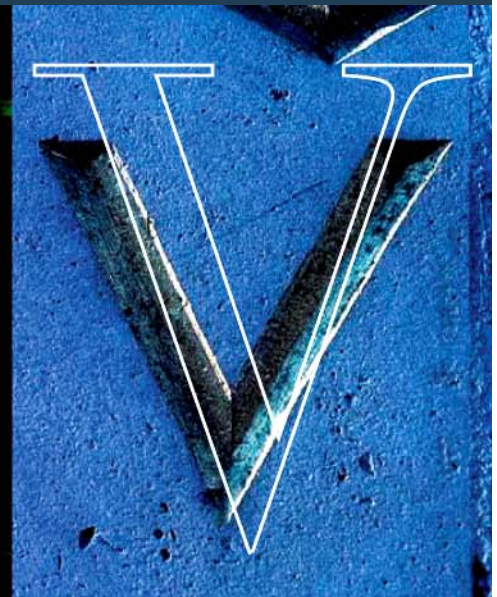
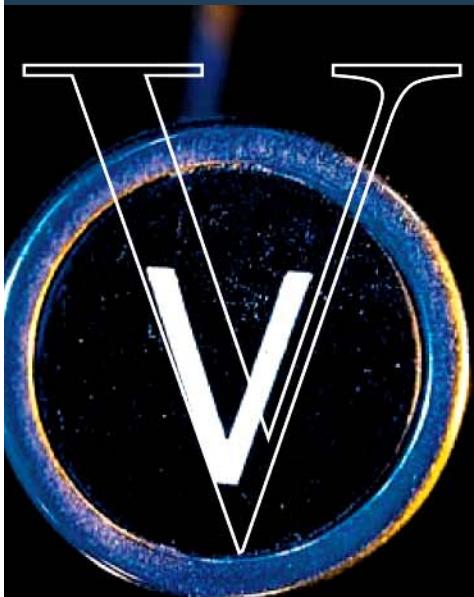


VENABLE[®]_{LLP}

TOP LEGAL ISSUES:
2011 AMCSUS ANNUAL MEETING

Caryn Pass

March 7, 2011



Top Legal Issues

overview

- Legal issues based on working with schools nationwide
- Many issues arise from
 - Economic times
 - New legislation and increased government enforcement
 - New technology without policies to govern use
- Preventing and resolving legal issues
 - Establish policies and standards up front
 - Be proactive in calling legal counsel
 - Be consistent with culture
 - Don't panic

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Parents

divorce and enrollment contract

- Divorce and personal turmoil
 - Requests for documents and information
 - Who has access to what?
 - Check court orders, subpoenas
 - Check state laws
- Enrollment contract
 - Include language regarding school's right to collect legal fees and other costs incurred when dealing with legal battles between parents
 - Make sure tuition obligation is clear and enforceable
 - Who signs the enrollment contract?



Parents

other challenges

- Demanding “more” for their money
 - Re-evaluating costs
 - Challenging programs and decisions
 - Requesting special services (e.g., school counselor)
- Parent bad behavior
 - Parent appearing altered or inebriated
 - Parent/family member crossing appropriate boundaries
 - School’s ability or obligation to limit access to students/school
 - Enrollment contract language should give school ability to remove a student due to bad behavior of parent or other adult associated with the student

Social Networking

student acceptable use policy

- Student acceptable use
 - How broad is the policy
 - On campus only or 24/7?
 - School-issued equipment only or personal computer?
 - Response to sexting, allegations of bullying, etc.
 - Investigation
 - Establish expectation of privacy
 - Discipline
 - No harassment, bullying, other activity that violates policy and mission of the school
 - Ensure consistent with other policies (e.g., student discipline policy)

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Social Networking

employee acceptable use

- Employee acceptable use
 - No harassment, bullying, or other activity that brings discredit to the school
 - Confidentiality of school and student information
 - Protecting school's reputation and brand
 - No official authority to speak on behalf of the school
 - No use of the school intellectual property, logos, trademarks, and copyrights in any manner
 - Avoid giving a professional reference through social media
 - Establish expectation of privacy
- NLRB case
 - All employees have § 7 rights to concerted activity
 - Impact of recent NLRB suit against employer for firing an employee over Facebook post

