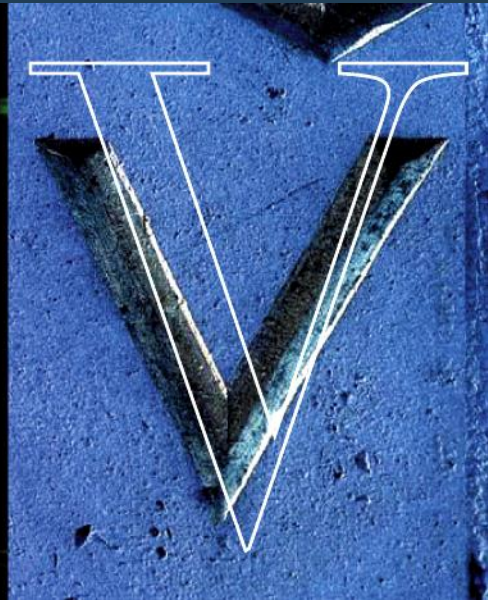
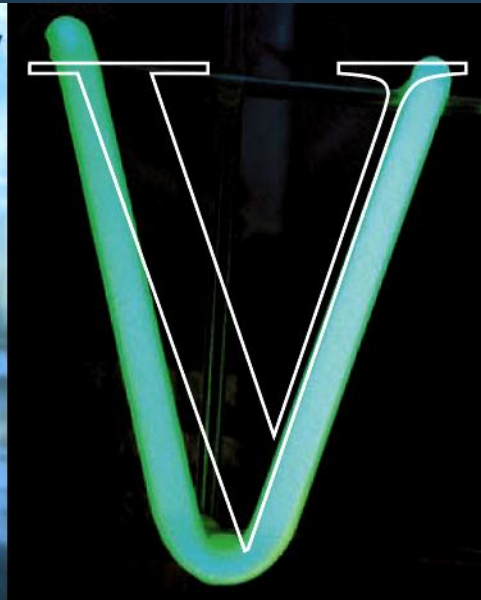
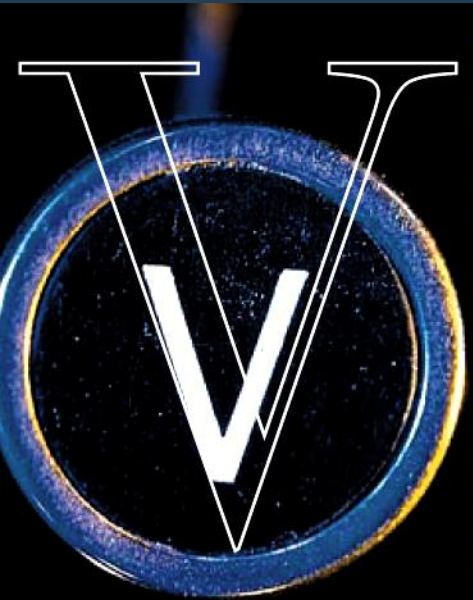


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Legal Update: managing risk, limiting liability and legal trends in independent schools

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Basic Foundation of Good Governance

What is Good Governance?

**“Planning for the School your
Grandchildren will attend”**

The Rest is Commentary

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Overview of session

- Based on working with schools nationwide
- Substantial increase in legal claims
- Matters with un-anticipated legal implications
 - custody battles
 - confidentiality of board
- Causes:
 - economic times
 - higher tuitions & expectations (parents)
 - concern for job (employees & parents)
 - new legislation & increased enforcement
 - technology (good and bad)
 - general increase in litigation
 - poor governance
 - too many parent lawyers and parents who practice without a license

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Strategies for limiting liability and managing risk

- Comply with culture, mission & strategic plan
- Educate trustees on legal trends *nationwide*
- Know what questions to ask
- Audit committee with risk management role
- Use resources– nwais, nais, nboa, newsletters
- Overstepping of board creates liability exposure
- Hardwire best practice governance documents
- Hardwire operational policies, procedures, actions
- **Commit financial resources:** security audit
- Consult counsel
- Stay calm

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Top legal issues: employment

- Allegations of wrongful discharge and discrimination
 - Based on protected category
 - race, age, sex, national origin, disability
- Breach of employment contract/agreement
 - Basis for termination, term modifications
- Handbook non-compliance
 - Establishing additional obligations
 - Voluntary “protected categories” (sexual orientation)
- Reduction in staff
- Application and selection process
 - Injury resulting from failure to properly vet
 - Criminal background check reflected past history of inappropriate contact with minor



What to ask: employment

- CLEAR OPERATIONAL RESPONSIBILITY
 - Avoid overstepping
- Confidentiality and privacy obligations
- Know talking points in response to termination questions
- Employment contracts/agreements & Employee handbooks
 - Financial resources committed to review?
 - Last reviewed and updated?
- Reduction in staff
 - Understand justification for reduction
- Confirm proper vetting procedure in writing
- PERSONEL COMMITTEE?
 - Operations vs Oversight
 - Establish clear powers

