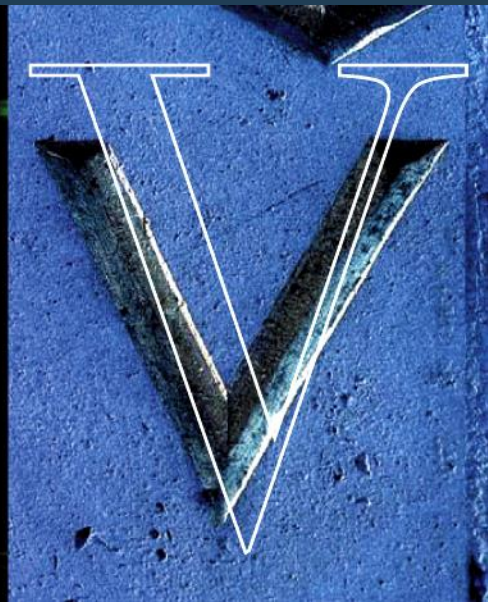
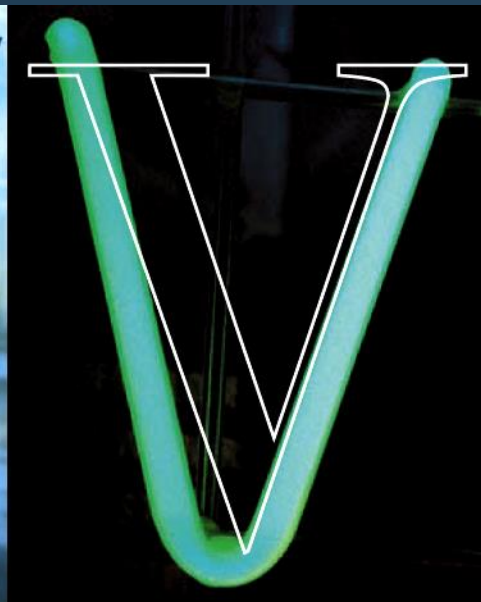
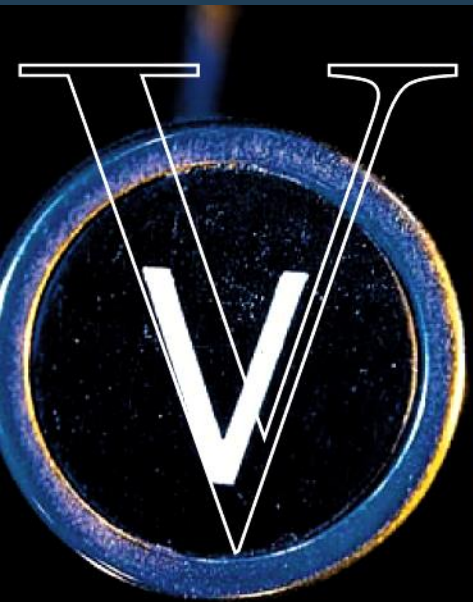


# VENABLE<sup>®</sup><sub>LLP</sub>

## NJAIS TRUSTEE ENRICHMENT DAY 2015 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– njais, 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
  - 3<sup>rd</sup> party review & report
  - Emergency preparedness policy
  - Legal counsel engagement: Attorney client privilege





## 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 3<sup>rd</sup> party
  - Injury during trip resulting from negligence of 3<sup>rd</sup> party
  - Failure to vet 3<sup>rd</sup> party
  - School sponsored vs 3<sup>rd</sup> party sponsored
  - Documented relationship with 3<sup>rd</sup> 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 3<sup>rd</sup> party?
  - Vetting of 3<sup>rd</sup> 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 3<sup>rd</sup> 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 3<sup>rd</sup> party
  - Vetting of home stay families
  - Agreements reviewed by counsel:
    - Enrollment contract with international implications
    - Agreement with 3<sup>rd</sup> 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
  - Conflict of interest
  - Charter/Articles of Incorporation
  - Whistle Blower
  - Document Ret/Destruction
- Intermediate Sanctions
- Committees for risk management oversight
  - Executive committee
  - Audit committee
  - Personnel Committee
  - Investment Committee

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## 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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