Social Networking

appropriate boundaries

- Maintaining appropriate boundaries
 - “Friending” students
 - Blurs the lines
 - texting, personal cell phones, personal email, online games
 - Opens teachers to allegations of abuse
 - Implied obligation to report/monitor Facebook or other activity online
 - “Friending” parents
 - Favoritism
 - What if parent is “friends” with student to monitor account
 - Parent has access to personal information (photos) of teacher
 - Parents talk

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Employment Agreements

form and structure

- Who receives
 - faculty, staff, administrators, coaches, tutors
- What form
 - letter v. agreement
- Nature of employment
 - employment-at-will v. fixed term
- Definition of “term”
 - 12 months v. 10 months
 - July 1 to June 30 or “academic Year”
 - Consider:
 - Unemployment benefit claims
 - Continuation of insurance
 - Timing of payments

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Employment Agreements

helpful clauses

- With uncertainty in budget and enrollment, preserve flexibility for the school
 - No expectation of contract in next year
 - Ability to change employment status
 - termination, modification, reduction in hours
 - Basis for employment change
 - change in curriculum; student enrollment; financial status of school; reorganization
 - Force majeure clause
 - No continuation of salary or pay upon termination
- Privacy of information and student images
- Trademark/copyright
- Conflicts of interest and outside employment (including tutoring, babysitting, house-sitting for families)



Independent Contractor v. Employee

overview

- Increased scrutiny by IRS and DOL
 - Employee reclassification initiative for independent contractors - *\$25 million dollars* to strengthen and coordinate federal and state efforts to enforce statutory prohibitions, and to identify and deter misclassification of employees as independent contractors
 - IRS announced it will randomly audit 6000 companies over the next 3 years to find misclassified employees
- Common challenges for schools
 - Tutors, testers, tennis/music instructor, coaches
- Implications of misclassification
 - Unpaid employer taxes
 - Employee benefits (including health and retirement)

Independent Contractor v. Employee

redesigned IRS test

- IRS looks at degree of control and independence based on three categories:
 - Behavioral: Does the school control or have the right to control what the worker does and how the worker does his or her job?
 - How is IC evaluated?
 - Financial: Are business aspects of IC's job controlled by the school?
 - How is IC paid, what expenses are reimbursed, who provides tools/supplies, who provides insurance?
 - Opportunity for profit and loss
 - Type of relationship: Are there written contracts or employee type benefits?
 - Pension plan, insurance, vacation pay, etc.?
 - Will the relationship continue and is the work performed a key aspect of the business?
 - Can worker perform this work for other schools?
- Weigh all factors – no magic “number” of factors
- Documents: agreement, job description, other documentation of factors used in coming up with the determination

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Student Discipline

establishing a clear policy

- Increased challenges to decisions due to common application
- Establish a clear policy and be consistent
 - What is the code of conduct?
 - Who investigates and determines discipline for violations of code of conduct?
 - Student board involvement?
 - Documentation
 - How does the school respond to sexting, bullying, and harassment?
 - Is the policy only applicable at school or is the school "24/7"?



E-commerce and electronic contracts

overview

- Benefits
 - Tracking
 - Convenience
 - Sustainability
- Legal compliance
 - State, federal, and common law
- Vender
 - Take care to confirm representations
- Objective
 - Enforceability



E-contracting details

Elements to consider

- Elements
 - Identity confirmation
 - Process for access to system
 - Consent to electronic contract
 - Confirmation of agreement to use e-contract
 - Ability to review and modify
 - Can party review submission of information and modify information
 - Confirmation of school's receipt and acceptance
 - Return email confirming receipt and acceptance of contract
 - School's inability to modify agreement
 - Confirmation that school can't modify agreement
 - Maintenance of document in school's system
 - How is information maintained by school



Enrollment Contracts

Key considerations

- Clearly define
 - Student's name, grade, cost of tuition and fees
- Maximum flexibility to remove student
 - Behavior or performance of student
 - Reference student handbook
 - Behavior of parent/guardian or other adult
- Leverage to enforce collection of tuition
 - Holding transcript or contract for following year
 - Prevent attendance at school, after school activities, graduation
 - Unable to take finals, AP exams or other tests