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Top legal issues: safety & security

- Safety of students number one priority
- Failure to consider safety and security of entire community = negligence
 - Tragedies nationwide place schools on “notice”
 - Failure to address security risk resulted in injury
- Risk vs Benefit
 - Reasonableness: Armed security guard? Obligation to “sign in”
 - Cost and budget: Electronic fence?
- Conduct security audit
 - 3rd party review & report
 - Emergency preparedness policy
 - Legal counsel engagement: Attorney client privilege

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What to ask: safety & security

- Operations and Oversight
 - Reasonable for board to establish committee
 - Audit with risk management or safety committee
 - Board policy on safety and security
 - Committee's role in process
 - Limited to oversight

- Security audit and results
 - Has school conducted an audit?
 - Financial resources committed to audit and recommendations?
 - Due diligence in selection of security auditor?
 - Board's role in emergency preparedness policy?
 - Lawyer involvement?



Top legal issues: student travel & field trips

- Recent cases shed light on legal exposure created by school sponsored student travel
 - Hotchkiss Decision
 - School failed to consider risks of activity
 - Insect bite caused catastrophic illness
 - Appropriate clothing reasonable requirement
- Injury during school sponsored trips run by 3rd party
 - Injury during trip resulting from negligence of 3rd party
 - Failure to vet 3rd party
 - School sponsored vs 3rd party sponsored
 - Documented relationship with 3rd party
 - Documented relationship with family
- Failure to obtain permission to participate in field trip
- Reasonableness of field trip and activity
 - Kindergarten white water rafting trip



What to ask: student travel & field trips

- Operations matter
 - Audit committee or board general oversight
- Who runs school trips?
 - Internal or 3rd party?
 - Vetting of 3rd party?
 - Proper agreements in place?
 - Permission and waiver from parents?
 - Risk assessment of activities?
 - Plans for reduction of risk.
- Field trip forms in place?
 - Permission by parent?
 - Granted through enrollment agreement?
 - Waiver of liability?
 - Assessment of reasonableness?



Top legal issues: international students

- Legal exposure
 - Identification, selection, enrollment agreement, housing/home stay
- Failure to vet international student resulted in injury
 - Student guilty of sexual abuse of brother
- Vetting of 3rd party
 - Establish role and responsibility in writing
 - Payment of tuition, selection of home stay family
- Execution of enrollment agreement
- School selects home stay family
 - Vetting of family: criminal background checks?
 - Permission granted by student's parent
 - Medical, transport, guardianship
 - Tax treatment of stipend



What to ask: international students

- Operations
 - Audit committee or board general oversight
- Questions:
 - Vetting process of students and 3rd party
 - Vetting of home stay families
 - Agreements reviewed by counsel:
 - Enrollment contract with international implications
 - Agreement with 3rd party
 - Agreement with home stay family
 - Other documents
 - International student policies
 - During vacation and breaks
 - Permission to travel
 - Guardianship and living arrangements when no boarding or home stay



Top legal issues: students

- Safety of students
 - Background checks
 - Parents, tutors, coaches, substitutes,
 - Comprehensive admissions process
- Discipline challenges
 - Common college applications
 - 24/7 vs during school day
 - Process & notice to students and parents
- Failure to admit and failure to educate
- Privacy of student information
 - Improper use of photos and other images
 - Communication to third party without permission or reason
 - Lawyers, non-custodial parents, teachers



What to ask: students

- Clearly operational
 - Audit committee or board general oversight
- Are proper vetting procedures for those in contact with students?
- Review of admissions process?
- Is there a comprehensive disciplinary process in place?
 - Included in enrollment agreement and student handbook
- Is there a student privacy policy?
- Is board provided with talking points when student issue arises?
- Is enrollment agreement reviewed and student handbook reviewed on regular basis?



Top legal issues: social media and technology

- “School” use of social media
 - Posting of student photo without permission
 - Promise of new science wing
- Student use of social media
 - Bullying, violation of standard of appropriate behavior or code of conduct
 - Posting pictures of drinking on facebook
 - Sexting
- Misuse by teacher
 - Participating in website that reflects “poorly”
 - Lap dancing business
 - Misuse of school technology
 - Watching pornography



What to ask: social media and technology

- Clearly operational
 - Audit committee or board general oversight
- Ensure there are the following policies:
 - Acceptable use policy for students and employees
 - Establishes clear standards of conduct
 - Consequences for violations
- Policy related to
 - Posting on school website, facebook and other social media
- Permission slips for:
 - Use of student photos and images
 - Student work



