, the parties relied upon the expertise of Attorney Karen S. McGinley, a shareholder in the law firm of Devine, Millimet & Branch, Professional Association, to handle the various bond issues that arose.

75 See RSA 550:10 (requiring the register of probate, when notice by publication is required under RSA 550, to publish said notice in a similar manner "unless otherwise ordered by the judge.").

76 See *Concord Nat. Bank v. Haverhill*, 101 N.H. 416, 419 (1958) (explaining that the Director "represents the public in the enforcement and supervision of charitable trusts").

77 See, e.g., RSA 7:19-b, II(a)-(g).

78 RSA 547:3-d, l.

### Author



*Ovide M. Lamontagne*

**Ovide M. Lamontagne** is a shareholder in the law firm of Devine, Millimet and Branch, and was lead counsel to Daniel Webster College in the transaction discussed in this article.



*Ryan M. Williams*

**Ryan M. Williams** is an associate in the law firm of Devine, Millimet and Branch, and assisted Attorney Lamontagne in the transaction.