Articles of Incorporation, Charters, By-laws and Good Governance

overview

- Review on a regular basis is essential
 - Failure to review may result in non-compliance
- Often ignored for years until governance issue arises
 - Review for legal compliance and school best practices
- Hope for the best but plan for the worse
 - Create proactive procedures to address possible problems
 - ie: removal of trustee

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Charter and Articles of Incorporation

overview

- Review regularly
 - Check state filing
 - Document filed consistent with board modifications or amendments
 - In active status
 - Failure to submit tax filings invalidate document
- Charter or Articles in forfeiture
 - Actions of Board invalid
 - School name can be taken
 - Loans and or financing in jeopardy

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By-laws

overview

- Review regularly to ensure compliance
 - Board's actions inconsistent by by-laws may prove invalid
 - Proxy vote not provided for in by-laws
 - E-mail notification of board meetings
- Establish policies consistent with good governance
 - Confidentiality provisions
 - Selection of Board members and voting
 - Slate vs. individual nominees
 - Term limits
 - Removal of trustees
 - Executive Sessions



Governance Documents

Overview

- Conflict of interest policy
 - Signed by trustees and head annually
 - Process for disclosing conflicts
 - Process for vetting conflict
- Whistle Blower policy
 - Ensures protection of employees who report financial impropriety from retaliation
- Document retention and destruction
 - Policy outlining how documents are maintained and destroyed
 - Important for litigation
 - Once litigation filed documents must be kept



Good Governance

overview

- Creation of liability for board or individual trustee
 - Fiduciary duty
 - Review of head's salary
 - Financial responsibility in decision making
 - Alternate budgets
 - Confidentiality
 - Failure to maintain confidentiality of board deliberations
 - Acting outside of scope of duty
 - Failing to support decision of board
- Board Training
 - Method of reducing liability



Litigation

Increasing frequency

- Employment
 - Allegations of wrongful termination
 - Discrimination based on protected category
 - Contract breach
 - Handbook non compliance
 - Reduction in staff
- Board Actions
 - Actions outside scope of duty
 - Breach of fiscal obligations
 - Breach of confidentiality



Litigation

Additional challenges

- Student issues
 - Discipline
 - Common college applications
 - Enrollment
 - Failure to admit
 - Failure to educate
 - Failure to protect
- Tuition collection
 - Parent's failure to pay tuition
 - Termination of agreement after deadline



Alternative Revenue Sources

Overview

- Trademark and copyright
 - Protect new programs
 - Name of school and logo
- Rental of space
 - Insurance
 - Rental Agreements
- Summer camp
 - Due diligence in hiring employees
 - Background checks; employment agreements
 - Permission slips and liability waivers
 - Risky activities
 - Horse back riding; climbing; foreign travel



Fiduciary Duty and Due Diligence

Financial obligations

- Legal exposure for misappropriations of funds
 - Insurance may not cover if gross misconduct
 - Fiduciary duty of business office
- Conflict of Interest Procedure
 - Bidding and selecting vendors
 - Considering disclosed conflicts
 - Documenting compliance with process
 - Confirming in board minutes
- Head of School Salary review
- Payment Practices
 - Review of exempt status and calculation of overtime
 - Tracking payroll against contracts



Fiduciary Duty and Due Diligence

Financial obligations

- Authority to bind School
 - Policy authorizing binding of school
 - Who can sign and amount limits for multiple signatures
 - What goes before board/finance committee
- Audit and 990 completion
 - Create policy that states
 - Who prepares and reviews
 - Lawyer/accountant
 - Who signs audit and 990
 - How is 990 presented to board
 - How is audit presented to board

contact information

Venable Independent School Lawyers

Caryn G. Pass, partner
cpass@venable.com
t 202.344.8039
f 202.344.8300

Heather J. Broadwater, associate
hbroadwater@venable.com
t 202.344.8042
f 202.344.8300

Grace H. Lee, associate
glee@venable.com
t 202.344.8043
f 202.344.8300

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www.venable.com





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