Top legal issues: board actions

- Breach of fiduciary duty
- Confidentiality
- Actions outside of scope of duty
- Governance documents
 - By-laws
 - Whistle Blower
 - Conflict of interest
 - Document Ret/Destruction
 - Charter/Articles of Incorporation
- Intermediate Sanctions
- Committees for risk management oversight
 - Executive committee
 - Audit committee
 - Personnel Committee
 - Investment Committee



Board's fiduciary duty

- Authority to bind school
 - who can sign and amount limits for multiple signatures
 - what goes before board/finance committee
- Endowment investments
 - compliance with investment policy
- Audit and 990 completion
 - how is 990 presented to board
 - how is audit presented to board
- Retirement plans and oversight
- Review of budget
 - passing balance budget
- Assuming debt



Board's confidentiality obligation

- Deliberations and exchange of views essential
 - process requires full and honest discussion
 - chilling effect if question of confidentiality
- Board = speak with one voice; appear unified
 - trustees = support board decision or leave board
- Avoid “public” discussions of issues before the board
 - car pool line; spouse; supporters of “your” position
- Breach of confidentiality
 - breach of privacy (student/employee issue)
 - negative impact on decision (appearance of uncertainty)
 - personal liability (cause damage to school)
 - negative reaction by community (reduction in pledges)



Actions outside of scope of duty

- Board responsibility
 - establishes policy; creates strategic plan for the school
 - makes larger policy decisions
 - **supports head of school**
- Administration responsibility
 - responsible for daily operations of school
 - implements boards policy
- Board operating in administration's arena
 - legal claims by heads of school
 - prevents head from performing job
 - legal claims by employees
 - trustees spoke in behalf of administration
 - retaliation for failure to appease trustee



Intermediate sanctions

- Method for review of compensation of head, business manager and others
- Avoid payment of excess benefit
- Review directly or by board establishing a committee
- Compensation committee
 - ensures members have no conflict of interest
 - selects comparable schools
 - collects comparable remuneration of similarly situated professionals (more than just salary)
 - considers information
 - establishes remuneration
 - documents process
- Presentation to board
 - general vs detail



Conflict of interest policy

- Written policy
- Formally adopted by board
- Signed by trustees and head annually
 - perhaps others
- Create disclosure statement
- Process for disclosing conflicts
- Process for vetting conflict
- Include tracking system
- Confirm tracking in board resolutions
- Referenced in 990

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By-laws

- Review regularly to ensure compliance
 - Board’s actions must be consistent with by-laws
 - Failure to comply with by-laws invalidates boards’ actions
 - proxy vote not provided for in by-laws
 - e-mail notification of board meetings
- Use by-laws as good governance foundation
 - Consider how board wants to act as an entity
 - What is the board’s culture
 - transparency?
 - commitment to diversity?
 - ability to address issues?
 - level of “democracy”?
 - expectations of board service?



By-law provisions

- Selection of board members
 - Fixed skills or open spots
 - From committee, board in general or community
 - Interview process and vetting
 - Presentation to the board
- Voting for board members
 - Slate vs. individual nominees
 - Nominations from the board at meeting
 - Percentage vote needed
- Term limits
 - Board chair and other officers
 - Board members



By-law provisions

- Percentage of votes needed for various decisions
 - What decisions are most vs. least important
- Committees
 - What committees exist
 - Role of each committee
- Executive committee
- “Care and feeding of head committee”
- Governance or committee on trustees
 - Review of trustees
 - Removal of trustees
 - receives and investigates complaints, reports to board, makes recommendation
 - TRUSTEE LEAVES DURING DELIBERATION



By-law provisions

- Executive sessions
 - Standing session at end of each board meeting
 - With/without head of school
- Head of school
 - Selection and review
 - Method for establishing compensation
- Directors and Officers insurance and indemnification
 - How much coverage?
- Make up of board
 - Faculty? Student? Alumni officer? PTA officer?
Non-parents? Other head of school?



Charter and articles of incorporation

- Establishes school as legal entity
 - Do you know where your articles are?
- Review regularly
 - Check state filing
 - Document consistent with board modifications/amendments
- Charter or articles in “forfeiture”
 - Actions of board invalid
 - board acts without authority
 - School name can be taken
 - Loans and or financing in jeopardy
- JEPORDIZE 501 (c)(3) status



Whistle blower policy

- Ensures protection of employees who report financial impropriety from retaliation
- Care be taken to limit extent of reporting topics
 - Only financial impropriety
- Consider who accepts and considers complaints
 - Audit committee
 - Finance committee



Document retention and destruction policy

- Policy outlining how documents are maintained and destroyed
- Important for litigation
 - Once litigation filed documents must be kept
- Assists in litigation filed against school
- Assists in subpoena by parents
- Ensures maintenance of necessary documents
- Consider all documents including
 - Financial aid, development, application
- Consider all parties at school with documents

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